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Editorial

In the contemporary and rapidly evolving landscape of jurisprudence, this volume seeks to interrogate the shifting paradigms of legal thought that increasingly shape social realities and governance structures. The articles featured in this issue engage critically with a wide spectrum of legal questions, with particular emphasis on the intersections of law, technology, human rights, and socio-legal transformation. Together, they reflect a growing scholarly commitment to examining how legal systems respond to emerging challenges posed by technological innovation, changing social norms, and evolving conceptions of justice and rights.

As legal frameworks across jurisdictions confront the implications of digitalization, artificial intelligence, surveillance, data protection, and access to justice, the convergence of law and technology has emerged as a crucial domain of inquiry. Simultaneously, enduring concerns relating to human dignity, constitutional guarantees, gender justice, and social equity continue to demand nuanced legal engagement. In this context, the *Kashmir Journal of Legal Studies* remains committed to fostering rigorous academic discourse that bridges doctrinal analysis with socio-legal realities, particularly from perspectives rooted in lived experiences and marginalized voices.

We are pleased to note that the Journal has been indexed by the Indian Citation Index (ICI), a recognition that underscores the scholarly quality, relevance, and credibility of its academic contributions. We gratefully acknowledge the authorization granted by ICI to use its official logo in this publication, which we are honored to include as a symbol of academic distinction.

At a time when foundational legal principles are being re-examined in light of technological disruption and renewed human rights debates, this Journal aspires to be more than a repository of research. It seeks to function as a forum for critical reflection, interdisciplinary dialogue, and progressive legal thought. We extend our sincere appreciation to the contributing authors for their intellectual rigor, to the peer reviewers for their careful and insightful evaluations, and to the editorial team for their unwavering dedication in shaping and curating this volume.

Kashmir Journal of Legal Studies

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Notes & Comments

Need For Gender-Neutral Rape Laws: A Comparative Analysis Post-Section 377 Repeal in The Bharatiya Nyaya Sanhita, 2023

Shubham Bhatia*
Dr. Vivek Shukla**

Abstract

In India, whilst the gender roles are deep-rooted in the society, the definition of rape under the law fails to capture the full spectrum of sexual violence. The present legal structure, rooted in a binary understanding of gender, leaves many survivors, including men, transgender, and non-binary individuals without adequate legal recourse. The need for gender-neutral rape laws in India has become increasingly urgent as the current legal framework, including Bharatiya Nyaya Sanhita, 2023 remains predominantly focused on women as victims, thereby excluding male, transgender, and non-binary individuals from protection against sexual violence. This exclusion perpetuates stigma, underreporting, and systemic inequities, leaving many victims without access to justice. Drawing on comparative analyses of international frameworks such as those in the United States, the United Kingdom, and Canada, the study underscores the importance of inclusive legal definitions that address the complexities of sexual violence and its impact on all individuals. By advocating for the redefinition of legal terms, public awareness initiatives, and stronger enforcement mechanisms, this research calls for a transformative shift in India's approach to addressing sexual violence, ensuring justice and dignity for all victims regardless of their gender identity. The research employs a doctrinal methodology, analyzing legal texts, statutes, and case law to assess the existing rape laws in India. It also includes a comparative study of gender-neutral rape laws in other countries to propose legal reforms for greater inclusivity.

Keywords: *Gender-neutral rape laws, sexual violence, constitutional equality, male victims, transgender rights, inclusivity, socio-cultural, non-binary individuals, sexual violence stigma.*

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* Assistant Professor of Law, Lincoln College of Law, Sirhind, Punjab
** Assistant Professor, School of Law, SVKM'S NMIMS Deemed to be University, Chandigarh Campus.

1. Introduction

In recent years, India has witnessed significant changes in its legal framework, particularly concerning the protection of individuals from sexual violence. One of the most pivotal moments in this transformation came after the horrific 2012 gang rape in Delhi, a crime that shocked the nation and drew widespread international condemnation. This tragedy ignited a national outcry and led to a renewed focus on strengthening the country's laws related to sexual offences, particularly the offence of rape. The aftermath of this incident led to the formation of the Justice Verma Committee, which made a series of recommendations aimed at broadening the legal definition of rape and enhancing the protection and justice for survivors of sexual violence. Among these reforms, the Criminal Law (Amendment) Act of 2013 was passed, significantly revising the provisions of Section 375 of the Indian Penal Code (IPC), 1860 to include a wider array of sexual offences. Despite these legislative advancements, however, the reforms remained gender-specific, largely focusing on women as the sole victims of sexual violence. This has sparked ongoing debates regarding the need for a more inclusive, gender-neutral approach to rape laws in India, an issue that has gained increasing attention in recent years.[1]

The recently enacted Bharatiya Nyaya Sanhita (BNS) Act, 2023, replacing the IPC, 1860, represents a significant overhaul of India's sexual offence laws. Notably, it updates Section 375 of the IPC to Section 63, introducing stricter penalties. This change reflects a commitment to addressing sexual violence more severely and recognizing the rights of victims. However, the BNS, 2023 retains a gender-specific approach, similar to its predecessor, which limits its protections. By focusing primarily on women as victims, the law fails to adequately protect male, transgender, and non-binary survivors of sexual abuse. This absence of gender-neutral provisions highlights a continuing disparity in legal protections, leaving certain groups vulnerable to underreporting and injustice. Advocates argue that gender-neutral rape laws are crucial for ensuring equitable justice for all individuals, irrespective of gender

1 Manupatra, "Articles – Manupatra" *available at*: https://articles.manupatra.com/article-details/An-Extensive-study-of-Rape-Laws-in-India (last visited December 12, 2024).

identity and that further reforms are necessary to address these gaps in India's legal system.[2]

One of the most glaring gaps in the Bharatiya Nyaya Sanhita, 2023 is its gendered definition of rape, which fundamentally alters the dynamics of legal protection. Under the erstwhile IPC, 1860, Section 375 delineated that a man can commit rape against a woman, but it also implicitly recognised male victims through the provisions of Section 377. By contrast, the BNS, 2023 confines the crime of rape to male perpetrators and female victims, thereby excluding male victims from the legal framework. Critics argue that this change not only undermines the rights of male victims but also perpetuates the stigma surrounding male sexual victimization, which is often dismissed or trivialized in societal discourse.[3]

The concept of gender-neutral rape laws is rooted in the belief that sexual violence can affect individuals of all gender identities, including men, transgender people, and non-binary individuals. The legal framework in India, however, has primarily addressed rape as a crime perpetrated by men against women, reinforcing traditional gender roles and stereotypes.

1.1. Objectives Of the Study

1. To Analyze the Gaps in India's Existing Rape Laws.
2. To Evaluate the Global Practices and Gender-Neutral Rape Laws in Other Countries.
3. To Propose Reforms for Gender-Neutral Rape Laws in India.

1.2. Research Methodology

The research methodology used in this study is doctrinal, which involves a detailed analysis of existing legal texts, statutes, case laws, and legal principles. The study primarily focuses on examining the provisions of the Indian Penal Code, 1860 the Bharatiya Nyaya Sanhita, 2023 and other relevant legislative documents related to rape laws in India.

2 "Amendments in Rape Laws," Drishti Judiciary *available at*: https://www.drishtijudiciary.com/to-the-point/bharatiya-nyaya-sanhita-&-indian-penal-code/amendments-in-rape-laws (last visited December 12, 2024).

3 Saksham Agrawal, "Gender-Neutral Rape Laws in India: Limitations of the BNS - LHSS Collective" LHSS Collective -, 2024 *available at*: https://lhsscollective.in/gender-neutral-rape-laws-in-india-limitations-of-the-bns/ (last visited October 25, 2024).

Additionally, a comparative approach is adopted to analyze gender-neutral rape laws in different countries, such as the United States, the United Kingdom, and Canada, to understand how these jurisdictions have addressed gender inclusivity in their legal frameworks.

2. Constitutional Provisions and Gender Equality

2.1 Constitutional Framework of India

The Constitution of India, adopted in 1950, serves as the supreme law of the land and lays the foundation for the legal framework governing the rights and duties of citizens. It is a document designed to uphold the principles of justice, liberty, and equality for all individuals, irrespective of gender, caste, religion, or race. The Constitution is based on the idea of a democratic republic, where all citizens are treated equally before the law. The framers of the Constitution were influenced by global human rights principles and sought to create a legal structure that would protect all, particularly marginalized and vulnerable groups. The Constitution recognizes the inherent dignity of individuals and seeks to protect their rights, ensuring a fair and just society. Specific provisions within the Constitution, especially in Part III, provide a framework for fundamental rights, which include rights related to equality, freedom of speech, and protection from discrimination, all of which play a vital role in advancing gender equality.[4]

2.2 Right to Equality (Articles 14, 15, 21)

Articles 14, 15, and 21 of the Constitution enshrine the right to equality. Together, they form a robust framework for ensuring equal treatment under the law.

Article 14 guarantees equality before the law and equal protection of the law. It prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. This provision is foundational in ensuring that no individual or group is treated unfairly by the state or in matters of law. The inclusion of "sex" as a protected category under this article is a crucial

4 "Fundamental Rights Available to Citizens and Non-Citizens," Drishti Judiciary *available at*: https://www.drishtijudiciary.com/to-the-point/ttp-constitution-of-india/fundamental-rights-available-to-citizens-and-non-citizens (last visited December 12, 2024).

step toward ensuring gender equality, though its application has been historically gender-biased in the context of sexual offences.

Article 15 further reinforces the principles of equality by prohibiting discrimination by the state on grounds of religion, race, caste, sex, or place of birth. It is significant for the protection of gender equality, particularly concerning laws that differentiate between men and women in cases of personal rights and freedoms. The provision allows for affirmative action and special provisions for women, children, and other disadvantaged groups, though it also raises concerns about the limitations of gender-specific laws, particularly in the context of sexual violence.

Article 21 guarantees the protection of life and personal liberty, which has been interpreted by the judiciary to include the right to live with dignity and the right to personal security. It has been used to advance gender justice in various rulings, ensuring that the fundamental right to life encompasses the protection of individuals from gender-based violence, including rape and sexual assault. Article 21 has been instrumental in extending the scope of human rights protections, providing a strong legal foundation for advocating gender-neutral laws that aim to protect all victims of sexual violence.

3. Evolution of Rape Laws In India

3.1 Historical Overview of Rape Laws in India

Rape laws in India have evolved significantly over the centuries, reflecting the changing social, cultural, and legal landscapes of the country. In pre-colonial India, the concept of rape was largely understood in terms of property rights and honour, with little regard for the victim's autonomy or rights. The British colonial era introduced the Indian Penal Code in 1860, which for the first time provided a codified legal definition of rape. Under Section 375 of the IPC, rape was primarily defined as an act of sexual intercourse with a woman without her consent, which could be committed by a man against a woman.[5]

5 Pamini Kasera, "A Historical Analysis of Rape Laws in India" *available at*: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3619807_code4205748.pdf?abstractid=3619807&mirid=1 (last visited December 12, 2024).

The laws governing rape in India remained largely unchanged for over a century. While the IPC addressed rape in terms of the protection of women's honour and chastity, it ignored issues of consent and the broader socio-cultural factors that contribute to sexual violence. This gendered approach led to the exclusion of male, transgender, and non-binary victims from legal protections, limiting the scope of justice in cases of sexual assault. Furthermore, the lack of clarity on issues like marital rape and the minimal punishment for certain offences highlighted the need for reform in the system. The Indian Penal Code, 1860 was replaced by the Bharatiya Nyaya Sanhita in 2023. The erstwhile section 375 of IPC, 1860 that dealt with rape was transformed to section 63 under the BNS, 2023. However, the provision remained the same and there was no change towards gender neutrality.

3.2 Legal Definition of Rape in India

The legal definition of rape in India has undergone significant changes, particularly following the 2012 Delhi gang rape incident that sparked nationwide protests and demands for stronger laws. Before the 2013 Criminal Law (Amendment) Act, the definition of rape under Section 375 of the IPC was narrow and restricted to penetration by a man into a woman's body. The amendments introduced in 2013 expanded this definition to include a broader range of sexual offences, such as acts involving digital penetration, insertion of foreign objects, and other non-consensual acts. This was a crucial step in recognizing that rape is not limited to traditional forms of sexual intercourse but encompasses various forms of sexual violence.

However, despite these amendments, the legal definition of rape in India remains gender-specific. Section 63 of the BNS, 2023 continues to define rape as an act committed by a man against a woman. This exclusion of male, transgender, and non-binary individuals as potential victims of rape creates a significant gap in legal protection. In addition, the law continues to exclude marital rape from its scope, except in cases where the wife is under the age of 15. This restriction has led to calls for reform to ensure that all individuals, regardless of gender, are equally protected under the law.

3.3 The Need for Reform in Rape Laws

The need for reform in India's rape laws has been a subject of intense debate, especially following high-profile cases of sexual violence. While the 2013 amendments to the Criminal Law were a step in the right direction, there remains a significant gap in the legal framework concerning the protection of male, transgender, and non-binary victims of sexual assault, even after the introduction of the new Bharatiya Nyaya Sanhita, 2023, as there is no provision under the BNS, 2023, protecting their bodily rights. The existing laws are built on a gendered framework that fails to account for the diverse experiences of individuals who face sexual violence. As a result, many victims find themselves excluded from the legal protections afforded to women, leading to underreporting of cases and a lack of justice for survivors.[6]

There is a growing consensus that the legal system must evolve to include provisions that protect all genders from sexual violence and to recognize marital rape as a crime in all circumstances. A more inclusive, gender-neutral legal framework would ensure that survivors of sexual violence, regardless of gender, have equal access to justice and protection.

3.4. Gap in male law after removal of Section 377 in Bharatiya Nyaya Sanhita, 2023

The introduction of the Bharatiya Nyaya Sanhita, 2023 marks a significant shift in India's legal framework regarding sexual offences, particularly in light of the repeal of Section 377 of the Indian Penal Code, 1860. This development raises critical concerns about the protection of male victims of sexual assault. Historically, Section 377 provided legal safeguards for non-minor males, categorizing certain non-consensual acts as rape and protecting them from sexual violence. However, with its removal from the proposed BNS, there is a palpable fear that male victims could find themselves bereft of adequate legal recourse.

6 Lalit Sharma Bharatiya and English Literature, "Addressing India's Rape Issue: A Comprehensive Analysis of Legal Frameworks, Socio-Cultural Challenges,..." unknown, 2024 *available at*: https://www.researchgate.net/publication/383424858_Addressing_India's_Rape_Issue_A_Comprehensive_Analysis_of_Legal_Frameworks_Socio-Cultural_Challenges_and_Enforcement_Mechanisms (last visited December 12, 2024).

One of the most glaring gaps in the IPC, 1860 was its gendered definition of rape, which fundamentally altered the dynamics of legal protection. Under this law, Section 375 clearly delineated that a man can commit rape against a woman, but it also implicitly recognized male victims through the provisions of Section 377. By contrast, the BNS, 2023 confines the crime of rape to male perpetrators and female victims, thereby excluding male victims from the legal framework. Critics argue that this change not only undermines the rights of male victims but also perpetuates the stigma surrounding male sexual victimization, which is often dismissed or trivialized in societal discourse.[7]

The consequences of this legislative shift are far-reaching. The BNS, 2023 inadvertently signals to male victims that their experiences are less valid or deserving of protection under the law. This perception can deter victims from reporting crimes, further entrenching the cycle of silence and shame that often accompanies male victimization. Moreover, the absence of legal provisions addressing male sexual violence could leave many victims without any form of recourse, as the existing avenues for seeking justice may become less accessible or entirely unavailable.[8]

The debate surrounding the BNS, 2023 and its implications for male victims underscores the need for a comprehensive review of the criminal justice system in India. Legal reforms must prioritize inclusivity and protection for all victims of sexual violence, regardless of gender. This can be achieved by adopting a more nuanced understanding of consent, victimhood, and the complexities of sexual violence. Additionally, societal attitudes must be challenged through awareness campaigns that educate individuals about the realities of male and transgender victimization, fostering an environment that encourages reporting and supports recovery.

The enactment of the Bharatiya Nyaya Sanhita, 2023, significantly undermines the legal protections available to male victims of sexual

7 Saksham Agrawal, "Gender-Neutral Rape Laws in India: Limitations of the BNS - LHSS Collective" LHSS Collective -, 2024 *available at*: https://lhsscollective.in/gender-neutral-rape-laws-in-india-limitations-of-the-bns/ (last visited October 25, 2024).

8 Oommen C. Kurian, "Gender attitudes in India: Changes in the 21st century" OBSERVER RESEARCH FOUNDATION (ORF), 7 March 2024.

assault in India. The removal of Section 377, combined with the gendered definition of rape in the proposed BNS, 2023 signals a regression in the recognition of male victimization within the criminal justice system. It is essential that lawmakers consider the implications of these changes carefully and strive for a legal framework that is inclusive, equitable, and reflective of the realities faced by all victims of sexual violence.

4. REPORT OF 172nd LAW COMMISSION AND JUSTICE VERMA COMMITTEE REPORT

4.1 REPORT OF 172nd LAW COMMISSION

This report made significant recommendations to reform the Indian Penal Code, 1860 particularly concerning sexual offences such as rape.

- The Law Commission proposed broadening the definition of rape so that it was no longer based on the assumption that only women can be victims. It recognized that rape and other sexual offenses can occur to any person, including men, transgender individuals, and non-binary persons.
- Inclusion of Male Victims: The report recommended that the law should be gender-neutral, meaning that men who are victims of rape or sexual violence should also be recognized under the law. This was a critical step in addressing the fact that sexual violence affects individuals of all genders, even though historically, rape laws have primarily been framed in the context of female victims.

4.2.1. Background of the Justice Verma Committee

The Justice Verma Committee was established in December 2012 in response to the brutal gang rape of a young woman in Delhi, which led to widespread protests and demands for reforms in India's laws related to sexual violence. The committee was tasked with reviewing the existing legal provisions and suggesting reforms to address the inadequacies in the law. Headed by former Chief Justice of India, Justice J.S. Verma, the committee comprised legal experts, academics, and social activists. Its primary objective was to recommend changes to the criminal justice system to make it more effective in dealing with sexual violence cases, ensuring swift justice, and providing better protection for victims.

The committee's report, submitted in January 2013, was widely hailed for its comprehensive recommendations, which addressed various aspects of sexual violence, including the definition of rape, the

punishment for offenders, and the rights of victims. It also recognized the need for changes in societal attitudes towards women and called for a broader understanding of gender equality in the legal system.[9]

4.2.2. Key Recommendations on Rape Laws

One of the most significant recommendations of the Justice Verma Committee was the broadening of the definition of rape. The committee suggested that the definition should not be limited to penile penetration but should encompass other forms of sexual violence, including digital penetration and other non-consensual sexual acts. This recommendation was reflected in the 2013 Criminal Law (Amendment) Act, which expanded the legal understanding of rape to include a wider range of sexual offences. Additionally, the committee recommended that the law should be gender-neutral, recognizing that men, transgender individuals, and non-binary people can also be victims of sexual violence. The committee also suggested that marital rape should be criminalized, arguing that consent within marriage should be treated with the same legal respect as any other relationship. These recommendations were aimed at addressing the gaps in the existing law and ensuring that the criminal justice system would provide comprehensive protection to all victims of sexual violence.[10]

5. Comparative Analysis of Gender-Neutral Rape Laws In Other Countries

5.1 Gender-Neutral Rape Laws in the United States

The United States has made significant strides in developing gender-neutral rape laws, recognizing that sexual assault can occur regardless of the victim's gender. Under U.S. federal law, specifically the **Violence Against Women Act, 1993**, the definition of rape was broadened to cover non-consensual sexual acts, including penetration with any object, by anyone, regardless of the victim's gender. This progressive shift reflects a

9 "Committee Reports," PRS Legislative Research *available at*: https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary (last visited December 12, 2024).

10 "The Justice Verma Committee Report 2013: A Comprehensive Analysis of Legal Reforms in India," *available at*: https://www.legalserviceindia.com/legal/article-17870-the-justice-verma-committee-report-2013-a-comprehensive-analysis-of-legal-reforms-in-india.html (last visited December 12, 2024).

growing recognition that men, women, transgender, and non-binary individuals can all be victims of sexual violence.

Additionally, U.S. states have adopted their variations of rape and sexual assault laws. Many states have amended their statutes to reflect gender-neutral language and to ensure that sexual violence is prosecuted effectively without discrimination based on the victim's gender. For example, Section 261 of the **California Penal Code** defines rape as *"an act of sexual intercourse with a person without their consent,"* without specifying gender. The inclusion of such provisions makes it clear that sexual assault is not gendered and ensures that all victims receive equal protection under the law.

5.2 Gender-Neutral Rape Laws in the United Kingdom

In the United Kingdom, gender-neutral rape laws are governed by the **Sexual Offences Act 2003**, which was a landmark piece of legislation that updated and expanded the legal framework surrounding sexual violence. This law replaced the old offence of rape, which previously applied only to women, and broadened it to apply to both male and female victims. Under the Sexual Offences Act, 2003 rape is defined as the penetration of any body part or object into another person's body without their consent, irrespective of the gender of the victim or the perpetrator.[11] The law further emphasizes consent as the central element of the crime, making it clear that a lack of consent is what constitutes rape rather than focusing on the gender of the participants. This recognition of both male and female victims has been instrumental in challenging the traditional gender norms surrounding sexual violence. Additionally, the UK legal system allows victims, regardless of gender, to report cases of rape and sexual assault without facing stigma or disbelief, encouraging a more inclusive approach to addressing sexual violence.

5.3 Gender-Neutral Rape Laws in Canada

Canada has also made significant progress in implementing gender-neutral rape laws, with the **Criminal Code of Canada** providing a broad and inclusive definition of sexual assault. Canadian law has long

11 "Rape and Sexual Offences - Chapter 7: Key Legislation and Offences," The Crown Prosecution Service *available at*: https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences (last visited December 12, 2024).

recognized that both men and women can be victims of sexual assault, and the Criminal Code uses the term "sexual assault" rather than "rape," reflecting a broader understanding of the crime. Under Section 271 of the Criminal Code, a person is guilty of sexual assault if they apply force to another person without their consent, and this applies equally to all individuals, regardless of gender. This definition includes both penetration and other forms of sexual violence, and it specifically removes gendered language from the statute. Furthermore, Canada has developed specific provisions for transgender and non-binary victims, acknowledging the unique challenges they may face when seeking justice in cases of sexual violence. These provisions help to ensure that all victims, regardless of their gender identity, can access legal remedies and support services.

6. Judicial Pronouncements

1. ***Michael M. v. Superior Court***[12]***:*** In this case, the US Supreme Court case upheld the constitutionality of a California statutory rape law that only criminalized males for sexual intercourse with a minor female, concluding that such a gender-specific law did not violate the Equal Protection Clause due to the unique biological consequences of pregnancy for females; essentially allowing for different legal treatment based on sex when justified by a significant difference between the genders.

2. ***People v. Liberta***[13]**:** The New York Court of Appeals rejected the claim that a man cannot be raped by a woman, describing it as fundamentally incorrect. The argument was based on the assumption that a man cannot participate in sexual intercourse unless he is sexually aroused, and if aroused, he must be consenting. However, the court clarified that "sexual intercourse" is defined as any penetration, no matter how slight, and does not depend on arousal or consent.

3. ***Independent Thought v. Union of India***[14] In this case, the Supreme Court of India struck down the exception to Section 375 of the Indian Penal Code (IPC) that allowed marital rape within the context of marriage where the wife is above the age of 15. The court held that the

12 450 U.S. 464 (1981).
13 474 N.E.2d 567, 577 (N.Y. 1984).
14 (2017) 10 SCC 800.

exception, which exempted husbands from prosecution for sexual intercourse with their wives under the age of 18, was unconstitutional as it violated the constitutional guarantees of equality and non-discrimination. The decision highlighted the importance of protecting women's sexual autonomy, irrespective of marital status, and recognizing the inherent dignity of women in a marital relationship. While this judgment addressed a gender-specific issue, it also opened discussions on the need for more inclusive provisions in sexual violence laws that account for male and transgender victims of sexual assault.

4. ***State (NCT of Delhi) v. Pawan Kumar***[15]***:*** The infamous Nirbhaya Case (2012) involved the brutal gang rape and murder of a 23-year-old woman in New Delhi, which led to massive public outrage and protests across India. This case brought attention to the inadequacies of India's rape laws, which were widely criticized for being too lenient. In response to the incident, the Indian government formed the **Justice Verma Committee**, which led to significant reforms in rape laws in India, expanding the definition of rape to include acts like penetration with objects and extending the scope of punishable offences related to sexual assault.

5. ***Reem v. Union of India*** [16] ***:*** The case challenged the constitutionality of Section 375 of the Indian Penal Code, which limits the definition of rape to instances involving female victims. The petition argued that this provision discriminated against male and transgender victims of sexual violence by denying them the right to legal protection under the same laws. Although the Supreme Court did not make a significant ruling in favor of gender-neutral rape laws in this case, it raised critical questions about the need for reform in India's legal system. This case highlighted the gap in the legal framework that fails to provide adequate protection to male and non-binary victims, urging lawmakers and the judiciary to reconsider the gender-specific approach in the context of sexual violence laws.

6. ***National Legal Services Authority v. Union of India***[17]***:*** In this case, the Supreme Court of India recognized transgender individuals as a

15 (2014) 3 SCC 727.
16 W.P. (C) No. 505 of 2018.
17 (2014) 5 SCC 438.

third gender under the Indian Constitution, affirming their right to equality and non-discrimination. Although this case did not directly address sexual violence, it was significant in the broader context of gender-neutral rape laws. The judgment laid the foundation for advocating for the rights of transgender individuals in all legal matters, including sexual assault cases. The ruling emphasized the need for legal reforms that recognize the unique vulnerabilities of transgender individuals, ensuring their access to justice and protection under laws that are inclusive of all gender identities.

7. *Shakti Vahini v. Union of India*[18] In the case, the Supreme Court dealt with the issue of forced marriages and trafficking of women, focusing on the protection of individuals from sexual violence. While the case centred on women's rights, it also discussed the broader implications of sexual violence, including the protection of all victims regardless of gender. This case underscored the importance of expanding the legal framework for sexual assault to cover both men and transgender individuals, reflecting the growing understanding of sexual violence as a universal issue. It highlighted the need for reforms in India's legal system to recognize and address the needs of all survivors, regardless of their gender identity.

8. *Pooja Sharma v. Union of India and Anr*[19].: The Supreme Court chose not to entertain a Public Interest Litigation (PIL) that sought the inclusion of sexual offences against males, transgender individuals, and animals within the provisions of the newly introduced Bharatiya Nyaya Sanhita (BNS). The BNS, which replaces the Indian Penal Code (IPC), is intended to update and reform India's criminal justice system. The Court's decision not to take action in the matter reflects the challenges of addressing such issues through judicial intervention and emphasizes the importance of legislative reforms to ensure that all affected parties.

9. Conclusion

In conclusion, the discussion surrounding gender-neutral rape laws in India reveals a complex intersection of legal, social, and cultural challenges that must be addressed for the country's legal system to evolve and offer equitable justice for all victims of sexual violence.

18 (2018) 7 SCC 8.
19 W.P.(Crl.) No. 398/2024.

The current gender-specific laws, particularly the definitions of rape under Section 63 of the BNS, 2023 limit the scope of legal protections and fail to reflect the reality of modern societal dynamics where men, transgender, and non-binary individuals are also vulnerable to sexual assault. The exclusion of these groups from legal protections perpetuates a cycle of underreporting, stigma, and injustice, leaving them without adequate recourse. The Justice Verma Committee's recommendations for reforming rape laws, particularly the push for gender-neutral provisions, were an important step forward in recognizing the limitations of the existing framework.

Globally, countries such as the United States, the United Kingdom, Canada, and Australia have adopted gender-neutral rape laws that recognize the victimization of all individuals, regardless of gender. These nations have embraced the understanding that sexual violence transcends gender boundaries and that the law must evolve to reflect the experiences of male, female, and transgender victims. The lessons from these countries emphasize the importance of creating a legal framework that is both inclusive and sensitive to the diverse needs of survivors.

Socio-cultural barriers, deeply rooted gender stereotypes, and the stigma surrounding male and transgender victims of sexual violence continue to hinder progress. Legal and institutional challenges, including a lack of adequate training for law enforcement and judicial officers, further complicate the issue. The political climate and public perception of sexual violence, which often reinforces traditional gender roles, must also be addressed to foster an environment where all victims feel safe coming forward to report crimes without fear of discrimination or disbelief.

10. Suggestions/Limitations

1. The path toward implementing gender-neutral rape laws in India presents several opportunities for reform but also faces notable limitations. One of the key suggestions is the urgent need for a comprehensive revision of Section 63 of the BNS, 2023 to include male, transgender, and non-binary victims. The law must be updated to reflect the diverse experiences of sexual violence survivors, ensuring that all genders are equally protected under the legal framework.

2. A gender-neutral definition of rape would promote a more inclusive approach to justice and ensure that all survivors, regardless of their gender identity, have access to legal recourse. Additionally, legal reforms must be accompanied by extensive training for law enforcement, judicial officers, and medical professionals to ensure that they are equipped to handle cases of sexual violence in a gender-sensitive and inclusive manner. Public education on the realities of sexual violence across all genders can help challenge deeply ingrained societal attitudes that perpetuate victim-blaming and silence victims. Awareness programs should also educate the public on the importance of gender-neutral laws in fostering a just and inclusive society. However, there are limitations to the implementation of gender-neutral rape laws in India.

3. Socio-cultural resistance to recognizing the victimization of men and transgender individuals may hinder legislative change. Additionally, political challenges and the reluctance to alter deeply entrenched gender norms could slow down the pace of reform. Despite these limitations, the push for gender-neutral laws remains crucial for ensuring that India's legal system evolves to provide equitable justice for all sexual violence survivors.

Safeguarding National Security In Outer Space: A Comparative Study Of Policies And Normative Structures

Raunak Sood*
Dimpal T. Raval**

Abstract

This paper examines the critical intersection of national security and space resource activities, analysing legal and policy frameworks across major spacefaring nations. Through analysis of international submissions, national laws, and scholarly works, it identifies key challenges that are unregulated private sector involvement, dual-use technologies, and the absence of binding norms to prevent harmful interference. The study proposes an eight-pillar National Security Doctrine for Space Resource Activities, emphasising authorisation regimes, cybersecurity, and international cooperation. Findings reveal fragmented governance favouring advanced nations, leaving developing countries vulnerable. Recommendations include legislative reforms, institutional coordination, and multilateral measures through COPUOS to ensure equitable and secure participation in space resource exploitation while mitigating militarisation risks.

Keywords: *space resource activities, national security, outer space governance, dual-use technologies, national security doctrine*

Introduction

Outer space is more than scientific exploration and has become a domain where national security, economic interests and geopolitical influence are converging. The rapid expansion of space resource activities grounded in the Outer Space Treaty, 1967, is insufficient with respect to commercial space activities and national defence objectives. This study originates from the recognition that national security concerns are permeating all dimensions of space resource activities, especially

* Doctoral Research Scholar, Rashtriya Raksha University, Gujarat, India. Email: raunak.sood_phd@rru.ac.in

** Associate Professor and Director, School of Criminal Law and Military Law, Rashtriya Raksha University, Gujarat, India. Email: dimple.raval@rru.ac.in

connected to dual-use technologies and cyber vulnerabilities, including the potential militarisation of commercial missions. The Outer Space Treaty has provided for the general principles for peaceful use, but prioritising the strategic control over equitable access and exclusion from the emerging "resource race" deepens structural inequalities in global space governance.

The researcher will investigate the intersection between national security and space resource governance through comparative legal and policy-based analysis by systematically examining how major space-faring nations such as the US, China, Japan, Luxembourg, UAE and European Union are constructing national security doctrines around resource utilisation. By analysing the official submissions to COPUOS, domestic legal instruments and relevant policy documents. This research is motivated by three central issues, which are firstly, whether national legal and policy frameworks integrate national security considerations within space resource activities, whether legal and normative gaps persist in preventing militarisation or weaponisation of space resources and finally, whether a unified national security doctrine can be developed for balancing the sovereign interests with collective global security in outer space.

The significance of this study with respect to India is that even though the Indian Space Policy, 2023 and the NGP, 2024, provide for an authorisation-based structure for private participation, they remain silent on a national security framework tailored to space resource exploitation. This study will address that very lacuna by conceptualising a national security doctrine for space resource activities and offering India a model for integration of security imperatives within its regulatory and strategic ecosystem. The research is of policy relevance because it reinforces India's strategic autonomy while ensuring compliance with its international obligations under the Outer Space Treaty. This research will further the argument that space resource activities will evolve under a cooperative yet security-conscious legal order where authorisation, regulation and international coordination will be the key pillars.

I. Research Methodology

The research employs a qualitative methodology integrating doctrinal, normative and comparative analysis of legal and policy frameworks concerning national security in space resource activities. Using descriptive, analytical and prescriptive approaches, the study examines scholarly literature, international submissions to COPUOS and the national laws of major spacefaring nations. The methodology synthesizes findings from these diverse sources through case study analysis to identify the legal commonalities. This culminates in the proposal of a working national security doctrine for regulating space resource activities.

II. Scholarly Perspectives

From the perspective of Asena and N. Ceren Turkmen, Türkiye has been acting in a manner prioritizing its national interests and security while enacting its space policies, for the regulation of indigenous satellite and missile capabilities, entangling its defence strategies (these defence strategies are going around the area of surveillance, reconnaissance and secure communications).[1] Kamel Dine Remili et al, in their research, have associated "national security" with Critical Technologies (technologies which are advanced for the achievement of national security objectives, including sovereignty and prosperity), which are important to national security.[2] Examples of critical technologies for serving national security are, firstly, satellite communication, secondly, remote sensing and finally, quantum technologies.[3] Sandunika Hasangani has defined the term "techplomacy" as one of the newest additions to the field of diplomacy.[4]

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1 Asena Boztas and N. Ceren Turkmen, "An interdisciplinary analysis of Turkiye's space policy: An economic and political perspective," 72 *Space Policy* 101664 (2025), *available at:* http:// dx.doi.org /10.1016/j. spacepol.2024.101664

2 Kamel Dine Remili et al., "Tech diplomacy and Critical Technologies: Case of the LEO satellite internet," 49 *Telecommunications Policy* 102947 (2025). https://doi.org/10.1016/j.telpol.2025.102947

3 *Ibid.*

4 Sandunika Hasangani, *Tech Giants, 'TechPlomacy' and Mitigating Online Radicalization: Lessons for Sri Lanka* 1–13, (Lakshman Kadirgamar Institute of International Relations and Strategic Studies, Colombo, Sri Lanka, 2020) at p.no. 2, *available at:* https://lki.lk/publication/tech-giants-

Jessica L. West is of the view that for pursuing "shared safety, security and benefits in outer space" by nations, there has to be a strategy, policy, MOU ("Memorandum of Understanding") or Accord for overcoming the strategic rivalry between nations, national security concerns and reducing their competing interests.[5] Luncedo Ngcofe has opined that access to outer space is extremely crucial for developing nations (e.g. India, Indonesia, South Africa and others) for strengthening national security, promotion of scientific research, creation of an innovation-friendly environment and fostering international collaboration.[6] Carla P. Freeman has analysed the Chinese perspective on governance of outer space since its corresponding strategy for outer space is informed by Chinese national security concerns, because of the US dominance in the international arena.[7] Legal scholars and experts in China have argued for sovereign rights over space-based objects and objected to the US-led militarisation of outer space.[8] Arfin Sudirman and Taufik Rachmat Nugraha have analysed the Indonesian perspective on space security in the Indo-Pacific by specifically conducting an analysis of Indonesia's space security policy, which led to a finding that space is a strategic frontier similar to land, sea, and air for military use, thereby any desecuritization trend in Indonesian space law and policy needs to be re-amended to securitize space-assets of Indonesia.[9] Juan Racionero-Garcia and Siraj Ahmed Shaikh have examined how Western countries and organisations understand outer

techplomacy-and-mitigating-online-radicalization-lessons-for-sri-lanka/ (last visited July 22, 2025)

5 Jessica L. West "Space Security Cooperation: Changing Dynamics," *Handbook of Space Security* 145–62 (Springer International Publishing, Cham, 2020) at p.no. 145. https://doi.org/10.1007/978-3-030-23210-8_123

6 Luncedo Ngcofe, "Is there enough space for Africa in outer space?" 121 *South African Journal of Science* (2025) at p.no. 1. https://doi.org/10.17159/sajs.2025/18777

7 Carla P. Freeman, "An Uncommon Approach to the Global Commons: Interpreting China's Divergent Positions on Maritime and Outer Space Governance," 241 *The China Quarterly* 1–21 (2020) at p.no. 4. https://doi.org/10.1017/S0305741019000730

8 *Id.* at p.no. 17.

9 Arfin Sudirman and Taufik Rachmat Nugraha, "Space security in Indo-Pacific: An Indonesian perspective," 20 *Asian Security* 129–40 (2024) at p.no. 3,7 & 8. https://doi.org/10.1080/14799855.2024.2431964

space as per their national security strategies and found that national security strategies are directly linking cybersecurity and geopolitical competition.[10] National security strategies in outer space should focus on alliances and multilateral cooperation, but within a realistic framework (based on pragmatic practices) with more emphasis on State sovereignty and strategic advantage.[11] Mariel Borowitz clearly stated the national security argument of the U.S., which means and includes the ability and potential of the nation to defend and protect its interests concerning space activities associated with both lunar and cislunar space for protection against potential threats and successful projection of power in outer space.[12] Another argument of Mariel Borowitz is that the military force of the U.S. needs to develop its military presence to counter China in the cislunar space because of heavy Chinese investments in technologies for capturing the cislunar space.[13] A common argument of the UN NSS ("United States National Security Council") is that national security capabilities must be developed in cislunar space for defence of strategic assets on the Moon, therefore lunar resources have a strategic value with potential for economic benefits for the U.S. leading to the acquisition of a strategic interest to access and defend lunar resources.[14] Mariel Borowitz, Althea Noonan and Reem El Ghazal have further argued that civil or commercial cislunar activities benefit from military support, but such efforts do not represent national security activity in space; hence, to attach a national security value to operations in cislunar space means to protect against threats or project military power.[15] Lawrence Rubin has written on

10 Juan Racionero-Garcia and Siraj Ahmed Shaikh, "Space and cybersecurity: Challenges and opportunities emerging from national strategy narratives," 70 *Space Policy* 101648 (2024). https:// doi.org /10.1016/j. spacepol. 2024.101648

11 Mireia Mas Vivancos, "The importance of space security for the Global South → UNIDIR" *The United Nations Institute for Disarmament Research*, 2025, *available at*: https://unidir.org/the-importance-of-space-security-for-the-global-south/ (last visited July 11, 2025).

12 Mariel Borowitz "US Strategic Interest in the Moon," 1st ed. *Routledge Handbook of Space Policy* 457–91 (Routledge, London, 2024) at p.no. 467.

13 *Id* at p.no. 471.

14 Supra note 12 at 472.

15 Supra note 12 at 474; Mariel Borowitz, Althea Noonan and Reem El Ghazal, "U.S. Strategic Interest in the Moon: An Assessment of Economic, National

the space race in the Middle and further highlighted that national security, prestige and commercial development are the rationale of Middle Eastern countries for developing their respective space programs.[16] "National security" centres on the idea that space assets enhance the power of a State and its security by providing a wider range of sensitive military intelligence and increasing fighting capabilities.[17] Susan Henrico, Ivan Henrico, and Dries Putter have analysed the African perspective in the case of an armed conflict in outer space, the authors went on to argue that South Africa's "national interests and security" are envisaged (co-located) within the "freedom from fear and freedom from want" paradigm, which makes "national development" inseparable from "national security" in the space domain.[18] Jane Harman, Nina Armagno and Esther Brimmer are of the opinion that maintaining national security in outer space will involve securing access to space, maintaining technological superiority and fostering a capable domestic workforce.[19] Harrison H. Schmitt has argued that widening disparity between the supply and demand for highly educated talent weakens a nation's capacity to compete globally in advancing commercial and national security technologies, especially in the case of maintaining a lunar helium-3 fusion power initiative.[20]

Security, and Geopolitical Drivers," 69 *Space Policy* 101548 (2024). https://doi.org/10.1016/j.spacepol.2023.101548

16 Lawrence Rubin, "A Middle East space race? Motivations, trajectories, and regional politics," 69 *Space Policy* 101608 (2024). https://doi.org/10.1016/j.spacepol.2023.101608

17 *Ibid.*

18 Susan Henrico, Ivan Henrico and Dries Putter, "A grey zone: The contours of outer space armed conflict and South Africa's national interests," 32 *African Security Review* 57–80 (2023) at p.no. 71. https://doi.org/10.1080/10246029.2022.2138769

19 Jane Harman, Nina Armagno and Esther Brimmer, "Why Space Is a National Security Priority | Council on Foreign Relations", *available at*: https://www.cfr.org/article/why-space-national-security-priority (last visited July 11, 2025).

20 Harrison H. Schmitt, "Lunar Helium-3 Energy Resources," *Energy Resources for Human Settlement in the Solar System and Earth's Future in Space,* 33–51 (American Association of Petroleum Geologists, Tulsa, OK U.S.A.) at p.no. 47, *available at:* https:// i2 massociates.com/downloads /CHAPTER02.pdf *(*last visited July 22, 2025)

III. Summarization of Research Gap Identified

The existing literature explores the national security concerns in outer space but does not address the legal and policy challenges arising from space resource activities. There is a lack of focused analysis as to how space mining and resource utilization impact national security. Securitization of space assets and technological capability of major space powers leaves developing countries with unclear pathways for secure and equitable participation, which is a critical gap in the evolving global space governance. There is a lack of recognition of authorisation and an absence of a multilateral control mechanism. There is a normative and definitional vacuum around dual-use technologies in resource missions, which are potentially leading to covert militarisation under the guise of commerce. The absence of a coordinated global Space Situational Awareness system, which integrates both governmental and commercial data sources under neutral supervision, is another research gap. No uniform SOPs exist for interpreting and implementing "harmful interference" thresholds specific to space resource activities, and lack of a binding international regime for private actor compliance with national security protocols, especially in multilateral ventures or orbital mega-constellations.

IV. An International Perspective On National Security And Space Resource Activities

The UN General Assembly has established the COPUOS ("Committee on Peaceful Uses of Outer Space") whose role and function is to review international cooperation for peaceful uses of outer space, develop programs to assist in the continuation of research on outer space, study legal problems and report to the General Assembly about its activities.[21] The COPOUS has a role to act as a facilitator for international legal and scientific conferences for the exchange of experiences by Member States in consultation with the Secretary-General and in cooperation with appropriate specialised agencies.[22]

21 UN General Assembly, *International Co-operation in the Peaceful Uses of Outer Space*, GA Res 1472 (XIV), GAOR, UN Doc A/RES/1472(XIV) (Dec. 12, 1959) at p.no. 5.

22 Id. at p.no. 6.

A. Submissions of Member States before the Working Group on Legal Aspects of Space Resource Activities

The COPUOS has released an initial draft containing recommendations for a set of principles for space resource activities, with the first principle being that space resource activities should be directed in accordance with international law (in full compliance with the Charter of the United Nations) to maintain international peace and security and promote international cooperation and understanding.[23] The Islamic Republic of Iran has expressed in its submission to the Legal Subcommittee that COPUOS should play a central role in data sharing, facilitating equitable access to space data, setting reporting standards and ensuring transparency while safeguarding legitimate security concerns associated with space resource activities.[24] It can be derived from the submission of Iran that national security for space resource activities should be regulated by a global authority such as the UN COPUOS, and the legal mandate for COPUOS should be increased for it to be made a regulator for addressing the security concerns of States. Canada, in its submission, is of the view that, to maintain international peace and security, space resource activities should be conducted with due regard to the interests of all States and avoid potentially harmful interference with the space resource activities of other States.[25] A legal argument can be made from the submission of Canada that a national security threat in space resource activities could mean that other States are not giving "due

23 Working Group on Legal Aspects of Space Resource Activities, *Initial Draft Set of Recommended Principles for Space Resource Activities*, UN Doc A/AC.105/C.2/L.339, (2025) at p.no. 4

24 Working Group on Legal Aspects of Space Resource Activities, Islamic Republic of Iran, *Perspective on the Initial Draft Set of Recommended Principles for Space Resource Activities*, UN Doc A/AC.105/C.2/2025/CRP.25 (2025) at p.no. 7.

25 UNCOPOUS, "Submission of Canada to the Working Group on Legal Aspects of Space Resource Activities of the Legal Subcommittee of COPUOS" *Working Group on Legal Aspects of Space Resource Activities, available at*: https://www.unoosa.org/documents/pdf/copuos/lsc/space-resources/DraftPrinciplesContributions/Submission_of_Canada_to_the_Working_Group_on_Space_Resource_Activities_-_Draft_Set_of_Principles_14_November_2025.pdf (last visited July 13, 2025).

regard" and causing "harmful interference" in space resource activities of another State. The Grand Duchy of Luxembourg has submitted that the emergence of new space actors, including the private sector, is creating complex security issues (including opportunities) and advocated for practical guidance on the avoidance of the "harmful interference" principle.[26] Indeed, "harmful interference" is more of a technical term with no practical guidance; thus, for strengthening national security in space resource activities, it is important for States to come together to develop a consensus on an SOP ("Standard Operating Procedures") offering practical guidance to all States on an international platform. Another aspect can be addressed from the point of Iran's submission that COPOUS, maybe the body well-equipped for the development of a document on practical guidance.

France, in its submission, has underlined that in practice, astronauts have a military background and the equipment used during space missions contains "dual-use technologies" which can be used for non-peaceful purposes, thus raising a national security concern for other nations.[27] Italy, in its submission, has iterated the No-Harm Principle in Art. III of the OST to mean prohibition of activities which cause significant harm to other States or ABNJ ("Areas Beyond National Jurisdiction")[28] and relied on the Advisory Opinion rendered by the ICJ

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26 COPUOS, "Contribution of the Grand Duchy of Luxembourg on Elements for an Initial Draft Set of Recommended Principles for Space Resource Activities" *Working Group on Legal Aspects of Space Resource Activities,* at. p.no 2.

27 COPUOS, "Second French contribution to the Working Group on Legal Aspects of Space Resource Activities, November 2024" *Working Group on Legal Aspects of Space Resource Activities, available at*: https://www.unoosa.org/documents/pdf/copuos/lsc/space-resources/DraftPrinciplesContributions/241220_French_contribution_French_ressources.pdf (last visited July 13, 2025).

28 UNOOSA, "Working Group on Legal Aspects of Space Resource Activities– Italian Contribution" *Working Group on Legal Aspects of Space Resource Activities, available at*: https:// www.unoosa.org /documents/pdf/ copuos/lsc/space-resources/DraftPrinciplesContributions/ITALIAN_CONTRIBUTION_Working_Group_on_Legal_Aspects_of_Space_Resource_Activities.pdf (last visited July 13, 2025).

on the 'Legality of Threat or Use of Nuclear Weapons' (1996) *"to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"*[29]. An argument can be made from the submission of Italy that national security for space resource activities means not causing damage to the assets of other States during resource-related activities. The Kingdom of the Netherlands and Luxembourg, in their joint contribution, have expressed that appropriate measures should be taken for the avoidance and mitigation of harmful impacts arising from space resource activities which are a risk to the safety of persons, cause damage to persons, cause adverse changes in the environment of Earth, and cause harmful interference with other ongoing space resource activities.[30] Drawing from the submission of the Netherlands and Luxembourg national security approach, for space resource activity, should deter harmful interference with national space resource activities, cause adverse changes in the environment of Earth, including the national territory, cause damage to citizens or risk the safety of citizens engaged in space resource activities.

Contribution from the Russian Federation has expressed that space resource activities should be based on the principle of control because of the special nature of space resource activities and their associated risks. Furthermore Russian Federation suggested that control mechanism which may include the establishment of responsibility, monitoring compliance with legal norms of resource exploitation, control over the licencing of activities, algorithm for resolving conflicts and finally the establishment of an international body responsible for ensuring implementation of regime for the exploration, exploitation and use of space resources (analogous to International Seabed Authority and International Telecommunication Union).[31] UAE, in its submissions, have raised

29 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] I.C.J. Rep 226 at para. 27.

30 UNCOPOUS, "Joint contribution submitted by Luxembourg and the Kingdom of the Netherlands on Elements for an Initial Draft Set of Recommended Principles for Space Resource Activities" *Working Group on Legal Aspects of Space Resource Activities,* at pt. 10.

31 UNOOSA, "Contribution of the Delegation of the Russian Federation to the Working Group on Legal Aspects of Space Resource Activities of the Legal

similar contentions to the principle of control expressed by the Russian Federation, but instead seeks to control space resource activities by engaging in careful authorization of space resource activities, thus slightly deviating from the "principle of control" as expressed by the Russian Federation.[32] An argument for a national security approach to space resource activities derived from submissions of the Russian Federation and UAE ("United Arab Emirates") can be that any non-state actor which are engaging in space resource activities without proper authorization (or proper control as expressed by the Russian Federation) can be a national security issue for Member States. Finally, the U.K. ("United Kingdom") in its submission highlighted that space actors should undertake space resource activities in accordance with relevant principles as agreed by other State-based mechanisms or mechanisms established by COPOUS for safe operations on celestial bodies, including responsible use of existing resources with due regard to other potential users of existing space resources.[33] Borrowing from the UK's position on space resource activities, it can be argued that a breach of national security may be invoked if mechanisms for safe operations and responsible use have been violated. Such violations could cause harm or pose a threat of harm to potential users.

B. Reports of the Committees, Commissions and Representations before the United Nations General Assembly

Indonesia and Japan have legislation and domestic regulatory frameworks dedicated to addressing policy agendas such as national

Subcommittee of the Committee on the Peaceful Uses of Outer Space on elements for an initial draft set of recommended principles for space resource activities" *Working Group on Legal Aspects of Space Resource Activities, at* pt. 7.

32 UNOOSA, "Elements for an Initial Draft Set of Recommended Principles for Space Resource Activities: UAE Contributions" *Working Group on Legal Aspects of Space Resource Activities,* at p.no. 2.

33 UNCOPOUS, "UK Contribution to Chairs of the Working Group on Space Resources for Consideration in Zero Draft" *Working Group on Legal Aspects of Space Resource Activities,* at p.no. 2.

security and business promotion in outer space.[34] The names of the legislation are as follows:

1. Indonesia has enacted legislation titled "Law No. 21 of 2013 on Space Activities".[35]

2. Japan has enacted the legislation titled "Act on the Promotion of Business Activities for Exploring and Developing Space Resources"[36]

India, Indonesia, Turkey, and Thailand have expressed their plans to draft new legislation, and Malaysia has established regulations for the implementation of the Malaysian Space Board Act, 2022.[37] The COPOUS, in its report before the UNGA, has stated that national security-related discussions for outer space should take place before the Disarmament Commission and First Committee of the UNGA.[38] In the UNGA, Mr. Felemban, representing Saudi Arabia, stated that the outer space policy of Saudi Arabia has been developed for the development of the economy, human capital, enhancing international cooperation and strengthening national security.[39] The SSC ("Saudi Space Commission" established in 2018) has been active in the area of strengthening space

34 Committee on the Peaceful Uses of Outer Space, *Report on the Status of the National Space Legislation of Countries of the Asia-Pacific Regional Space Agency Forum National Space Legislation Initiative, Third Phase*, UN Doc A/AC.105/2025/CRP.20 (June 23, 2025), para. 37.

35 The Space Activities Law, 2013 (Law of the Republic of Indonesia No. 21 of 2013, State Gazette No. 133 of 2013) *available at:* https://www.unoosa.org/documents/pdf/spacelaw/national/UU_Nomor_21_Tahun_2013.pdf (last visited October 8, 2025).

36 APBAEDSR (Act No. 83 of 2021), *available at:* https://www.japaneselawtranslation.go.jp/en/laws/view/4332/en (last visited October 8, 2025)

37 *Id.* at para. 36.

38 United Nations General Assembly. (2023). Report of the Committee on the Peaceful Uses of Outer Space, Sixty-sixth session (31 May–9 June 2023). Official Records, Seventy-eighth Session, Supplement No. 20 (A/78/20). United Nations, para. 50.

39 United Nations General Assembly. (2023). Summary record of the 16th meeting of the Special Political and Decolonization Committee (Fourth Committee), Seventy-seventh session, Agenda item 45: International cooperation in the peaceful uses of outer space (continued). Official Records, A/C.4/77/SR.16. United Nations, para 1.

security and cooperating with respective international counterparts.[40] Ms. Fernandez Palacios, representing Cuba, has voiced concerns in the UNGA about the development of space weapons and opposed the use of space technology to undermine the national security of other nations as "highly concerning", including the use of a spy satellite network, which is not compatible with peace and development.[41] A viewpoint can be taken out of the statements of Mr. Felemban and Ms. Fernandez Palacious that national security for space resource activities should mean that space technology should not be used to undermine the security of other nations; instead, it should be used for strengthening the security of private activities controlled by States. The Disarmament Commission has recommended measures in its report that, voluntarily and subject to national security considerations, States should engage in the TCBM ("transparency and confidence-building measures") for preventing an arms race in outer space activities.[42] So, for the promotion of national security in space resource activities, it can be suggested that states should regularly engage in TCBM to prevent it from turning into an arms race during resource exploitation, extraction, processing and other connected activities.

V. Global Legal And Policy Frameworks

China

China views outer space as a global common and supports the usage and exploration of resources. Art. 32 of the National Security Law of the People's Republic of China states that China is committed to the peaceful exploration and use of outer space by supporting scientific investigation, development and exploitation, strengthening international cooperation and preserving the national security of its activities and assets in outer space.[43] In 2021, China released a white paper titled "China's Space Activities", in Art I. China claimed that it wanted to utilize outer space

40 Ibid.
41 Supra note 38 at para 4.
42 UN General Assembly, *Report of the Disarmament Commission for 2023*, GAOR, 78th sess, Supp No 42, UN Doc A/78/42 (27 April 2023) at para. 15.
43 National Security Law of the People's Republic of China, 2015, art. 32.

only for its growing demand for national security, the construction of the economy and for developing the collective national strength of China.[44] The U.S.-China Economic Security Review Commission released a report claiming that China (in its joint statement with Moscow dated 05.07.2017) was threatening to weaponize outer space, threatening international security and strategic stability, especially since China is not agreeing to go with a Code of Conduct in outer space.[45] The legal and strategic position for China is that its legal framework should ensure that its space activities conducted by China do not conflict but advance strategic interests; thus, to maintain national security in space resource activities from a Chinese perspective, there must be a balance of economic benefits with the global common principles for the avoidance of unilateral exploitation of space resources.

European Union

The European Commission has released a proposal for "safety, resilience and sustainability of space activities in the Union"[46] (hereinafter referred to as "Proposal") the proposed regulations seek to avoid interfering with sovereign competences in defence and national security by explicitly respecting Art. 4(2) of the Treaty of the European Union[47] which states that national security remains the sole responsibility of each Member State. The proposed regulation completely excludes space objects which are used for defence or national security, regardless of being

44 Information Office of the State Council of the People's Republic of China, *China's Space Activities* (November 2000), available at: https://www.cnsa.gov.cn/english/n6465684/n6760328/n6760333/c6813192/content.html (last visited on July 14, 2025).

45 U.S.-China Economic and Security Review Commission, *China's Position on a Code of Conduct in Space* (Washington, 8 September 2027) at p.no. 2, *available at:* uscc.gov/siteshttps://www.uscc.gov/sites/default/files/Research/USCC_China%27s%20Position%20on%20a%20Code%20of%20Conduct%20in%20Space.pdf/default/files/Research/USCC_China%27s Position on a Code of Conduct in Space.pdf. (last visited July 23, 2025)

46 Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union, COM (2025) 335 final, 25 June 2025.

47 The Treaty on European Union, 2012, art. 4(2).

operated either by government or private entities.[48] Art. 4 of the Proposal envisages the "National security clause" that the national security of the Members cannot be overridden by anything contained in the Proposal.[49] This leaves a vacuum for states to invoke national security exceptions under the Proposal for space resource activities to shield sensitive space resource activities from public or international scrutiny, justify non-disclosure of operational details for defence reasons and limit private access to certain space domains for national interest. A communication from the Commission for "Welcoming Foreign Direct Investment while protecting essential interests" stated that foreign control over companies poses risks to security, public order, and technological sovereignty, and screening of foreign investments in critical sectors is extremely crucial.[50] Space technologies, which are often of dual use, are treated as strategic assets under national security doctrines; hence, members can block or impose conditions on such investments to protect vital space infrastructure.[51] An inference may be drawn from this communication that national security concerns involve foreign companies buying stakes in companies handling critical space technologies, thus space resource activities, which might involve critical, dual-use technologies vital to national defence and strategic autonomy. They must be safeguarded through security, screening and regulation to prevent foreign control or interference.

India

The ISP ("Indian Space Policy, 2023") is the main document for the regulation of space activities in India, released by ISRO ("Indian Space

48 Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union, COM (2025) 335 final, 25 June 2025, at whereas cl. 36.

49 *Id* at art. 4.

50 European Commission, "Communication from the Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and the Committee of the Regions: Welcoming Foreign Direct Investment while Protecting Essential Interests" (European Union, 2017) *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0494 (last visited July 11, 2025)

51 Ibid.

Research Organization"). IN-SPACe ("Indian National Space Promotion and Authorisation Centre) has to function like an autonomous institution with the mandate to guide and authorize space activities, keeping in mind the national security, safety and foreign policy considerations and international obligations.[52] In May 2024, IN-SPACe came up with NGP ("Norms, Guidelines and Procedures for Implementation of Indian Space Policy-2023 in respect of Authorization of Space Activities") norms, Chapter III clause (5) states that space activities cannot be carried out in a manner which might pose to defence, security and intelligence operations, public order, property, safety of people or foreign relations of India and should not have a negative effect on environment and public health.[53] IN-SPACe is allowed to impose control on operations of authorised space objects and space activities or terminate authorisation in the interest of national security.[54] Chapter III clause (25) clearly makes a provision for exploration and utilization of space resources, which requires separate authorization which might be denied if it may interfere with activities of other states or it acts in conflict with the national interest and international obligations of India.[55] Applications must give prior notice before discontinuing any authorized space activity which affects public interest or national security, with penalties for unjustified withdrawal.[56] In the case of Ex-Armymen's Protection Services Private Limited v. Union of India and Ors, the SC ("Supreme Court") has clearly stated that it is very difficult for the court to give an exact definition of "national security" but the term "national security" is inclusive of "*socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace etc.".*[57] Thus, India's stance is

52 The Indian Space Policy, 2023, s. 5(1).

53 Norms, Guidelines and Procedures for Implementation of Indian Space Policy-2023 in respect of Authorization of Space Activities (NGP), Indian National Space Promotion and Authorization Centre, Department of Space, Government of India, IN:ISP2023:NGP2024/V1.0 (May 2024) at chap. III, cl. 5.

54 Supra note 53 at chap. III, cl. 21.

55 Supra note 53 at chap. III, cl 25.

56 Supra note 53 at chap. III, cl. 27.

57 Ex-Armymen's Protection Services Private Limited v. Union of India and Ors, 2014 SCC OnLine SC 175, at para. 15.

crystal clear that space resource activities should not jeopardize India's national security, strategic interests or international obligations. IN-SPACe retains the authority to suspend or revoke authorizations if such activities are posing risks to defence, intelligence or public order.

United States

The U.S. has enacted the CSLCA ("U.S. Commercial Space Launch Competitiveness Act, 2015"), Title I ("Spurring Private Aerospace Competitiveness and Entrepreneurship Act of 2015") Sec. 109 (7) (e) (1) has given the Department of Defence the power to protect national security assets in space.[58] The interpretation given is that when it comes to safeguarding the national security of the U.S., the Department of Defence has full power related to it.[59] The Secretary of Transportation, concurring with the Secretary of Defence after consultation with heads of other Federal agencies, has the mandate to release safety-related space situational awareness data and information to any entity consistent with national security interests and public safety obligations of the United States.[60] The Secretary of Transportation has been further given the mandate of overseeing and coordinating space activities and has the duty to protect national security interests, public property, health and foreign policy interests of the U.S.[61] Furthermore, after consultation with the Secretary of Defence, Administrator of NASA, and heads of other executive agencies it is obligated to identify the requirements for the protection of national security interests, foreign policy interests for any launch of commercial vehicles.[62] The Secretary of Commerce, in consultation with heads of other appropriate federal agencies and NOAA ("National Oceanic and Atmospheric Administration") on remote sensing shall submit a report to the Senate Committee (Commerce, Science and Transportation) and the House Committee (Science, Space and Technology) recommending statutory updates for licensing remote sensing systems for protection of US national security, maintenance of US

58 U.S. Commercial Space Launch Competitiveness Act, 2015, Title I, s. 109(7)(e)(1).
59 *Id* at Title I, s. 109(7)(e)(1).
60 Supra note 58 at Title I, s. 110 (1).
61 Supra note 58 at Title I, s. 113 (b) (3).
62 Supra note 58 at Title I, s. 113 (c) (1) (A).

private sector leadership and reflecting the state of art technologies to maintain US technological dominance in this area.[63] POTUS ("President of the United States") has the responsibility to promote the right of U.S. citizens to engage in exploration and commercial recovery of space resources free from any "harmful interference" by continuing the authorization and supervision by the Federal Government.[64] Thus, national security for space resource activities from an American perspective is a tripartite combination of the Department of Defence (Protection, Defence and Strategy), the Department of Transportation (oversight on launch activities) and the POTUS (diplomatic responsibilities). U.S. leadership for space resource utilization is not only commercial or scientific, it is more strategic for deterrence and defence readiness, supply chain independence and preservation of a free, open and rule-based space environment.

Luxembourg

Luxembourg passed the "*Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace."* (translated to English: "Law of July 20th 2017 on the exploration and use of space resources") has a strict authorization regime consisting of only Luxembourg-based corporate entities[65], authorization is non-transferable[66], administrative presence in Luxembourg is essential,[67] and management must be of good repute and experience[68]. The Luxembourg law provides for gatekeeping mechanisms for screening of bad actors, foreign control or infiltration of sensitive technologies or dual-use applications. There is a requirement for detailed risk assessment and financial coverage[69], auditing by independent and experienced auditors[70], disclosure of shareholders and beneficial

63 Supra note 58 at Title II, s. 202.
64 Supra note 58 at Title IV, § 51302 (3).
65 *Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace* , 2017, art. 4.
66 *Id* at art. 5.
67 Supra Note 65 at art. 7(1).
68 Supra Note 65 at art. 9.
69 Supra Note 65 at art. 10.
70 Supra Note 65 at art. 11.

ownership[71], and authorisation can be withdrawn for failure to meet conditions[72]. The national security implications for provisions of Luxembourg law include security for money laundering, terrorist financing or illicit technology transfers and use of space missions as a front for non-transparent financial or intelligence operations. Finally, penalties for unauthorised space activities or false information, including prison and fines; courts can issue injunctions with daily penalties up to one million euros.[73] Having legal penalties gives a deterrent effect and enforcement leverage for the prevention of abuse of the space resource framework being used for any national security threat.

Japan

Japan has passed the "Act on the Promotion of Business Activities for Exploring and Developing Space Resources" (Act. No. 83 of 2021), though the act does not mention "national security" explicitly but the national security interest in space resource activities can be observed in provisions related to licensing, international cooperation, public disclosure limitations and coordination. The Act has placed licensing restrictions on grounds of public safety and international commitments, "public safety" might implicitly imply the inclusion of grounds such as "national defence", strategic risk mitigation and especially regulation of "dual-use technologies" or geopolitical sensitivities.[74] The Prime Minister of Japan has the power to withhold information from the public,[75] giving discretionary confidentiality, which can extend to national security-sensitive activities that could have military or geopolitical implications. Space Resource Activities should not harm other states or hinder the implementation of treaties in an unjust manner, which harms the interests of other states,[76] thereby preserving peaceful and lawful conduct in space, minimising geopolitical friction, especially in areas of resource competition or militarisation of space. Coordination with foreign

71 Supra Note 65 at art. 8.
72 Supra Note 65 at art. 14.
73 Supra Note 65 at art. 18.
74 Act on the Promotion of Business Activities for Exploring and Developing Space Resources, 2017, art. 3(2)(i).
75 Supra note 74 at art. 4.
76 Supra note 74 at art. 6.

governments and international systems is important for strategic alignment and technology standardization for the deterrence of unilateral actions posing security risks.[77] Ministerial consultation between the Prime Minister and the Minister of Economy, Trade and Industry,[78] Although it appears to be commercial in nature but where critical minerals or resources are concerned, independence will intersect with economic security.

United Arab Emirates

The concept of national security is not defined in the resolution issued by the UAE for space resource activities, but it is contextually embedded in several provisions of the regulation. The regulation prescribes several conditions for applications as operators should not carry out activities which jeopardize or carry the risk of causing damage to international legal obligations of UAE.[79] National security is tied to the safety and continuity of strategic assets in space; thus, applicants have to prevent or mitigate risks to persons or property and harmful interference with ongoing space activities.[80] The state is under an obligation to consult with any affected state when it has reasons to believe that space resource activities may result in interference with another State's activities, because fulfilling the consulting obligations can avert potential space disputes, which could escalate into national security threats.[81] The UAE space agency has been given the flexibility to address evolving national security threats, such as the emergence of dual-use technologies or cyber vulnerabilities.[82] The maintenance of a space resources database for tracking activities and priority rights at the national level[83] is serving as a national security function for enabling surveillance, threat assessment and strategic planning about potential adversaries or unauthorized actions in space. Even though the regulation is focused on commercial rights,

77 Supra note 74 at art. 7.
78 Supra note 74 at art. 3(3).
79 Space Resources Regulation: Regulatory Framework on Space Activities of the United Arab Emirates, 2023, art. 4 (1)(a).
80 *Id* at art. 4(1)(c).
81 Supra note 79 at art. 5(4).
82 Supra note 79 at art. 5(6).
83 Supra note 79 at art. 6.

"without prejudice to international obligations"[84] embeds a national security-related reservation for protecting sovereign claims and preventing unauthorised exploitation of space resources by third parties, having both economic and security implications. The reporting of accidents, interference, damage to property or persons and incidents involving other state's space objects[85] is relevant to SSA ("space situational awareness") and critical to defence strategy, thereby intersecting with national security imperatives.

VI. Analyzing the Legal and Policy-based Commonalities Observed Across Jurisdictions

States like Canada, Italy and the Netherlands are stressing the "no-harm" principle as a cornerstone of national security. Russia and the UAE argue for strict control mechanisms and authorisations for preventing unauthorized actors from undermining national security in space resource activities. The U.K. emphasizes safe operations and due regard, while Iran and Cuba highlight the use of space technologies which do not undermine other nation's security. France warns of dual-use militarization via private actors. The following are some of the commonalities observed by the researchers:

a. **Authorisation and Control of Space resource activities** - States need to have strict Licensing regimes, foreign entity screening, and revocability of license on national security grounds.

b. **Harm Prevention and Due regard to other nations during space resource activities** - Art. IX of OST and the enactment of national laws requiring risk assessments, emergency reporting.

c. **Strategic Infrastructure Protection** - National SSA systems, remote sensing and technological controls should be maintained during space resource activities by the private sector

d. **Cybersecurity & Techplomacy** – Interagency coordination, data sharing limitations and private companies must be vetted securely after authorisation for space resource activities.

84 Supra note 79 at art. 7.
85 Supra note 79 at art. 8.

e. **Military-Civilian overlap** – Dual-use clauses, as observed by the US and France, ought to be paid heed to for international practical guidance on such technologies.

f. **Foreign Policy Alignment** – National security is linked to international cooperation in outer space (UAE, China and India).

The key capabilities which are essential for ensuring national security and defence in the context of space resource activities include; firstly, advanced warning and military intelligence systems; secondly, secure communication networks and coordination mechanisms; thirdly, space-based environmental monitoring and resource management systems; the constructive and strategic use of space technologies for strengthening national security and finally fostering global cooperation which presents unprecedented opportunities for enhancing collective security and governance in outer space.[86] The collective addressability of congestion, competitiveness and contestation in space resources must be reduced and managed effectively by nations, thus ensuring that future "national security" threats are effectively addressed by nations.[87] Therefore, international cooperation and space situational awareness are important pillars of national security.

The researchers are proposing a working national security doctrine for space resource activities, which is as follows:

"National Security in Space Resource Activities refers to the sovereign right and obligation of a State to regulate, protect, and defend space-based assets, infrastructure, and commercial activities related to space resource exploration, exploitation, and utilization, including the mitigation of threats that may arise from foreign interference, militarization, cyber operations, environmental damage, or geopolitical instability"

86 Volodymyr Neskorozhenyi, Volodymyr Zakharov and Alexander Slyusarenko, "Space and National Security: Points of interaction, Opportunities and Issue of Priority," 13 *Advanced Space Law* (2024) at p.no. 102-103. https://doi.org/10.29202/asl/13/9

87 Joshua Duke, "Seizing the Stars: Resources, Expansion, and Counterspace Contingencies Across the Space Domain," 3 *Space Education and Strategic Applications Journal* 34 (2022) at p.no. 34. https://doi.org/10.18278/sesa.4.1.1

TABLE 1: NATIONAL SECURITY DOCTRINE FOR SPACE RESOURCE ACTIVITIES

PILLAR	SIGNIFICANCE OF THE PILLAR	ANALYSIS
Authorization of Space Resource Activities	Authorisation regimes should be governed by national laws and policies	The legal issue which needs to be addressed is that only State-authorised actors should be engaging in space resource activities, thus shielding sovereign security and preventing foreign infiltration.
State-based mechanism for oversight of dual-use technology	Regulation of technologies which serve both civilian and military purposes	Commercial private players can be disguised as covert military operatives, thus underscoring the need for interpretative clarity under Art. IV of OST.
National SSA Systems	State-based monitoring frameworks for space situational awareness (as observed in the case of the U.S. and the UAE)	A sovereign right to surveillance for early threat detection, which is legally aligned with the obligation for avoidance of "harmful interference" under Art. IX of the OST.
Cybersecurity and techplomacy	Protection against cyber threats and strategic vetting of private actors	Expands legal accountability by requiring cyber-resilient infrastructures; connects with soft law mechanisms like TCBMs and confidentiality clauses in licensing.
Cooperation at an International Level	Multilateral mechanisms like COPOUS, TCBMs and SOPs	Embedded in Art. I of OST, cooperation is becoming a security tool which allows the building of consensus and the prevention of conflict in contested or shared resource zones.
Protection of Celestial Zones	Safe usage and sustainable development of resource-rich lunar or asteroid bodies	This demands an interpretation of Art. II and IX of the OST, which are helping to prevent unilateral appropriation while ensuring that technology is being used for peaceful purposes and to preserve the environment.
Emergency Protocols	Notification and response duties in the case of space incidents	The legal responsibility of states under international law is important for collective security against emerging orbital threats

Regulation of Non-State Actors	State liability for private activities under Art. VI of OST	Having a state liability for national control over commercial missions fills gaps in OST by requiring domestic mechanisms for disciplining and monitoring private companies.

(SOURCE: Self-Conceptualised by the Researcher)

The pillars of the national security doctrine for space resource activities are legal authorisation, dual-use technology oversight, national space situational awareness, international cooperation with vetting, cybersecurity and technological sovereignty, protection of celestial zones, emergency protocols and non-state actor regulation by respective states. The proposed definition is more function-based as it focuses on the subject matter by narrowing "national security" to a specific operational context, and legally, it sets the definitional scope by distinguishing it from space security.[88]

VII. Way Forward: Suggestions And Proposal For India

For the implementation of the national security doctrine in space resource activities, the best legal and policy-based suggestions for States can be the following:

a. Taking legislative actions to incorporate a national security doctrine in it

b. Establish national security officers within space agencies for enabling better institutional coordination

c. Enable the administrative and judicial review of licences on national security grounds

d. Improving international cooperation and coordination by using SOPs and TCBMs through COPUOS or on other international forums.

A viable way forward for India is to include the introduction of NSIA ("National Security Impact Assessment") for space resource extraction missions. On the parallel lines, the development of SSS ("Space Security Standards"), which is a set of multilaterals, interoperable norms covering

88 Jakhu, R.S., Pelton, J.N., Nyampong, Y.O.M., "National Space Laws and the Exploitation of Natural Resources from Space," *Space Mining and Its Regulation* 131–44 (Springer International Publishing, Cham, 2017) at p.no. 135-139. https://doi.org/10.1007/978-3-319-39246-2_11

cybersecurity, private actor compliance and orbital safety, can provide a soft law foundation for responsible behaviour. India should establish a civil-military coordination agency and intelligence services to review license applications by the private sector and share threat intelligence and security incidents related to space resource activities. India should amend the Indian Space Policy to integrate the core tenets of the proposed eight-pillar national security doctrine and officially recognise space resource activities as a domain for bringing legislation into existence. Further suggestions by the researcher are as follows:

1. Develop a national policy for space resource activities and address the defence and national security priorities of India in it.
2. Ensure a strong Public-Private Partnership Model for creating an enabling environment for startups and established companies to participate in this sector through financial incentives, technology transfer and clear regulatory guidelines.
3. India should play an active role in the Working Group on Legal Aspects of Outer Space and give inputs on draft space resource activities legislation, and propose it to the Working Group for further action.

Conclusion

As space resource activities accelerate, the intersection of national security and outer space demands urgent and coherent regulation. This paper has proposed a foundational working draft of a national security doctrine grounded in comparative legal analysis and international consensus-building. However, this is a beginning point; future work must focus on operationalising this doctrine through multilateral treaties, standardised licensing norms, and institutional frameworks, especially under the umbrella of COPUOS. Since the space economy is expanding, the legal and policy framework for safeguarding sovereignty and shared security should be taken care of in the final frontier of mankind. Addressing the risk of militarized claims over resource-rich zones, states should collectively establish a global registry of space resource zones where the licensed activities are recorded to enhance transparency and reduce the risk of conflict. At the national level, each state should have a coordination agency which is a combination of civil-military interface, which is primarily responsible for intelligence-sharing, licensing review,

and preparedness against sabotage or interference. The framework has to be inclusive, and in totality, the national security in outer space should evolve into a resilient, transparent and cooperative model where both the strategic interests are safeguarded not via unilateralism but through shared norms, risk assessments, and institutional innovation. Without such transformation, space resource activities are going to become flashpoints for future geopolitical instability rather than instruments of collective progress.

Undermining Autonomy: The Constitutional Challenge Of The Waqf (Amendment) Act, 2025

Khabbab Ahmad*
Dr. Anjay Sharma**

Abstract

The Waqf (Amendment) Act, 2025 represents a paradigm change in the management of Muslim religious endowment in India, and contains some provisions that will improve the transparency, accountability, and supervision by the government. But its enforcement has occasioned constitutional debate ending with an impending case to the Supreme Court of India. The key elements of the controversy include the clauses that require the appointment of non-Muslim representatives to Waqf Boards, limitation of civil courts authority and expansion of the state dominance on the waqf property all of which put forth burning issues of religious independence, federalism and minority rights. The paper reviews the constitutional concerns of the Act in terms of inclusion of non-Muslim members, limitations on civil court jurisdiction, and increased state control over waqf lands etc. This study critically evaluates the Act's important elements which demonstrates how the Act may jeopardize minority rights and the secular structure of the Indian Constitution. Against the backdrop of the upcoming Supreme Court case, possible constitutional conclusions are critically assessed, and specific reform recommendations are offered in the paper. The following recommendations will help to balance the legitimate objectives of transparency and efficiency with the constitutional right to freedom of religion and protection of the minorities, so that the reforms in the governance are not used at the cost of the secular and federal character of the Indian Constitution.

Keywords: *Waqf Amendment Act 2025, Muslim Endowments, Religious Autonomy, Article 26, Minority Rights, Article 29 and 30,*

* Research Scholar, Faculty of Law, University of Delhi
** Assistant Professor, Faculty of Law, University of Delhi

Federalism, Basic Structure Doctrine, Judicial Review, Constitutional Law, India.

Introduction

The institution of waqf (Awqaf in plural) plays an immensely important historical, religious and socioeconomic role in Islamic law. Another type of waqf that is based on Shariah and which is more specific to the Hanafi school of jurisprudence is waqf, a perpetual charity, where a Muslim transfers immovable property or other assets to the use of humanity, religion, or piety. When a waqf was created, the ownership is considered to be transferred to God, and the usufruct or advantages of the property to that of the community, to support mosques, schools, cemeteries, orphanages, and other charitable purposes.

The idea of waqf was codified in India in Mughal times and was incorporated in the legal systems of British colonial India and incorporated into the legal system of property and trusts. Following the Independence, the Waqf Act, 1954[1] was enacted to control and monitor the waqf properties, and it was succeeded by the Waqf Act, 1995[2] aiming to offer a better form of governance. According to this framework, State Waqf Boards were formed with the responsibility of registering, protecting and managing waqf assets.

With this legal structure, the waqf wealth has had persistent problems of encroachments, misappropriation and mysterious administrative systems; which have resulted in massive loss of good land and resources. According to these systemic issues, the Waqf (Amendment) Act, 2025 was enacted, and proposed far reaching reforms to clear up the system, streamline the governance and increase the state control over the waqf institutions.

These changes have, however, have attracted a great constitutional debate on religious autonomy, minority rights and federalism with a number of these changes coming under the scrutiny of the Supreme Court

1 *The Waqf Act, 1954* (Act No. 29 of 1954).
2 *The Waqf Act, 1995* (Act No. 43 of 1995).

of India. This paper explores the developments in terms of constitutional and doctrinal considerations, and on how these developments may affect the secular and federalism of the Indian Constitution.

- **Legislative Evolution and Objectives of the Waqf (Amendment) Act, 2025**

Indian legislation that regulates waqf has a protracted history that dates back to colonial and post-colonial rule. The earliest statute to govern the waqf properties was the Mussalman Waqf Validating Act, 1913[3], which provided under the law that waqf was valid for the purposes of religion and charity. It was then succeeded by Mussalman Waqf Act of 1923[4] that established procedures of supervision and reporting. The waqf administration of the state was uniformed and the Waqf Act of 1954[5] was passed after Independence to establish a system of management of endowments, and the State Waqf Boards were established by the act. This was subsequently overtaken by the Waqf Act of 1995[6] that provided more powerful institutional frameworks, registration compulsory, and focused on protection of waqf properties against encroachment. With time, however, as many challenges like mismanagement, lack of transparency, encroachment, and overlapping of jurisdictions were experienced, structural gaps in the structure were exposed. It is in this context of the legislative and administrative backdrop that Government came up with the Waqf (Amendment) Act, 2025[7] with the following purpose in mind: enhancing legislative oversight, advancing transparency, and ensuring the effective use of waqf assets.

The Government of India came out with the Waqf (Amendment) Act, 2025 bearing the above-mentioned goals of improving transparency, curbing encroachment and misuse, and streamlining the administration of the waqf properties nationwide. This amendment aims to amend the current Waqf Act, 1995 that has long been in place to give the legal basis

3 *The Mussalman Wakf Act, 1913* (Act No. 6 of 1913).
4 *The Mussalman Wakf Act, 1923 (Act No. 42 of 1923).*
5 *The Waqf Act, 1954* (Act No. 29 of 1954).
6 *The Waqf Act, 1995* (Act No. 43 of 1995).
7 *The Waqf (Amendment) Act, 2025* (Act No. __ of 2025)

by which the administration of Muslim religious endowments in India took place[8].

The current regime, according to the Ministry of Minority Affairs, had their structural and administrative deficiencies, such that rampant encroachment, fraudulent transfers, and misappropriation of waqf assets are the order of the day. Critical problems of poor record-keeping, non-digitization and lack of transparency in decision making have been reported by several bodies such as the Sachar Committee, the Central Waqf Council that has compromised the trust of communities and diminished the developmental potential of the waqf lands[9].

One important aspect of the Amendment of 2025 is that it has brought a higher control in the regulations of lease, transfer or alienation of waqf properties. The Act requires the records of waqf to be digitized and the creation of a National Waqf Property Management System to bring accountability and reduce fraud in transactions.[10]

Importantly, the amendment also strengthens the role of the central government in the areas that were traditionally being handled by State Waqf Boards. This has been a constitutional issue considering that property and religious endowments can be found in the State List in the Seventh Schedule to the Indian Constitution. The opponents believe that this type of centralization can destroy state independence and undermine localized governance, whereas the advocates believe that it enhances the rule of law by preventing corruption and mismanagement.[11]

Renaming of the Act

The Act suggests rebranding of the Waqf Act, 1995 to the Unified Waqf Management, Empowerment, Efficiency and Development (UMEED) Act, 1995 to attain a wider and more centralized vision of management of waqf assets.

8 *Ibid.*

9 Ministry of Minority Affairs, Government of India, 'The Waqf (Amendment) Act, 2025', available at: https://www.minorityaffairs.gov.in/show_content.php?lang=1&level=2&ls_id=936&lid=1163 (visited on 26 October 2025).

10 *Ibid.*

11 *Ibid.*

Definition and formation of Waqf (Amended section 3)[12]

- Section 3(b): This states that waqf is a commitment made by any individual who practiced the Islam religion and who had served at least five years and owned the property.
- Section 3(c): guarantees that waqf-al-aulad will not deprive a woman of his inheritance.
- Section 3(d): Eliminates the idea of waqf by user, requiring written formal documentation of valid waqf establishment.

Non-Muslim and Muslim Women Members (Amended Section 9 and 14) Inclusion[13].

- *Central Waqf Council*: Two non-Muslims are added to the council and at least two women who are Muslims so that the council is inclusive of both sexes and the community.
- *State Waqf Boards*: They must have the representation of Shia, Sunni and Backward Muslim communities, and there must be the representation of the women and the non-Muslim population to provide the kind of social representation.

Empowerment of the District Collectors (Amended Section 40)[14]

District Collectors have been given the power to decide the state of contentious properties, as opposed to the Survey Commissioner. They will also preside over surveys and verification especially where the dispute pertains to claims between government and waqf property. This is in an attempt to minimize confusion and unauthorized claims.

Separate Waqf Boards (New Section 13A)[15]

Bohra and Aghakhani communities can be separated and are recognised as separate Waqf Boards since their needs are sectarian and need to be managed through separate boards.

Registration and Documentation Reforms.

Oral waqf and waqf by user is not allowed.

12 The Waqf (Amendment) Act, 2025, s 3.
13 The Waqf (Amendment) Act, 2025, s 9 and 14
14 The Waqf (Amendment) Act, 2025, s 40.
15 The Waqf (Amendment) Act, 2025, s 13A.

- Valid creation needs a waqf-nama and documents of ownership and evidence of the status of the waqif.
- The use of a centralized portal in which the waqf deeds must be registered online is mandatory to guarantee the traceability and legal authenticity.

Single Digital portal and Land Mutation Process (Amended Section 37)[16]

Waqf properties should be documented at a central online platform.

- Any property to be mutated as waqf must be put on notice for 90 days, and anyone or government agency can object.
- Claims before mutation are verified and certified by the District Collector.
- Dispute Resolution and Appeals (Amended Section 6 and 83)
- District Collectors are able to resolve the conflict on whether land is waqf or government land.
- Waqf Tribunals are to be reorganized to have two members.

A Tribunal orders an appeal to the High Court within 90 days, which strengthens the judicial checks.

Disqualification of Mutawallis (New Section 50A)[17]

The disqualification of individuals who could serve as mutawalli (custodian) has various causes as age, mental incapability, insolvency, conviction of a crime, or encroaching on waqf property or being removed because of corruption or mismanagement.

Striking a Balance between Regulation and Autonomy.

The amendment tries to strike equilibrium between the regulation oversight and the minority rights in the Indian Constitution of 26 which ensures liberty of managing religious affairs. The amendment can be seen as a move towards modernization in waqf regulation by its supporters and an incursion on autonomy of the Muslim institutions of religion by its opponents.[18]

16 The Waqf (Amendment) Act, 2025, s 37.
17 The Waqf (Amendment) Act, 2025, s 17.
18 Constitution of India, art. 26 (‘Freedom to manage religious affairs’).

This is the core of the constitutional test that is imminent in the Supreme Court, and the 2025 Amendment is a hallmark legal event in the shifting interface of state regulation, religious freedom and federalism.

- **Some of the Contested Provisions and Implications on the Constitution.**

The Waqf (Amendment) Act, 2025 is a proposed major legislative intervention of the administration of waqf assets in India. Although the above intent of the amendment as outlined in its legislation is aimed at introducing enhanced transparency, efficiency in administration and inclusivity, some of its provisions have raised serious constitutional challenges. Some of the most discussed issues include inclusion of non-Muslims in Waqf Boards, elimination of the concept of waqf by user and vested more powers in the hands of the executive to adjudicate over the dispute on the waqf properties. Such provisions do not just represent administrative revisions; they do involve, in addition to other provisions, religious autonomy under the Articles 26, the cultural and educational rights of minorities under the Articles 29 and 30, federalism as a feature of the basic structure of the Constitution, and the doctrine of judicial independence. Each of these constitutional issues is discussed in the sub-sections below.[19]

Federalism and Competence in legislation.

The main issue about the Waqf (Amendment) Act, 2025 is that the Parliament has the legislative ability to impose clauses that significantly change the nature of the waqf management especially where waqf assets are pieces of land and religious endowments. Legislative powers are shared between the State and Union in the Seventh Schedule of the Indian Constitution. Of specific interest here are two entries. Entry 28 of the State List specifically includes charities and charitable institutions, charitable and religious endowments and religious institutions, whilst Entry 18 is concerned with land rights in or over land, land tenures including the relation of landlord and tenant. As can be seen in these entries, waqf

19 "Cabinet approves Waqf Amendment Act, 2025", Press Information Bureau Release, 3 April 2025, available at: https:// pib.gov.in /PressRelease Page. aspx ?PRID =2118799 (visited on 26 October 2025).

properties, as a religious endowment and an immovable property, are squarely within the realm of the states.[20]

The amendment brings on board several features which are effective in increasing central control on issues that have been traditionally handled at the state level. These are empowering district collectors to decide who owns and what the status of disputed waqf properties is, centralising the registration and mutation of waqf assets by having a National Waqf Property Management System and ensuring that uniform digitisation of waqf records is done across states. These actions, in as much as they come off as efficiency and transparency strategies, do cast constitutional questions of encroachment on State List subjects. *State of West Bengal v. Union of India (1962)*[21] strongly believed that Parliament would not have the power to make laws on the matters which are solely the preserve of the states except when the Constitution expressly permitted it. Moreover, the Court acknowledged that federalism is one of the components of the fundamental structure of the Constitution. The amendment by placing the decision-making powers in the hands of the central or centrally controlled executive authorities jeopardizes the federal balance and it reduces the state control of land and religious endowment in the state legislations.

The additional complication of this constitutional conflict is that waqf administration was traditionally organized as a governmental issue with State Waqf Boards gaining control over handling and regulating the properties under its region. Any legislative move to redirect or weaken this control must then be subject to a very stiff constitutional test. In case the Union law has been discovered to interfere with exclusive State List matters, it can be ultra vires.[22]

Article 26 and Religious Autonomy.

The second significant constitutional question that the Waqf (Amendment) Act, 2025 provokes is that it may threaten the religious independence of Muslim communities which is secured under Article 26

20 Constitution of India, Seventh Schedule, List II (State List), Entries 18 and 28.

21 *State of West Bengal v. Union of India*, AIR 1963 SC 1241.

22 *Ibid.*

of the Constitution of India. Article 26 grants to all religious denominations the right to organize and constitute institutions of religious and charitable character, to regulate its internal affairs in all things pertaining to religion, to own and acquire property, to dispose of such property in a legal manner. In contrast to Article 25 that promotes individual religious freedom, Article 26 provides institutional and collective freedom to religious denominations in the administration of their religious matters and endowments.[23]

The amendment has especially been contentious regarding the inclusion of non-Muslim members in Waqf Boards. Waqf as such is a religious endowment, which is based on Islamic jurisprudence. Such properties are run not only with the administrative supervision but also a knowledge of religious and traditional practices embedded within the Muslim law. The inclusion of non-Muslim members in these bodies of governance is seen to water down the denominational nature of the management of waqf with the amendment. This brings the question of whether the State can ask the community to have structures that interfere with the right of the community to manage its religious institutions the way it feels like in the way it has its faith and traditions[24].

The judicial precedent gives a lot of protection to religious autonomy in this case. The Supreme Court in the case of *Commissioner, Hindu Religious Endowments, Madras v. Shirur Mutt (1954)*[25] affirmed the Article 26(b) point stating that administration of religious institutions is safeguarded and the State has the power to interfere with secular matters but not with the gist of religious administration. In *Ratilal Panachand Gandhi v. State of Bombay (1954)*[26]The Court made it clear that even though regulation can be exercised it should not constitute a significant intrusion with religious rights. Similarly, in *S.A. Azeez Basha v. Union of India (1968)*[27]The Court stressed the point that Parliament can exercise

23 *Constitution of India*, art. 26.
24 *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.
25 *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.
26 *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388.
27 *S.A. Azeez Basha v. Union of India*, AIR 1968 SC 662.

control over secular administration, but not the denominational rights. The amendment arguably encroaches on the area of religious autonomy ensured by Article 26 by permitting the involvement of non-Muslims on waqf boards and by taking the role of dispute settlement out of community-based institutions and transfers it to the executive[28].

Judicial Accessibility and Independence.

The consideration of the constitutional issues related to the effect of the amendment on the independence of the judiciary and the access to the justice is another crucial constitutional issue. The Act suggests a major reorganization of the dispute resolution system of waqf properties. It increases tribunals with powers over Waqf and curtails the power of civil courts in disputes connected with waqf, and vests ultimate decision-making experimental on quasi-courts under executive jurisdiction. The measures are potentially detrimental to the autonomy of adjudication and restrict the right of the citizens to the recourse to the constitutional courts.[29]

Judicial independence has always been acknowledged as one of the fundamental conditions of the fundamental structure of the Constitution. In *S.P. Gupta v. In Union of India (1981)*[30]The Supreme Court placed enormous emphasis on the central role that judicial independence takes to the constitutional scheme. Truer to the point, in *L. Chandra Kumar v. Union of India (1997)*[31]*The* Court opined that the judicial review as envisaged in Articles 226 and 32 is an indispensable characteristic of the Constitution which may not be dispensed by legislative assembly. The effort to render the decision of Waqf Tribunals final and the intentions to limit the jurisdiction of the ordinary courts can thus be subject to critical constitutional considerations. Although it may be acceptable that specialised tribunals have a part to play in expeditious adjudication, it simply cannot substitute constitutional courts and cannot have its

28 *Ibid.*

29 'Protecting Minority Rights in India: An Analysis of the Indian Constitution and Judicial Interpretations' (2024) 15(3) *Constitutional Law Review* 234 (HeinOnline).

30 *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

31 *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125.

jurisdiction so broadened that it is virtually invulnerable to bring executive decisions to the scrutiny of the courts. This kind of insulation would go against the basic structure doctrine.[32]

Also, complete control over adjudicatory powers granted to the District Collectors as executive members constitutes a conflict of interest by itself and fails to promote the separation of powers. Religious property cases, which often have sensitive community issues to consider, need not be adjudged by an executive but rather adjudged over by an independent and impartial person or panel[33].

Rights of the minorities under articles 29 and 30.

Waqf is a system which is closely interconnected with the cultural and educational life of Muslim population in India. Waqf funds used in many of the prevailing properties will support education institutions, madrassas and local welfare. This connection introduces into the play the rights of minorities in Articles 29 and 30 of the Constitution. Article 29(1) ensures that minorities have the right to preserve their language, script and culture whereas Article 30(1) grants minorities the right to create and manage educational institutions of their preference.[34]

Inclusion of non-Muslims in Waqf Boards as envisaged by the amendment gives the chances of cultural erosion and foreign domination over such institutions that form the cultural and educational fabric of the Muslim population. The Supreme Court in *Re Kerala Education Bill (1957)*[35] ruled that the state regulation cannot ruin the fundamental nature of a minority institution. Equally, in *T.M.A. Pai Foundation v. The Court (State of Karnataka 2002)*[36] reiterated this argument once again by stating that minority autonomy in running their institutions is a constitutional right. The amendment could be violating these safeguarded rights by

32 Ibid.
33 S. Dibagh Kishwar, 'State Control and Digital Dispossession: A Critique of the UMEED Rules, 2025' (2025) 12(2) *Journal of Constitutional Law and Governance* 89.
34 *Constitution of India*, arts. 29(1) and 30(1).
35 *re The Kerala Education Act*, AIR 1959 SC 995.
36 *T.M.A. Pai Foundation v. State of Karnataka*, AIR 2002 SC 3551.

centralising control and transferring the control to players outside the community in the administration of waqf.

The user abolition of waqf is another important element because it will eliminate legal status of religious endowments which have been established by the use and tradition. These endowments are part and parcel of the culture and religion practiced by many Muslim communities. By invalidating this doctrine, some cultural practices might have been invalidated and the right to conserve culture at Articles 29(1) invalidated, which has more side effects than upholding the right to conserve culture.[37]

More Far-Reaching Constitutional Consequences.

Looked compositive, the stipulations of the Waqf (Amendment) Act, 2025, create constitutional issues that go far too far beyond the management of religious endowments. The elevation of the central government and the erosion of community-based autonomy and limitation of judicial inspection get into the fundamental structural values of the Constitution which include federalism, judicial review, and safeguarding of minority rights.[38]

Although the government has justified the amendment as a move to guarantee accountability, guard against encroachment of waqf lands and enhance the standard of good governance, these purposes should be fair in resting on the constitutional principles of autonomy and pluralism. Religious endowments like waqf enjoy a special constitutional position where the administration regulation meets basic rights. Any faecal intervention in this field needs then be highly limited to accomplish justifiable regulatory goals without violating the rights of religious groups as well as upsetting the federal system.[39]

37 The Infinite, 'The Waqf Amendment Act, 2025: A Critical Analysis of Legal Reforms, Property Rights, and Administrative Accountability in India', *The Infinite* (2025) https://www.theinfinitejournal.com/waqf-amendment-2025 (visited 20 September 2025).

38 Tasleem Rasool, *Waqf—The Muslim Endowments in India: Ideological and Legal Intricacies* (2024) 30(4) *Trusts & Trustees* 289.

39 Vibhuti Kumari, 'WAQF (Amendment) Act, 2025: A Constitutional Analysis of Religious Freedom and Minority Rights' (2025) *International Journal of Innovative Research and Insight Law (IJIRL)*.

The case, which awaits to be heard by the Supreme Court, is likely to be determined as to whether the given provisions are an acceptable form of regulation or an unconstitutional overreach. Not only will the ultimate ruling of the Court determine the way the waqf property is governed but also can establish crucial precedents regarding the extent to which the state may interfere with the religious endowments, the boundaries of legislative power on the national level, and minority rights in a secular constitutional system.[40]

- **Principal Areas Affected**

Waqf (Amendment) Act, 2025 is not just an administrative reform it is a structural change in the regulation of Muslim religious endowments in India. Its provisions have an impact on the internal organizational processes of waqf institutions, access to justice within the community, cultural identity within waqf practices, and socio-economic well-being of its beneficiaries. The section looks at the four major areas of influence that occurred because of the amendment.[41]

Reduced Freedom of Choice of Religious Organization.

One of the most disputed issues was the possibility of non-Muslim members to be included as part of Central and State Waqf Boards. The administration of waqf institutions in the past has been carried out by people who belong to the Muslim faith and especially ulema and mutawallis (custodians) and the other members of the community who interpret and use the Sharia based principles to control the way waqf properties are run[42]. This is changed in the amendment through the need to have non-Muslim representation on boards of waqf thus bringing in outside voices into the decision-making process.

This addition poses the constitutional inquiry of denominational autonomy in Articles 26(b) which forms the right of all religious denominations to carry out their own affairs in all affairs that pertain to

40 "Experts Raise Alarm over Centralization in Waqf Amendment Act", *Indian Express*, February 2025.

41 Sravasti Dasgupta, "Bill to Amend Waqf Act Proposes Stripping Power from Boards to Decide if Properties are Waqf", *The Wire*, Aug. 08, 2024

42 Ismat Ara, "Why the Proposed Amendments to the Law Governing Waqf Properties Have Triggered a Fierce Debate", *The Hindu*, Aug. 18, 2024

religion. The administration is a secular institution, but it is largely connected with religious ideas and traditions[43]. The involvement of non-Muslims can also cause a conflict in the interpretation of Shariah principles, which will destabilize the potential of the community to regulate its endowments using its faith.[44]

Examples: According to the current system, the religious and communal organizations represent in the decision-making process the creation, management, or transfer of waqf property. Since non-Muslim members are now included in these boards, may arise among what is considered as legitimate religious use may lead to decisions which are not no longer in accordance with the religious intentions of the donor (*niyyah*). This is a physical encroachment of the internal religious leadership of the community and that has great constitutional problems as to whether denominational rights should be safeguarded.

Demise of Judicial Check and Balance and openness to Justice.

The second influential effect deals with the compromising of judicial control by expanding the powers of the Waqf Tribunal and limiting the area of the civil courts. The amendment places the adjudicatory power of cases involving waqf exclusively to tribunals and executive authorities thereby restricting the grandeur of judicial review by the ordinary civil courts[45].

The separation of power of the judiciary is the fundamental aspect of the constitutional plan and has been held as being in the fundamental fabric of the Constitution *in S.P. Gupta v. Union of India (1981[46])*. Moreover, *L. Chandra Kumar v. Union of India (1997)[47]*, the Supreme Court ruled that the judicial review in Articles 226 and 32 cannot be dismissed or limited. Limiting access to civil courts in waqf cases-

43 *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.
44 Vijaita Singh and Ishita Mishra, "Waqf Amendment Bill Introduces District Collector as an Arbiter to Decide Whether a property is a Waqf or Government Land", *The Hindu*, Aug. 08, 2024.
45 *Mahesh Kumar vs. Haryana Waqf Board,* 2013 (4) ALJ 398: 2013 (97) ALR 855.
46 AIR 1982 SC 149
47 AIR 1997 SC 1125.

particularly those concerned with encroachment or unlawful alienation of property - can cause procedural and substantive obstacles to those who may so be affected.

For example, once a waqf property is improperly sold or encroached, an offended mutawalli or beneficiary would lose the opportunity to raise a civil suit in a local court. Instead, they would be pushed to go to a Waqf Tribunal that might not have the independence and procedural protection of ordinary courts. This particularly becomes difficult in rural or economically disadvantaged places where there is a low level of legal awareness and where civil courts have always been the main arenas of establishing property rights claims. Such limitation of the judicial forums therefore causes both the basic structure doctrine and the right of the community to effective judicial redress.

The Waqf by the User Doctrine and Cultural Displacement

Another far-fetched issue of the amendment is the abolishment of the waqf by use doctrine. This doctrine considers the properties that were continuously and exclusively used for religious purposes that include mosques, graveyards (*qabristans*), or dargahs as waqf, even though they might never have been formally registered. The abolishment of this doctrine erodes are centuries old natural principle in the law which is deeply entrenched in the Islamic jurisprudence[48].

By abolishing this safeguard, the undocumented yet historically important waqf properties will be left exposed to legal irrelevance. Unregistered such properties can be disputed[49], purchased, or taken over by the private or state actors, especially those located in commercial or urban-welcoming lands.

Exemplary Case: In most villages and towns of the countryside, there has always been a mosque or a cemetery, but this is not documented. These properties could be deprived of the security of waqf under the new structure and thus legally reclaimed or reused. This is not only disruptive

48 Dushyant Kishan Kaul, "The 'Essential Practices' Doctrine: Examining the Constitutional Impact of Inordinate Judicial Intervention on Religious Freedoms" 29 *International Journal on Minority and Group* 350 (2022).

49 *Ibid.*

to religious practice but also eliminates history and culture continuity, which violates the right of the community before and above all to preserve its culture in Article 29(1) of the Constitution. The described change is a cultural displacement, and not only a legal one since it has long-lasting repercussions on the local Muslim groups.

Lesser Community participation and Socio-Economic implications.

The fourth area of impact is that the participation of the community in the management of the waqf assets has been reduced and has resulted in the socio-economic impacts on beneficiaries. Historically, the administration of waqf has been a community-based practice, where the local mutawallis and the local organisations administer the assets according to the purpose donated by the donor (niyyah)[50].

The amendment however, places administrative powers under the state and central government thus giving less power to the community in decision making.

There are two significant implications in this centralization. First, it dilutes the pandemic accountability and leads to a possibility to make decisions that are not in harmony with religious and community requirements. Second, it also influences the allocation of waqf income, which since ancient times has been channelled into education, healthcare, housing and welfare programmes of the lost quarters of Muslim population[51].

Exemplary Case: An endowment of waqf has been established locally to finance madrassa education, but now it can be channelled to meet state-directed developmental efforts, without proper consultation with the community. This contributes to the purpose of donation and interferes with the conventional dynamic between waqf institution and beneficiaries. That being the case, since, as pointed out in Sachar Committee Report (2006) Muslim community is already one of the most

50 Quraishi Ahmad Muhammad, *Waqfs in India: A Study of Administrative and Legislative Control* (Gian Public House, Delhi, 1990).

51 The Law Commission of India, *Report No. 287: Reforms in the Administration of Waqf Properties* (2024).

undermined socio-economically disadvantaged with respect to India, the diversion or misuse of the waqf revenue would further enable poverty, school dropout rates, and accessibility of healthcare to decrease[52].

● **Interim Judicial Response and Other Constitutional Unresolved Issues.**

Some of the constitutional strains noted in the previous sections, especially that of a lack of religious autonomy, the lack of judicial remediation, the loss of traditional doctrines of waqf, and the exclusion of communal representation has already come to the Hon'ble Supreme Court of India in form of various petitions contesting the Waqf (Amendment) Act, 2025. On 15 September 2025, the Court issued an interim order that focused on several aspects of the Act but specifically left the resolution of the underlying constitutional issues to the ultimate hearing on the merits indicating the scale of the constitutional issues at stake[53].

Scope of the Interim Order

The Supreme Court Bench led by Chief Justice B.R. Gavai and Justice A.G. Masih tabled restricted questions that it wanted interim consideration. These were:

(i) the validity of the five-year practice of Islam condition to the establishment of a waqf

(ii) the non-Muslim membership of Central and State Waqf Boards

(iii) the overrule of the doctrine of waqf by user.[54]

The Court left the other important questions, especially the executive control over the determination of waqf property and the federalism question, to a separate hearing.

Criticism of Judicial Reasoning.

The court of First Instance has received a great deal of academic and professional critique on an interim judgment as inclusive of only some of the provisions where the Court does not attempt to answer the

52 The Prime Minister's High-Level Committee, *Social, Economic and Educational Status of the Muslim Community of India* (Cabinet Secretariat, Government of India, November 2006) 45.

53 Nizamuddin Ahmad Siddiqui, 'The Waqf Interim Judgement is a Smokescreen: A (Detailed) Critique', *The Leaflet* (19 September 2025).

54 *Ibid.*

fundamental structural questions. The factual assumptions that were not proven include, it has been argued, untested assumptions that were accepted as a matter of fact by the Court, including how many non-Muslim members the board ought to have, rather than whether the inclusion of such members in the board on a case -by-case basis would be in violation of Article 26(b), so that although the constitutional intervention in denominational affairs was being contemplated, the main constitutional query on the matter remained unanswered.[55] And the interpretive approach taken by the Court, especially the number of non-Muslim judges on the board, failed

Unanswered Constitutional Problems.

Although there will be a partial interim relief, there are other important questions still awaiting a verdict before the Supreme Court:

Replacement of waqf boards by executive: Non-existence of Section 40 of the Waqf Act, 1995 and authority of District Collectors to decide the property status of waqf creates a problem of separation of power, federalism, and denominational autonomy[56].

Replacement of Muslim law with statutory law: The fact that Article 3(r) and other clauses have been amended to comply with the religious definition of waqf with statutory words implies that Article 26 on the freedom to practice religion is also in question[57].

Stronger Union regulation: The Act concentrates the administration of waqf in a region conventionally also in the State List (Entries 18 and 28), interviews the federal structure and the basic structure doctrine[58].

Abolition of waqf by user: Abrogation of the doctrine undermines such cultural protection of undocumented mosques, dargahs and graveyards thus casting doubt over Article 29(1)[59].

55 *Ibid.*
56 NDTV, 'Interim Order, Court Observations: What You Should Know About Waqf Order' (15 September 2025).
57 Supreme Court Observer, *Interim Plea Judgement Summary* (September 2025).
58 *Ibid*.
59 YouTube, *Legal commentary & press briefing on interim order* (September 2025).

Deletion of Section 104: Allowing the non-Muslims to give away property to waqf in the past allowed the involvement of Articles 14 and 15 on equality and non-discrimination.

All these matters pierce the constitutional structure of the relationship between state control and religious liberty.

Future Consequences of the Still Active Litigation.

This is why the case is not dismissed, as the scope of unaddressed matters is rather broad, and the interim order was framed very narrowly. The Court will have to decide the ultimate issue on whether it is the Waqf (Amendment) Act, 2025:

i. is allowed regulation within Article 26, 29 and 30,
ii. pulvinate the federal circuit dividend of powers, or
iii. weakens the foundations of the Constitution, as it incurs into the judicial review and the rights of minorities[60].

Such balancing out act in the constitution between the regulatory supervision and the protection of denominational autonomy needs close judgment on the part of the doctrine. The temporary injunction is only a deferral of this judgement.

- **Policy and Comparative Perspectives.**

Constitutional and administrative issues that the Waqf (Amendment) Act, 2025 has brought are not concerned with India solely. States have been forced to juggle the state control with the local control throughout the governance of religious endowments across the globe. Comparative models have a good idea of how transparency, accountability, and religious freedom can be organized according to a legal system. He or she can study the strategies followed in Malaysia, Turkey, and the United Kingdom as informative policy lessons to India[61].

60 *Ibid*.

61 A. Al-Khateeb and Y. J. Amuda, 'Application of Legal Principles of Islamic Objectives on the Regulation and Management of Islamic Endowment (Waqf): Drawing Lessons from Different Contexts' (2024) 18(2) *Journal of Islamic Law and Governance* 145.

Malaysia: Centralized and Government with a Religious Council.

Malaysia uses a centralised and religiously based system of administering the Islamic endowments (waqf). Through the Federal Constitution, the Islamic matters rest on the state level and every state establishes its state Islamic religious council (SIRC) and they are appointed as the sole trustee of all waqf property.[62]

The SIRC model incorporates both societal legitimacy and state control, so that the endowments are processed in Sharia's terms, in addition to being brought to bear on them through the law. It is worth noting that Malaysia has achieved a lot in digital mapping, open registries, as well as public reporting of waqf assets[63]. The religious status of the trustee body however is not lost because the non-Muslims are not allowed to take part in decision making that are related to religious endowments.[64]

The model explains that the transparency mechanisms are applicable without watering down the religious autonomy if the structure of regulation inherits the denominational character and works through the institutions that are trusted by the community[65].

Turkey: The State Control via the Directorate of Religious Foundations.

Turkey is a very statist country with its Directorate General of Foundations (Vakiflar Genel Mudurlu) that controls and regulates all religious endowments[66]. Even though the confrontation of the administrative control is under the administration of Directorate,

62 Contemporary Waqf Reporting Practices and Governance in Malaysia: 'A Systematic Literature Review' (2023) 5(2) *International Journal of Advanced Research in Economics and Finance* 180.

63 Aznan Hasan, *Good Governance of Waqf Institutions: A Case Study of Malaysia* (International Islamic University Malaysia Press 2023).

64 A. S. Rakhmat and I. S. Beik, 'Pengelolaan Zakat dan Wakaf di Malaysia dan Turki: Studi Komparatif' (2022) 6(1) *Al-Iltizam* 45.

65 Malaysian Department of Awqaf, Zakat and Hajj (JAWHAR), *Guidelines on the Governance of Waqf Institutions* (2022).

66 Turkish Directorate General of Foundations, *Annual Report 2022* (Vakıflar Genel Müdürlüğü 2023).

registration of properties, auditing of property management and regulatory control under the state are comprehensive[67].

Despite producing tremendous administrative efficiency and limited encroachment, this model has also received a share of criticisms on the grounds of limiting the participation of religious communities and even taking away the institutional autonomy[68]. Effectively, the discretion of waqf boards and religious foundations is restricted and discretion by state is dominant over decision making of leasing, development and use of properties.[69]

This instance shows that overextended state dominance can be dangerous especially in the societies having plural religious groups. It demonstrates that transparency led by the state can be implemented, although at more than a community cost, which is also a conflict here in the Indian case[70].

United Kingdom: Charity and Religious Endowments.

In the United Kingdom there is a secular regulatory regime by which the charitable trust regime regulates the religious endowments. The religious organisations are like other charities that are tried as a benefit of the populace and are governed by the Charity Commission[71]. Religious charities have their trustees who deal with compliance with the trust law, fiduciary liability and reporting requirements but this does not mean that the state will meddle with the religious doctrine or the internal administration issues.

This model is based on a rigid legal accountability system i.e. compulsory audit and reporting and registration but does not restrict

67 Murat Çizakça, *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present* (Boğaziçi University Press 2000).

68 Miriam Hoexter, *Endowments, Rulers and Community: Waqf al-Haramayn in Ottoman Algiers* (Brill 1998).

69 Timur Kuran, 'The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System' (2001) 35(4) *Law & Society Review* 841.

70 Mohammed Obaidullah and Tariqullah Khan, *Financing SDGs through Islamic Social Finance: The Role of Awqaf* (Islamic Research and Training Institute 2020).

71 Amy Singer, *Charity in Islamic Societies* (Cambridge University Press 2008).

religious groups in any way to make internal decisions on religious and doctrinal issues[72].

In the case of India, according to this model, statutory transparency can be achieved without jeopardizing the autonomy of the religious, by providing rules of neutrality and integrity, in place of direct executive power[73].

Transparency and Autonomy Policy tension.

The three models are indicative of a basic policy conflict between on the one side the need to maintain transparency and to prevent mismanagement and on the other side respecting the autonomy of religious communities.

i. The model of Malaysia shows a religious-community-based government that is transparent through the statutes.

ii. Turkey is a symbol of state-controlling power with minimal community involvement.

iii. UK demonstrates that in a secular regulatory approach, legal responsibility can co-exist with freedom[74].

The constitutional system of India, especially Articles 26, 29, and 30, is more in the UK and Malaysian tradition, proposing to defend denominational freedom but allowing warranted state intervention in secular affairs. Such an overtly statistical strategy as that used by Turkey would be constitutionally threatened in India with a safety granted to the concerns of the minorities and religious freedom.[75]

Relevance for India

The plural experience implies the following policy lessons to the Indian setting:

72 Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge University Press 1985).

73 *Ibid.*

74 Siraj Sait and Hilary Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (Zed Books 2006).

75 Monica M. Gaudiosi, 'The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College' (1988) 136(4) *University of Pennsylvania Law Review* 1231.

i. Transparency will not need to be compromised to have community-led governance as robust disclosure, registration and audit obligations can be established.

ii. Too much executive control may lead to abuse of constitutional provisions of denominational autonomy.

iii. A superior balance might be found through the neutrality of regulatory institutions or independent statutory commissions which have direct control over waqf property[76].

iv. The use of digital tools in management, the case with Malaysia, does not have to render the community irrelevant.

The regulatory model should always be accommodative to the rights of the minority as stipulated in the Constitution of India, Articles 26, 29, and 30.

- **Recommendations**

Though the Waqf (Amendment), 2025, was presented as a step toward transparency and accountability, its current form can potentially result in disastrous consequences on the constitutional and community levels in general. Based on the constitutional provisions observed in the sections 3-6 specifically on religious autonomy, federalism and minority protection it is proposed as follows to ensure any legislative revision could be constitutional, community responsive and efficient in administration[77].

The Statutory Waqf Development and Oversight Council (WDOC) will be established to implement fortuitous proper development and Oversight of waqf[78].

There must be a statutory body constituted of a committed community, having legal autonomy and supervisory powers, which:

- have transparent governance,

76 Azman Haji Mohd Noor and Mohamed Saladin Abdul Rasool, 'Digitalisation of Waqf Management: A Systematic Literature Review' (2022) 12(6) *International Journal of Academic Research in Business and Social Sciences* 1444.

77 Tauseef Ahmad, 'Waqf Amendment Act 2025 and its Impact on Muslim Endowments in India' (2025) 8(2) *International Journal of Law, Management & Humanities*.

78 *Ibid.*

- to carry out periodic independent audit,
- observes welfare-oriented use of waqf income and
- protect local values and religious cultures[79].

This body is to be constitutional responsive to Articles 26, 29, and 30 of the Constitution and designed not to assume the role of replacement of the powers of the State Waqf Boards.

Maintaining the Pre-eminences of the Muslim Representation in the Religious Agencies.

To maintain denominational independence under the Article 26(b), Muslim representation is to be kept central in the governing of the waqf. There should be a ban on the participation in voting in the position of non-Muslim members given they are appointed as advisors or technical. The Muslim members should have the last word on the issue of religious property usage, management, and customary issues to ensure the deterioration of denominational identity.[80]

Recognition of Procedural Safeguarded Waqf by User.

Preservation of the waqf by user doctrine should be done in the statute, with stringent protection. The traditional usage of religious sites by the community should be accepted with reference to affidavits, documentary evidence, oral history, and community testimony. This would be in line with Article 29(1) and would safeguard the informal religious spaces containing crucial cultural and religious locations.[81]

Digital transparency mechanisms and public consultation mechanisms: This area highlights the importance of ensuring digital transparency and conducting public consultations, as the government must strive to guarantee that e-government boards address the needs of the community.

79 The Law Commission of India, *Report No. 287: Reforms in the Administration of Waqf Properties* (2024).

80 United Nations Development Programme (UNDP), *Capacity Development for Sustainable Development* (UNDP 2022).

81 Monzer Kahf, 'The Role of Waqf in Improving the Ummah Welfare' (Paper presented at the International Seminar on Waqf as a Private Legal Body, Amman, Jordan, 2003).

Public Consultation and Digital Transparency Mechanisms

The significance of the mechanism of digital transparency and public consultation: This section explains the necessity of ensuring digital transparency and organizing the consultation of the population, as the government must do its best to ensure that boards of e-government can meet the needs of the community.[82]

To enhance accountability:

- It is required that a transfer, lease or redevelopment of waqf property need to be consulted publicly.
- Records of waqf and financial statements as well as all decisions by the board should be presented on a centralised and publicly reached digital portal[83].

Periodic audits done by an independent media must be published to increase the level of trust or confidence on the part of the people or community.

Dedicated Waqf Welfare Fund

The allocation to be done is a fixed percentage of net annual waqf revenue to:

- Education,
- Healthcare,
- Scholarships, and
- Homelessness support to socio-economically disadvantaged parts of the Muslim community.[84]
  - This would make waqf institutions regain their original sense of charity and community-development.

Conclusion

The Waqf (Amendment) Act, 2025 is an important turning point in the constitutional history of India as far as the control over the religious

82 Azman Haji Mohd Noor and Mohamed Saladin Abdul Rasool, 'Digitalisation of Waqf Management: A Systematic Literature Review' (2022) 12(6) *International Journal of Academic Research in Business and Social Sciences* 1444.

83 *Ibid.*

84 M. Abdullah, 'Waqf, Sustainable Development Goals (SDGs) and Maqasid al-Shariah' (2020) 47(8) *International Journal of Social Economics* 1013.

endowments is concerned. Although its stated aims of transparency, accountability, and efficiency in its management are valid, the methods used in its present incarnation cast deep constitutional challenges. The changes proposed including that of the composition of the Waqf Boards, restriction of the jurisdiction of the civil court, an end to the old doctrines such as that of waqf by user, among others are not merely administrative measures. They attack the principle of denominational autonomy in Articles 26(b) and minority cultural rights in Articles 29 and 30, federal legislative competence, and judicial review, which is one of the fundamental pillars of the basic structure.

A more balanced way- the one that involves digital transparency, a community-based way of governance, and judicial protection can achieve the intent of the legislature without abusing constitutional principles. The example of transparency and autonomy in Malaysia, Turkey, and UK demonstrated the comparative models in which both features can be implemented in case they are organized well.

The case presented to the Supreme Court is thus not just about statutory interpretation and retaining the constitutional design of secularism, federalism, minority and judicial review. Regardless of the case, this BP will probably become a landmark in determining how much the state authority is allowed to interfere with religious endowments in India.

Finally, the reform of the law in that regard should be constitutionally based, community-oriented, and administrational realistic. It is only under such circumstances that waqf institutions will still be used to their purposes of continuity in their spiritual and their community welfare as well as their social justice in the context of the plural constitutional democracy of India.

Environmental Jurisprudence and the Legality of Ex-post Facto Clearances: A Sustainability Assessment

Neethu M S*

Dr. S T Naidu**

Vishnu CH****

Abstract

"Ex-post facto environmental clearances" represent a significant challenge within the realm of environmental law. This paper examines the legality and sustainability of such clearances, emphasizing the potential conflicts between economic development and environmental protection. Ex-post facto clearances are often justified as necessary for rapid development; however, they undermine foundational principles of environmental assessment and regulatory compliance. This study begins by defining ex-post facto clearances, detailing their legal frameworks, and exploring the rationale behind their use. A critical analysis of relevant case law reveals the tensions between judicial interpretations and legislative intent. The environmental implications of these practices are substantial, leading to increased degradation of ecosystems, adverse public health outcomes, and negative socio-economic impacts on vulnerable communities. The paper further investigates the challenges of balancing development and conservation, emphasizing the importance of stakeholder engagement and sustainable practices. Recommendations for legal reform are proposed, advocating for stricter regulatory measures, enhanced transparency, and the integration of sustainability principles into project planning. By fostering a more robust legal framework, it is possible to promote environmental integrity while accommodating necessary economic growth. Ultimately, this paper argues for a re-evaluation of ex-post facto clearances with respect to sustainable

* Research Scholar, School of Law Vel Tech Rangarajan Dr. Sagunthala R&D Institute of Science and Technology, Avadi

** Associate Professor of Law, School of Law, Vel Tech Rangarajan Dr. Sagunthala R&D Institute of Science and Technology, Avadi

*** Research Scholar, Government Law College Trivandrum, University of Kerala

development, calling for a legal paradigm that prioritizes ecological health alongside economic aspirations.

Keywords: *Ex-post Environmental clearances, Environmental Law, Sustainable Development, Regulatory Compliance, Ecosystem Degradation.*

1. Introduction

Environmental clearances (ECs) are legal permissions that industries, infrastructure projects, and other significant ventures must obtain before starting any project that has an impact on the environment. These clearances ensure that projects are aligned with environmental policies and do not lead to significant degradation. However, a legal grey area has emerged in the form of "*ex-post facto* environmental clearances." These are clearances granted retrospectively to projects that have already started or even completed their activities without obtaining the necessary ECs.[1]

The concept of "ex-post facto environmental clearance" raises several questions about its legality and sustainability. How can a project that potentially violates environmental norms be legalized after the fact? Does this undermine the entire purpose of environmental laws? Moreover, how does it affect sustainability efforts, considering the environmental damage that may have already occurred before the clearance was granted?

This paper aims to assess the legality and sustainability of ex-post facto environmental clearances within environmental law, focusing on legal precedents, sustainability impacts, and potential reforms to the existing framework.

1.1 Understanding Environmental Clearances

The purpose of environmental clearances is to ensure a harmonious coexistence of economic growth and environmental conservation within the bounds of the law. Globally, environmental clearances are regulated by national and international laws, protocols, and guidelines, such as "the Rio Declaration on Environment and Development and the Paris Agreement." In many countries, clearances are mandatory for projects that

1 S Ghosh, "Demystifying the environmental clearance process in India", 6 NUJSLR 433.

may have a significant impact on ecosystems, air quality, and water resources.

In India, the legal foundation for environmental clearances is found in "*Environment (Protection) Act, 1986"*, along with subsequent rules and guidelines issued by "the Ministry of Environment, Forest, and Climate Change (MoEFCC)."[2] Projects requiring ECs include mining operations, industrial plants, and infrastructure projects like highways, ports, and airports. The "Environmental Impact Assessment" (EIA) process forms the core of obtaining such clearances, involving public consultations, expert assessments, and detailed project reports on how the development would affect local ecosystems, biodiversity, and communities.[3]

However, the rising trend of ex-post facto clearances brings significant legal ambiguity to this process. Projects that should have undergone stringent scrutiny before initiation are granted permissions retrospectively, potentially bypassing the rigorous EIA process.[4]

1.2 Ex-post Facto Environmental Clearances: Definitions and Context

"Ex-post facto environmental clearance" means the granting of environmental permission to a project that has already commenced or even completed without prior approval. This practice has been used in various countries, often justified by governments on the grounds of economic necessity or the need to regularize ongoing projects that, if halted, could cause job losses or disruptions in essential services.

In India, this issue became prominent with the 2020 Supreme Court ruling in *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors*[5]., where the Court held that "ex-post facto clearances" were contrary to environmental law, yet instances of such clearances continue to emerge. Similar issues have been raised in other countries, notably in developing economies, where environmental regulations may not be as rigorously

2 S Singh, "Environmental and Social Safeguards in India-A Critical Assessment" EVALUATION 2030 FOR, 219.
3 AK Rathour, "Environment impact assessment (EIA) studies for developmental activities in India in context with EIA 2020", 9(1) Oct.JER 21-45.
4 Ibid.
5 AIRONLINE 2020 SC 445.

enforced, and economic imperatives often lead to leniency toward non-compliant projects.

The practice raises several ethical, legal, and environmental concerns. Legally, it undermines the preventive nature of environmental law, which is designed to assess and mitigate damage before it occurs. From an environmental standpoint, it may sanction irreversible ecological harm, as any remedial action is often insufficient to fully reverse the impact.

1.3 Legality of Ex-post Facto Environmental Clearances

Ex-post facto clearances occupy a contentious legal space, as they retroactively approve projects that should have undergone prior environmental scrutiny. National and international laws vary, with some outright condemning the practice and others allowing it under limited circumstances.

2. Legal Frameworks Across Jurisdictions

2.1 India

- The "*Environment (Protection) Act of 1986"* and "the *Environmental Impact Assessment (EIA) Notification of 2006*" require prior environmental clearance. Ex-post facto clearances challenge this preventive approach. Preventive approach.[6]
- The landmark case, Alembic Pharmaceuticals Ltd. v. Rohit Prajapati[7]The Supreme Court held that retroactive clearances undermine the purpose of environmental laws and cannot justify economic expediency over environmental protection.
- Despite the ruling, large industries in mining, real estate, and infrastructure continue to seek ex-post facto clearances to avoid economic disruption.

2.2. United States

- under the National Environmental Policy Act (NEPA) of 1969 , Environmental Impact Statements (EISs) are mandatory for projects significantly affecting the environment. Retroactive clearances are generally not recognized.

6 S Jolly and S Singh, "Environmental impact assessment draft notification 2020, India: A critique", 5(1) CJEL 11-36.

7 Supra note 5.

- The Friends of the Earth, Inc. v. Laidlaw Environmental Services (2000)[8] Courts imposed penalties for non-compliance rather than allowing ex-post facto approvals, reinforcing preventive compliance.

2.3. European Union

- The Environmental Impact Assessment Directive mandates assessments before project approval.
- Commission v. Ireland[9]. In this case, the ECJ held that Ireland had violated EU law by allowing certain projects to proceed without an EIA.
- Ex-post facto clearances in the EU are extremely limited and allowed with rare exceptions granted only under extraordinary circumstances.[10]

2.4. Latin America

- Countries like Brazil and Argentina often grant retroactive approvals due to economic pressures in mining, agriculture, and hydroelectric projects.
- Case Study : Belo Monte Dam, Brazil: Ex-post facto clearance was granted despite opposition from environmental groups and indigenous communities, justified by national energy needs. Critics argue it sets a risky precedent for environmental governance.[11]

3. Judicial Precedents and Legal Challenges

The legality of "ex-post facto environmental clearances" has been challenged in several jurisdictions, leading to judicial precedents that shape the interpretation of environmental laws.

3.1 India: Alembic Pharmaceuticals Ltd. v. Rohit Prajapati[12]

- The Supreme Court ruled that post-facto environmental clearances violated the "principle of sustainable development." The Court emphasized that the environment is held in public trust, and any

8 528 U.S. 167 (2000).
9 (1982) Case 249/81.
10 J Krommendijk and K Van der Pas, "To intervene or not to intervene: intervention before the court of justice of the European Union in environmental and migration law" 26 IJHR 1394-1417.
11 Sara Diamond and Christian Poirier, "Brazil's Native Peoples and the Belo Monte Dam: A Case Study", Nacla (September 2, 2010) https://nacla.org /article/brazil %E2%80%99s- native- eoples- and-belo-monte-dam-case-study (08 October, 2024)
12 Supra 5.

derogation from established procedures can result in irreversible environmental damage.

- The Court stated: "If industries are allowed to carry on operations without complying with the requisite regulatory mechanism, it would lead to irreparable damage to the environment."
- The judgment laid down that any project that commences without environmental clearance should face immediate cessation and penalty, indicating the illegality of ex-post facto clearances in Indian environmental law.

3.2 United States: Sierra Club v. Morton (1972)[13]

- This case emphasized the role of public participation in environmental decision-making, a principle undermined by ex-post facto clearances. While the case did not directly address retroactive approvals, it highlighted the necessity of environmental assessments to prevent harm.
- Courts in the U.S. have consistently ruled that retroactive approvals of projects do not satisfy NEPA requirements, reflecting the country's preventive stance on environmental governance.

3.3 European Union: Commission v. Ireland[14]

This case established that EU Member States cannot permit projects without first conducting an EIA. The European Court of Justice ruled that retroactive approvals violated EU environmental directives, affirming the illegality of ex-post facto clearances within the European legal system.

4. Arguments For and Against Ex-post Facto Clearances

4.1 Arguments For Legalizing Ex-post Facto Clearances:

- Economic Imperatives: Halting large projects can cause job losses, financial instability, and delays in infrastructure. Retroactive approvals regularize ongoing projects without economic disruption.
- Administrative Bottlenecks: In countries with slow clearance processes, projects may start without approval. Ex-post facto clearances offer a practical solution to bureaucratic delays.
- Legalizing Non-compliant Projects: Rather than penalizing non-compliant projects, retroactive clearances allow regulation to ensure environmental standards are met.

13 405 U.S. 727 (1972).
14 C-215/06.

4.2 Arguments Against Ex-post Facto Clearances:[15]

- Erosion of Environmental Law: Retroactive approvals undermine the preventive purpose of environmental law and allow potentially irreversible damage.
- Lack of Accountability: Such clearances reduce developer accountability and create a loophole incentivizing regulatory bypass.
- Violation of the Precautionary Principle: Environmental law requires preventive action; ex-post facto clearances permit harmful activities to continue unchecked until after damage occurs.

5. Environmental Impact Assessment (EIA) and Ex post facto Environment Clearance (EC)

- Environmental issues are a global, national, and local concern. While natural resources have improved living standards, human activities such as deforestation, industrial effluents, resource mismanagement, overgrazing, and urbanisation have caused ecological imbalance and widespread pollution, threatening biological, chemical, physical, psychological, and social well-being.
- Environmental Impact Assessment (EIA) ensures that development and environmental protection progress together by evaluating a project's positive and negative impacts. It helps planners design sustainable projects and provides decision-makers with information to minimise environmental harm.
- Environmental Clearance (EC) is the regulatory approval process for projects likely to affect the environment, with authorities accepting or rejecting proposals based on EIA compliance.
- Instances of non-compliance highlight major flaws. The IIT Madras expansion (2013) felled over 8,000 trees without prior clearance, later receiving post-facto approval. The Char Dham Highway Project was split into 53 segments to bypass EIA procedures, causing significant environmental damage. The Koodankulam Nuclear Power Plant also began construction without mandatory Coastal Regulation Zone clearances.

15 SN Upadhyay and M Singh, "Environmental clearance and sustainable development: changing paradigm of environmental constitutionalism in India", JMR 8-18 (2024).

- In 2020, the Supreme Court rejected MoEFCC's allowance of ex-post facto clearances, affirming that such approvals violate core environmental law principles and cannot legitimize retroactive regularisation of environmental harm.

6. Sustainability of Ex-post Facto Clearances: Environmental, Economic, and Social Aspects

The sustainability of ex-post facto clearances is crucial to determining whether they can be justified within the broader goals of environmental governance. Sustainability encompasses three key pillars: environmental, economic, and social aspects, all of which are interrelated when evaluating the impacts of post-facto approvals.[16]

6.1 Environmental Sustainability

Environmental sustainability means maintaining ecosystem productivity and balance over time. Ex-post facto clearances often conflict with these goals by legitimizing activities that have already caused harm, leaving little room for mitigation.

- **Irreversible Damage:** Once deforestation, biodiversity loss, or water pollution occur, restoration is often costly, slow, and sometimes impossible. Industrial clearances leading to forest destruction also worsen climate change.
- **Compensatory Measures:** Governments may impose afforestation or pollution control requirements as compensation, but these rarely offset actual damage. Poor monitoring and enforcement further reduce their effectiveness.
- **Case Study:** Mining in Odisha: Several mining projects in Odisha received retroactive approvals despite deforestation, pollution, and community displacement. Satellite data revealed poor implementation of compensatory afforestation, leaving environmental damage largely unaddressed.

6.2 Economic Sustainability

Economic sustainability supports growth without harming environmental or social systems. While ex-post facto clearances may

16 Ibid.

protect short-term economic interests, they often undermine long-term prosperity.

- **Short-term vs. Long-term Gains:** Such clearances may avert immediate disruptions but cause future losses through soil degradation, water scarcity, and reduced productivity in resource-based sectors.
- **Cost of Environmental Degradation:** Loss of ecosystem services like clean water, fertile soil, and clean air leads to health costs and food insecurity, outweighing short-term gains. Global estimates place the cost of degradation in trillions of dollars.
- **Case Study:** Belo Monte Dam, Brazil: Granted post-facto approval, the dam boosted energy supply but disrupted ecosystems, reduced fish stocks, and hurt tourism. Long-term economic losses now exceed initial benefits.

6.3 Social Sustainability

Social sustainability promotes equity, resource access, and resilience for present and future generations. Ex-post facto clearances often disregard these principles, especially harming marginalized groups.

- **Impact on Indigenous Communities:** Projects near indigenous lands destroy livelihoods, cultural heritage, and access to natural resources, causing severe displacement.
- **Social Inequity:** Vulnerable rural populations suffer pollution, water scarcity, and land loss, while affluent groups reap project benefits.
- **Public Participation and Social Justice:** The EIA framework mandates public consultation, but ex-post facto approvals bypass this process, silencing affected communities.
- **Case Study:** Indigenous Protests in Latin America: In Ecuador and Peru, post-facto mining approvals caused land degradation and displacement. Despite consultation laws, indigenous protests highlight persistent exclusion and inadequate remediation.

7. International Case Studies and Comparative Analysis

To fully grasp the complexity of ex-post facto environmental clearances, it's crucial to examine how different countries approach the issue. This section will analyze case studies from both developed and developing countries, illustrating the diversity in legal, environmental, and socio-economic outcomes. We will also explore the role of

international environmental treaties in influencing national practices regarding ex-post facto clearances.[17]

7.1. Ex-post Facto Clearances in Developing Countries

Developing nations often face unique challenges in balancing economic development with environmental protection. The pressure to boost industrial growth, create jobs, and improve infrastructure frequently results in projects being initiated before environmental clearances are obtained, especially in sectors like mining, agriculture, and energy. This has led to a rise in ex-post facto clearances, which are often justified on the grounds of economic necessity.

7.1.1 India

India offers one of the most prominent examples of the struggle between economic development and environmental governance. Despite a clear legal framework requiring environmental clearances before projects begin, the practice of granting ex-post facto clearances has been common, particularly in sectors such as real estate, mining, and energy.

- **Case Study: Sterlite Copper Plant, Tamil Nadu[18]**

The Sterlite Copper plant in Tamil Nadu, owned by Vedanta Resources, was allowed to operate for several years despite ongoing environmental violations. In 2013, the plant was temporarily shut down following protests over pollution and public health concerns. However, the company applied for ex-post facto environmental clearance, which was granted retrospectively by state authorities. The clearance led to widespread protests, culminating in violent clashes in 2018 when the plant was ordered to be shut permanently after failing to comply with environmental norms. The case highlights the tension between economic interests and public health, as well as the weaknesses in the enforcement of environmental laws.

- **Case Study: Coal Mining in Odisha[19]**

Odisha, a mineral-rich state in India, has witnessed numerous instances

17 L Rengan and A Sreekumar, "Critical appraisal of Environmental impact Assessment; International and National perspective" (2021).

18 Pandi-Perumal, S. R. (2022). "Sterlite Copper: Much Ado About Nothing, all the while Ignoring the Elephant in the Room?. Available at SSRN 4106810."

19 S Banerjee, "Mining and Jurisprudence: Observations for India's mining

where coal mining projects began operations without obtaining prior environmental clearances. In some cases, ex-post facto clearances were granted after the fact, despite the significant environmental impact of deforestation and displacement of indigenous communities. While these projects were economically important, the lack of compliance with environmental standards exacerbated land degradation, pollution, and social conflict, particularly among the Adivasi (tribal) populations.

7.1.2 Brazil

Brazil, home to the Amazon rainforest, struggles to balance economic growth with the protection of one of the world's most vital ecosystems. Despite commitments under international treaties like the Paris Agreement, ex-post facto clearances have been granted for various agriculture and energy projects, raising concerns about environmental accountability.

- **Case Study: Belo Monte Dam[20]**

The Belo Monte Dam, one of the world's largest hydroelectric projects in the Amazon, has been highly controversial due to its severe environmental and social impacts. It caused the displacement of indigenous communities and the destruction of vast rainforest areas. Despite legal challenges, the government issued post-facto clearance to continue the project. Critics argue that the environmental assessment was rushed and inadequate, failing to address irreversible biodiversity loss and insufficient compensation to affected populations.

7.1.3 Nigeria

Nigeria, a major oil-producing nation, faces serious environmental challenges, particularly in the Niger Delta, where oil extraction has resulted in pollution and habitat destruction. Ex-post facto clearances have often been used to regularize oil operations initiated without proper environmental oversight.

- **Case Study: Oil Spills in the Niger Delta[21]**

Oil spills in the Niger Delta have caused extensive damage to water, soil,

sector to improve environmental and social performance" (2020).

20 Supra 11.

21 EN Olowokere, "Oil Exploration in the Niger Delta: A Critique of the Legal Framework for Compensation", 49(4-5) EPL 276-287 (2020).

and local livelihoods. Many companies operated without valid environmental clearance and later received retroactive approvals. The legal system has been criticized for its leniency, imposing minimal penalties on polluters despite long-term harm to ecosystems and public health. Weak regulatory enforcement has left affected communities vulnerable and with limited means to challenge these retrospective approvals.

7.2. Ex-post Facto Clearances in Developed Countries

Developed countries tend to have stricter environmental regulations, and the practice of ex-post facto clearances is generally discouraged. However, in some instances, projects have been retroactively approved, often due to political pressure or administrative oversight.

7.2.1 United States

The U.S. enforces strong environmental laws through the National Environmental Policy Act (NEPA) and the Clean Water Act. Although rare, some projects have received retroactive approvals, often prompting legal disputes.

- **Case Study: Keystone XL Pipeline[22]**

The Keystone XL pipeline, intended to transport crude oil from Canada to the U.S., was approved by the Trump administration without a full Environmental Impact Statement (EIS). This led to lawsuits from environmental groups, who argued that proceeding without complete assessment undermined NEPA. While not a direct ex-post facto clearance, the case shows how political pressure can enable retroactive approval of environmentally harmful projects, even under robust legal systems.

7.2.2 European Union

The European Union upholds strict environmental standards under the Environmental Impact Assessment Directive (Directive 2011/92/EU). Ex-post facto clearances are generally prohibited as they contradict the preventive principle, though some member states have tried to bypass these rules.

22 IF Fergusson, "Canada-US relations. Current Politics and Economics of the United States, Canada and Mexico" (2015).

- **Case Study: Spain's Coastal Development Projects**[23]

In Spain, several coastal projects proceeded without proper clearances, causing serious environmental degradation along the Mediterranean coast. Local authorities later granted ex-post facto approvals despite opposition from environmental groups and the European Commission. The EU intervened, imposing fines and requiring compliance with its environmental directives. This case underscores the conflict between local economic interests and the EU's rigorous environmental standards.

7.3. The Role of International Environmental Bodies and Treaties

International treaties and organizations strongly influence national environmental policies, including restrictions on ex-post facto clearances. These frameworks promote sustainable development, compliance, and preventive environmental governance.

7.3.1 Rio Declaration on Environment and Development (1992)

Adopted at the 1992 Earth Summit, the Rio Declaration stresses sustainability and the precautionary principle. Principle 15 states that a lack of full scientific certainty should not delay measures to prevent environmental harm. Ex-post facto clearances contradict this principle, as they permit activities without prior assessment.

7.3.2 Paris Agreement (2015)

The Paris Agreement under the UNFCCC commits nations to reduce greenhouse gas emissions and limit global warming. While it does not explicitly address ex-post facto clearances, its requirement for pre-approved national environmental strategies implies full compliance from project inception. Granting clearances retroactively for carbon-intensive projects risks breaching these commitments.[24]

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23 "Peco, B., Suárez, F., Oñate, J. J., Malo, J. E., & Aguirre, J. (2017). Spain: first tentative steps towards an agri-environmental programme. In Agri-environmental policy in the European Union (pp. 145-168). Routledge."

24 C Böhringer and TF Rutherford, "US withdrawal from the Paris Agreement: Economic implications of carbon-tariff conflict", 89 HPCA 89, 1-39 (2017).

7.3.3 Convention on Biological Diversity (1992)

The Convention on Biological Diversity (CBD) seeks to protect ecosystems, ensure sustainable use, and promote fair sharing of genetic resources. Ex-post facto approvals for activities like deforestation, mining, or large-scale agriculture threaten biodiversity. The CBD thus requires integrating biodiversity protection into national policies and conducting assessments before project approval.[25]

7.4. Comparative Analysis of Ex-post Facto Clearances: Lessons Learned

When comparing the use of ex-post facto clearances across different regions, several patterns emerge:

1. Developing Countries

Ex-post facto clearances are common in developing nations due to economic pressures, especially in mining, energy, and agriculture. The key lesson is the need to strengthen institutional capacity and regulatory frameworks to ensure environmental clearances are obtained before projects commence.

2. Developed Countries

In developed nations, retroactive clearances are rare because of strong regulations and judicial oversight. Nonetheless, political and economic pressures can occasionally relax standards. The lesson is that even robust systems require vigilance to prevent erosion of environmental protections.

3. International Influence

Treaties like the Paris Agreement and the Rio Declaration guide national policies and discourage retroactive approvals. However, enforcing these agreements domestically, particularly in developing countries, remains a challenge.

8. Policy and Governance Implications

Ex-post facto environmental clearances pose serious challenges to policymakers, undermining environmental governance and creating loopholes that benefit project developers. Addressing these issues requires

25 UN, I. (1992). Convention on biological diversity. Treaty Collection.

both legal and governance reforms aimed at strengthening accountability and transparency.

8.1. Legal Reforms Needed for Regulating Ex-post Facto Clearances

Legal reforms are needed to eliminate gaps that permit retroactive approvals by enforcing strict pre-clearance requirements and clear penalties for violations. clear penalties for non-compliance.[26]

8.1.1 Strengthening Pre-clearance Procedures

Governments should enhance the efficiency and transparency of clearance processes through reduced bureaucratic delays, digitalization, and mandatory public participation. A streamlined system will discourage developers from starting projects without approval.

8.1.2 Penalties for Non-compliance

Stronger sanctions such as higher fines, suspension, or license revocation—should apply to projects that bypass clearance. Laws must clearly state that any project begun without approval faces immediate penalties or shutdown.

8.1.3 Judicial Oversight

The judiciary plays a vital role in enforcing environmental laws and reviewing the legality of ex-post facto clearances. Strengthening judicial capacity and expertise in environmental matters will ensure fair and effective oversight.

8.2 Governance Reforms: Enhancing Institutional Capacity

Weak institutional capacity often allows projects to proceed without clearance. Strengthening environmental authorities is essential for effective monitoring and enforcement.

8.2.1 Capacity Building for Environmental Agencies

Agencies must have adequate staff, funding, and technical training. Improved data systems and inter-agency coordination can enhance environmental governance and regulatory efficiency.

26 "Azanda, I. (2003). From Ex Ante to Ex Post Enforcement of Article 81: Efficiency, Legal Certainty and Community Enlargement. Eur. JL Reform, 5, 173."

8.2.2 Monitoring and Compliance Mechanisms

Investments in technology such as satellite imaging, GIS, and remote sensing—can improve real-time monitoring and help detect violations early, reducing reliance on ex-post facto approvals.

8.3 Role of Civil Society and Public Participation

Active public involvement and strong civil society engagement are key to transparent and accountable environmental governance.

8.3.1 Promoting Public Consultations

Public consultations before project approvals increase transparency and allow affected communities to voice concerns. Strengthened legal provisions for participation can prevent retroactive approvals.

8.3.2 Supporting Legal Challenges

Civil society organisations should be empowered to hold governments and corporations accountable. Legal aid for affected communities can ensure access to justice and support challenges against unlawful ex-post facto clearances.

9. Conclusion

Ex-post facto environmental clearances remain highly controversial for their impact on sustainability, legality, and equity. Though often justified by economic or administrative reasons, their long-term environmental and social costs outweigh short-term gains.

Such clearances weaken preventive environmental law, breach the precautionary principle, and erode public trust. Globally, they have caused degradation, social conflict, and legal disputes, highlighting the urgent need for stronger regulation.

Governments must ensure projects receive prior assessment and approval, supported by legal reform, judicial oversight, and public participation. International frameworks should also guide national policies toward sustainability and justice.

In conclusion, ex-post facto clearances are neither sustainable nor lawful solutions. Future environmental governance must prioritize prevention, transparency, and accountability to protect future generations.

Safeguarding Women In The Medical Profession: Legal And Institutional Perspectives

J.P.RAI[*]

Abstract

Protection of women in the medical profession requires not only the enforcement of laws but also a transformation in attitudes, where dignity, respect, and equality are embedded in every layer of the profession. Legal safeguards alone are not sufficient unless supported by institutional accountability, gender-sensitive work culture, proper grievance redressal mechanism, and widespread awareness among all stakeholders. A collective effort by the legal system, medical institutions, policy-makers, and society at large is essential to ensure that women medical professionals can work in environments that are safe, inclusive, and just.

Keywords: *Protection of women, Workplace, Medical Profession, Sexual Harassment.*

I. Introduction

A powerful way to grasp the essence of any civilization and to truly appreciate its achievements while confronting its failings, is to examine the role and status of its women.[1] Despite constituting half of the world's population, women continue to face entrenched discrimination and systemic bias, particularly in workplaces that pride themselves on progress and service, such as the medical profession.[2] Any form of discrimination strips individuals of their power, denies them dignity, and exposes the hypocrisy of societies that claim to champion equality while tolerating injustice at their core. India, ranking 108 out of 193 countries in

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* LL.M. (Gold Medalist), Ph.D., Professor, Faculty of Law, BHU, Varanasi-221005. Author can be reached at <*jprailawschool@gmail.com*>

1 Altekar A.S, The Position of Women in Hindu Civilization, (1938), The Culture Publication House, Benares Hindu University, Varanasi, available at https://archive.org/details/in.ernet.dli.2015.100033/page/n3/mode/2up, visited on Sept. 11, 2024.

2 Rao Shankar I.N., Indian Social Problems: A Sociological Perspective, (2015), S Chand Publishing, New Delhi

the Gender Inequality Index 2022[3], reflects this paradox starkly. Gender inequality, manifesting in unequal treatment and opportunity, persists in professions where women are both highly visible and uniquely vulnerable. The medical profession, with its demanding hours, rigid hierarchies, and intimate patient interactions, should be an exemplar of safety and respect, yet too often, it fails those who serve within it.

Sexual harassment is one of the most insidious forms of gender-based discrimination, violating dignity, breeding hostility, and undermining the fundamental promise of a safe workplace. While official reports show a worrying rise in workplace sexual harassment cases in India, from 402 in 2018 to 422 in 2022[4]; these figures barely scratch the surface of the reality that remains largely underreported.[5] Women not only shoulder two-thirds of the world's work but receive barely a tenth of its income, a brutal reminder of the enduring global injustice that extends far beyond pay checks, into the realm of daily indignities, threats, and violence that target women simply for being women. In the medical field, this injustice takes on particularly grave dimensions. Long, irregular hours and a culture of deference to seniority can silence victims and enable perpetrators. Close physical proximity with patients and colleagues can blur boundaries, making vigilance and institutional safeguards indispensable. While laws exist on paper, the persistence of harassment and bias in practice reveals an uncomfortable truth; that protective frameworks are only as effective as the culture that upholds them.

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3 Human Development Report 2023/24 by the United Nations Development Programme (UNDP) published on March 13, 2024, available at https://hdr.undp.org/system/files/documents/global-report-document/hdr2023-24reporten.pdf, visited on Oct 23, 2024.

4 National Crime Records Bureau (NCRB) Annual Report on "Crime in India" 2022, documents offences against women including incidents of sexual harassment, available at https://www.ncrb.gov.in/crime-in-india-year-wise.html?year=2022&keyword=, visited on Nov. 11, 2024.

5 National Women Commission Reports that 46.58% of women have experienced sexual harassment in the workplace, but only 3.54% chose to report the incident to the authorities, and just 1.4% filed a complaint with the police, available at https://www.ncw.gov.in/yestoposh-issued-in-public-interest-by-national-commission-for-women-2/, visited on May 10, 2024.

Protecting women in the medical profession, therefore, is not merely a matter of compliance with legal norms, it is a test of whether a society truly values the dignity, safety, and contribution of half its citizens. It demands a renewed commitment to fostering workplaces where respect is non-negotiable, vigilance is active, and inclusivity is not an empty slogan but a lived reality. Keeping in mind recent incident of rape and murder of a trainee doctor in RG Kar Medical College and Hospital, Kolkata, this paper seeks to examine the effectiveness and implementation of legal protections available to women in the medical field, exploring the gaps between law and practice, and identifying barriers that hinder a safe and equitable work environment for female healthcare professionals.

II. Historical Perspective

The status of women in any profession, including medicine, cannot be understood in isolation from the broader historical forces that have shaped societal attitudes toward gender. For centuries, the lack of genuine effort to understand female psychology and lived experiences has contributed to deeply rooted misconceptions, often portraying women as biologically inferior[6] or unsuited to demanding intellectual and professional roles. This misuse of biological differences has repeatedly served as a convenient justification for discrimination, exclusion, and systemic bias. [7]

In India, the colonial period under British rule, which spanned nearly two centuries, played a paradoxical yet significant role in the trajectory of women's rights. While colonial policies often reinforced patriarchal structures, the era also gradually laid the groundwork for women's emancipation. Influenced by the ideals of European liberalism: liberty, equality, individual dignity, and universal rights, this period saw the

6 Beauvoir, Simone de. *The Second Sex*. Translated by Constance Borde and Sheila Malovany Chevallier, Vintage Books, New York, 2011, available at https://uberty.org/wp-content/uploads/2015/09/1949_simone-de-beauvoir-the-second-sex.pdf, visited on March 13, 2024.

7 Chodorow, Nancy. *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*. University of California Press, 1978, available at https://www.ucpress.edu/books/the-reproduction-of-mothering/paper, visited on July 22, 2024.

emergence of critical reforms aimed at addressing some of the most egregious social injustices faced by women.[8] The Social Reform Movement and the Nationalist Movement were pivotal in this transformation. Reformers, thinkers, and activists began to question oppressive practices like child marriage, sati, and the denial of education to women.[9] These movements gave voice to the struggles of women, championing the idea that a nation could not progress while half its population remained subjugated. In doing so, they laid a moral and ideological foundation for future generations to continue the fight for gender equality.

Post-independence, India's legal framework took significant strides toward correcting historical wrongs and institutionalizing gender equality. Landmark reforms granted women the right to own and inherit property; an essential step toward economic independence and empowerment. These changes sought to place women on an equal footing with men under the law, fostering a more inclusive mindset rooted in the principles of equality, liberty, and the inherent worth of every individual. While these legal milestones are important, the persistence of discrimination and harassment in modern workplaces, including the medical profession, reminds us that true equality is not achieved through legislation alone. It requires a cultural shift that dismantles lingering prejudices born of historical misconceptions about women's capabilities and roles. Understanding this historical context is vital to recognizing that the fight for women's protection and empowerment; whether in the home, society, or the operating theatre, is far from over.

III. Protection Of Women At Workplace: International Perspective

The protection of women from discrimination and harassment in the workplace is not just a local or national concern; it is a universal human

8 Sarkar, Sumit, and Tanika Sarkar. *Women and Social Reform in Modern India: A Reader*. Indiana University Press, 2008, available at https://iupress.org/9780253220493/women-and-social-reform-in-modern-india/, visited on April 10, 2024.

9 *Ibid.*

rights issue that has been consistently addressed by the international community for decades. Various global treaties, declarations, and institutional frameworks have laid down comprehensive definitions, responsibilities, and pathways for eliminating sexual harassment and promoting gender equality at work. Yet, a closer look reveals a persistent gap between the promises enshrined in international instruments and the lived reality for millions of women worldwide.

The United Nations Charter, 1945[10] laid the philosophical cornerstone for modern human rights discourse by recognizing the inherent dignity and equal, inalienable rights of all people.[11] Its preamble reflects an unwavering commitment to fundamental freedoms and equal rights for men and women, asserting that discrimination based on sex has no place in a just and peaceful world order.[12] Building on this foundation, the **Universal Declaration of Human Rights (UDHR), 1948**[13], often hailed as the *Magna Carta of Rights*, declared that every human being is entitled to all rights and freedoms without distinction of any kind, including sex.[14] Its principles: universal, indivisible, and interdependent, continue to inspire global efforts to address sexual harassment, an affront to the dignity that the UDHR upholds.[15]

Further strengthening this framework, the **International Covenant on Civil and Political Rights (ICCPR), 1966**[16], and the **International**

10 Available at https://www.un.org/en/about-us/un-charter, visited on July 12, 2024.

11 Donnelly, J., Universal Human Rights in Theory and Practice, (2003), Cornell University Press available at https://www.cornellpress.cornell.edu/book/9780801477706/universal-human-rights-in-theory-and-practice/#BookTabs=1, visited on Nov. 11, 2024.

12 Article 1, The UN Charter.

13 Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights, visited on July 30, 2024.

14 *Ibid., Universal Declaration of Human Rights (*UDHR), Preamble.

15 Glendon, M. A., *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, (2002), Random House, New York.

16 Available at https://www.ohchr.org/en/ instruments-mechanisms / instruments / international-covenant-civil-and-political-rights, visited on June 22, 2024.

Covenant on Economic, Social and Cultural Rights (ICESCR), 1966[17], compel state parties to guarantee equal rights to men and women[18] and to take measures to prevent and redress gender-based discrimination.[19] The ICCPR mandates that states must protect victims of sexual harassment as a violation of civil and political rights[20], while the ICESCR recognizes the right to safe and fair working conditions; a right gravely compromised when harassment persists unchecked.[21]

The **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979**[22], represents perhaps the most comprehensive international legal instrument dedicated exclusively to women's rights. Often described as an International Bill of Rights for Women, CEDAW defines discrimination expansively[23] and calls on signatory states to root out cultural and institutional biases that sustain gender inequality. Its Optional Protocol (1999) further strengthens accountability, allowing individuals and groups to bring complaints directly to the CEDAW Committee, highlighting an essential move from rhetorical commitment to enforceable action.[24]

Recognizing that violence remains one of the greatest barriers to gender equality, the **Declaration on the Elimination of Violence Against Women, 1993**[25], built on CEDAW's foundation to focus specifically on violence, both physical and psychological, as a structural impediment to equality and development. The **Beijing Declaration and**

17 Available at https:// www.ohchr.org / en/ instruments- mechanisms /instruments/ international- covenant- economic-social- and-cultural - rights, visited on Oct. 18, 2024.
18 *Ibid*, Article 2(2).
19 *Ibid,* Article 2(1).
20 *Ibid*, Article 3.
21 *Ibid*, Article 7.
22 Available at https://www.ohchr.org /en/ instruments-mechanisms/ instruments/ convention-elimination-all-forms-discrimination -against-women, visited on May 23, 2024.
23 *Ibid,* Article 1.
24 *Ibid.* Article 2.
25 Available at https://www.ohchr.org /en / instruments-mechanisms /instruments /declaration-elimination-violence-against-women, visited on Nov. 17, 2024.

Platform for Action, 1995[26], reaffirmed this urgency, setting a transformative agenda for empowering women in public and private spheres and prioritizing protection from violence and harassment.

The **International Labour Organization (ILO)**[27] has played a pivotal role in operationalizing these broad commitments within the realm of employment. Through its Discrimination (Employment and Occupation) Convention, as well as resolutions and symposiums since 1985, the ILO has consistently identified sexual harassment as a grave workplace hazard that undermines productivity, violates equality, and erodes trust in institutions meant to protect workers. Its practical focus on policies, training, and workplace culture offers a crucial bridge between high-level declarations and the day-to-day realities of working women.[28]

Despite dense latticework of international norms and institutional efforts, sexual harassment and gender discrimination persist in workplaces worldwide including in supposedly progressive and highly regulated professions like medicine. This exposes an uncomfortable truth: international declarations can articulate ideals and bind states to obligations, but the real battle lies in translating these obligations into lived realities. Nations vary widely in how earnestly they implement these standards, how robustly they enforce protective measures, and how far they go to challenge patriarchal mindsets that treat harassment as a trivial occupational hazard rather than a human rights violation. As the medical profession continues to evolve within this global context, it must ask itself whether it will mirror the hollow gap between high-minded commitments and day-to-day practice or rise as a beacon of meaningful protection, respect, and dignity for women who devote their lives to the service of others.

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26 Available at https://www.un.org /womenwatch /daw /Beijing /pdf /BDPfA%20E.pdf, visited on Sept. 30, 2024.

27 Available at https://www.ilo.org/, visited on Oct 27, 2024.

28 Addressing gender-based violence and harassment in a work health and safety framework, ILO Working Paper in June 2024, available at https://www.ilo.org/sites/default/files/2024-07/116_web.pdf, visited on Nov. 22, 2024.

IV. Protection Of Women At Workplace: Constitutional Perspective

India's long and complex history of gender-based discrimination has made it necessary to craft a constitutional framework that does more than merely promise equality in theory, it must actively dismantle centuries of systemic bias and social injustice.[29] The framers of the Constitution recognized that gender equality could not be left to chance or to the slow evolution of social attitudes. Instead, they embedded within the Constitution both broad guarantees and targeted provisions to uplift women and protect them from discrimination, including sexual harassment in the workplace.[30]

At its core, the Preamble of the Indian Constitution lays out a bold promise: to secure to all citizens regardless of gender; justice, liberty, equality, and dignity. These ideals are not ornamental rhetoric; they are binding commitments that demand real, actionable safeguards to ensure that women can participate fully and fearlessly at every level of society, including in their workplaces.

The Right to Equality, enshrined in Articles 14 to 18, provides the legal backbone for gender justice. Article 14 guarantees equality before the law and equal protection of the laws, while Article 15[31] explicitly prohibits discrimination on grounds only of sex, among others. Significantly, Article 15(3) empowers the state to make *special provisions* for women and children: a recognition that true equality sometimes requires affirmative action to correct deep-seated historical disadvantages.[32] Article 16 reinforces this principle within the sphere of

29 Jain M P Prof., Indian Constitutional Law, Lexis Nexis, 8th Edition (2022), Wadhwa, Nagpur

30 Government of India, *The Constitution of India*, Articles 14, 15, and 21. See also: B. Sivaramayya, *Gender Justice: Constitutional Perspectives*, (2001) Eastern Book Company, Lucknow.

31 See also *Air India* v *Nargesh Meerza*, AIR 1981 SC 1829, where the Court invalidated certain employment regulations for air hostesses, such as mandatory retirement after the first pregnancy and marriage restrictions. The Court found these rules to be unreasonable, arbitrary, and unconstitutional under Articles 14 and 15(1).

32 In *Government of Andhra Pradesh* v. *P.B. Vijaykumar*, AIR 1995 SC 1648, the Court acknowledged that women's limited participation in

public employment, mandating equal opportunity for all citizens. While these provisions provide a robust constitutional shield, the reality on the ground often exposes gaps between constitutional promise and institutional practice. For decades, the absence of a clear legal definition of sexual harassment left countless women without explicit recourse, relying instead on the broader equality guarantees that, while powerful, were too abstract to tackle the nuanced realities of workplace misconduct.

This vacuum was partly filled by the judiciary's creative interpretation, most notably in the landmark *Vishaka v. State of Rajasthan*[33] case, where the Supreme Court explicitly recognized sexual harassment at the workplace as a violation of fundamental rights under Articles 14, 15, and 21. The Vishaka Guidelines became the bedrock for workplace protection until Parliament codified them in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The Directive Principles of State Policy (DPSPs) further illuminate the Constitution's vision of substantive gender equality. While not enforceable in Court, they set out a roadmap for the State's moral and policy obligations with the help of Articles 38[34], 39[35] and 42[36] which are key aspects in securing women's full participation in the workforce without fear of exploitation or harassment. In addition, Article 51(c) obligates India to respect international law and treaty commitments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This not only underscores India's alignment with global human rights standards but also situates its constitutional vision within a broader international context.

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employment stemmed from social and economic inequalities. The law thus supports women's empowerment and aims to eliminate such disparities.

33 AIR 1997 SC 3011.

34 To secure a social order, and to minimize inequalities in status and opportunities amongst people.

35 To ensure that all citizens, men, and women equally, have the right to an adequate means of livelihood and that there is equal pay for equal work for both men and women.

36 To secure just and human conditions of work and for maternity relief.

The real test of constitutional values lies not in their eloquence but in their enforcement. While India's constitutional architecture is impressively progressive on paper, societal attitudes, weak institutional redress, and lack of accountability often erode its transformative potential. The medical profession, with its unique vulnerabilities, hierarchies, intimate patient interactions, and odd working hours must be a priority arena for realizing these constitutional promises. True protection for women requires moving beyond tokenism or reactive measures after harm has occurred. It demands proactive creation of safe, inclusive, and dignified workplaces where every woman, regardless of rank or role, can thrive without fear.

V. Protection Of Women At Workplace: General Statutory Perspective

A workplace free from discrimination, harassment, and violence is not just an ethical aspiration but a legal imperative for any society that claims to value equality and human dignity. In India, the need for robust statutory protections for women has been driven by the stark reality that women continue to face disproportionate risks of exploitation and harassment in their professional lives. While constitutional ideals lay the foundation, it is the statutory framework that translates these ideals into actionable, enforceable rights. The Indian legal landscape has evolved significantly, layering multiple statutes to secure women's rights in the workplace. These laws aim to tackle the problem at every level; from punishing perpetrators of harassment to obligating employers to prevent and redress such misconduct proactively.

The **Indian Penal Code (IPC), 1860**, now complemented by the **Bharatiya Nyaya Sanhita (BNS), 2023**, provides the bedrock of criminal accountability. Sections dealing with assault[37], sexual harassment[38], stalking[39], intimidation[40], obscenity[41], and rape[42] address the most direct

37 Section 354 of IPC (Section 74 of BNS).
38 Section 354A of IPC (Section75 of BNS).
39 Section 354D of IPC (Section 78 of BNS).
40 Section 503 of IPC (Section 351 of BNS).
41 Sections 292-294 of IPC (Sections 294-296 of BNS).
42 Sections 375 of IPC (Section 63 of BNS).

threats to women's safety in workplaces and beyond. This evolution, particularly with the BNS's reorganization, reflects an ongoing attempt to modernize legal terminology and expand protections for women's bodily integrity and dignity. However, these criminal provisions primarily address misconduct *after* it has occurred. They do not directly build preventive workplace cultures; highlighting a gap that specialized employment and labour laws must bridge.

Complementing these penal provisions are labour and industrial statutes that embed protective measures into the fabric of employment itself. The **Industrial Employment (Standing Orders) Act, 1946**[43] compels employers to set clear codes of conduct, establishing behavioural baselines that can prevent misconduct before it escalates. The **Factories Act, 1948**[44] goes further, incorporating gender-specific measures such as regulating night shifts, mandating crèches, and providing sanitary facilities, which recognize the unique vulnerabilities of women in industrial settings.

Social security and welfare statutes like the **Employees' State Insurance Act, 1948**[45], and the **Maternity Benefit Act, 1961**[46], demonstrate an important truth: workplace safety is not only about physical security but also about economic and emotional security. Paid maternity leave, medical benefits, and safeguards against unfair dismissal during pregnancy are not "special privileges;" they are structural guarantees that make women's participation in the workforce viable and dignified. The **Equal Remuneration Act, 1976**[47] takes aim at the persistent wage gap by mandating equal pay for equal work and

43 Available at https://labour.gov.in/sites/default/files/Industrial-Employment-Standing-Orders-Act-1946.pdf, visited on Sept. 10, 2024.

44 Available at https://labour.gov.in /sites /default/files/ factories_act_1948. pdf, visited on Oct.19, 2024.

45 Available at https://labour.gov.in /sites/default /files /the employees act 1948_0.pdf, visited on Oct. 17, 2024.

46 Available at https://labour.gov.in /sites /default /files /the_maternity_ benefit_act_1961_0.pdf, visited on Sept.22, 2024.

47 Available at https://labour.gov.in /sites /default /files /equal_ remuneration_ act _1976_0.pdf, visited on Nov. 10, 2024.

prohibiting discrimination in recruitment and promotion. Its existence underscores a core reality: economic exploitation is often intertwined with other forms of harassment and bias. When women are seen as lesser contributors economically, they become more vulnerable to mistreatment and less empowered to resist it.

At the heart of India's statutory framework is the **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013**[48], commonly known as the POSH Act. Born from the judiciary's proactive *Vishaka Guidelines*[49]The POSH Act represents a landmark shift from purely punitive measures to a comprehensive model combining prevention, prohibition, and redressal. It legally obligates all employers to establish Internal Complaints Committees (ICCs), conduct awareness programs, and adopt policies that foster safe working environments.

The POSH Act's implementation reveals a sobering truth: laws alone do not ensure compliance. Many organizations either underreport or fail to properly constitute ICCs. Women often hesitate to file complaints due to stigma, fear of retaliation, and the risk of career setbacks. The reality is that statutory protections can remain paper tigers unless reinforced by genuine institutional commitment, active monitoring, and a workplace culture that prioritizes dignity over silent complicity. Integration of statutory protections with mandatory gender-sensitization training and third-party audits may be a good initiative. While current laws focus on mechanisms like ICCs and reporting structures, they do not adequately address the cultural inertia that allows harassment to flourish. This step would also empower victims to come forward, knowing that the system does not rest solely on internal goodwill but is supported by independent oversight.

48 Available at https://wcd.delhi.gov.in/wcd/sexual-harassment-women-workplaceprevention-prohibition-and-redressal-act-2013sh-act-2013, visited on July 10, 2024.

49 *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

VI. Protection Of Women At Workplace: For Medical Professionals

Women form the backbone of India's healthcare system; whether as nurses, junior doctors, resident doctors, or senior consultants. They work in high-pressure, high-risk, and emotionally demanding environments where workplace safety and dignity are essential for effective healthcare delivery. Yet, paradoxically, while they care for patients' well-being, their own safety and dignity often remain vulnerable especially during night shifts, emergency duties, and in isolated hospital areas. A recent Indian Medical Association (IMA) survey (August 2024)[50] starkly illustrates these gaps: over one-third of doctors, with women disproportionately represented, report feeling unsafe during night shifts. Poorly equipped and inadequately located duty rooms, lack of secure sanitation facilities, and the threat of physical or verbal abuse, even from intoxicated patients or attendants, paint a worrying picture. In some extreme cases, doctors felt compelled to carry weapons for self-defence, an indictment of the system's failure to guarantee even basic security for its most vital personnel.

While general workplace safety laws apply to hospitals too, the unique challenges faced by medical professionals, especially women, require specific statutory safeguards. India's legislative efforts in this domain have been partial and fragmented. A comparative look at statutory protections reveals both strengths and significant gaps:

A. The **Epidemic Diseases Act, 1897**[51], revitalized through the **Epidemic Diseases (Amendment) Ordinance, 2020** (which was converted in the form of Act later on), brought critical, time-bound

50 Available at https://www.thehindu.com/news/national/35-doctors-in-india-feel-unsafe-while-at-work-survey-shows/article68872488.ece. The study, the largest of its kind in the country, involved 3,885 respondents from over 22 States, with 85% under 35 years old and 61% being interns or postgraduate trainees. Women comprised 63% of the participants, reflecting the gender ratio in some MBBS courses.

51 Available at https://www.indiacode.nic.in /bitstream /123456789/15942 /1/ epidemic_diseases_act%2C1897.pdf, visited on Aug. 27, 2024.

protections for healthcare workers during COVID-19.[52] This was a positive precedent: it recognized that healthcare workers, including women, are frontline responders deserving explicit legal shields. Yet, such crisis-based protection should not be an exception, it must be a permanent guarantee.

B. The **Employees' Compensation Act, 1923**[53] remains important for addressing workplace injuries and occupational hazards including biological risks for doctors. However, while it provides post-incident relief, it does not deter violence or harassment before it happens.

C. The **Indian Medical Council Act, 1956**[54] now replaced by the **National Medical Commission (NMC) Act, 2019**[55], sets ethical standards for the medical profession. While the NMC can discipline professional misconduct, it does not directly address physical safety, infrastructure standards for secure duty rooms, or harassment reporting mechanisms.

D. The **Clinical Establishments (Registration and Regulation) Act, 2010**[56] holds promise by mandating minimum facility standards. However, it focuses primarily on patient-facing infrastructure. It must evolve to set enforceable standards for safe staff quarters, gender-segregated duty rooms with locks and bathrooms, and 24x7 security, especially for on-call women doctors and nurses.

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52 The 2020 amendment specifically criminalizes assault, harassment, or violence against healthcare workers, including verbal abuse and physical attacks; damage to property or healthcare facilities. Such acts are made cognizable and non-bailable, with imprisonment up to 7 years.

53 Available at https://labour.gov.in/sites/default/files/ec_act.pdf, visited on April 27, 2024.

54 Available at https://wbconsumers.gov.in /writeread data /ACT %20&%20RULES /Relevant%20Act%20&%20Rules/ Medical%20Council%20of%20India%20%20Act.pdf, visited on June 23, 2024.

55 Available at https://www.indiacode.nic.in /bitstream /123456789 /11820 /1/A2019_30. pdf, visited on June 25, 2024.

56 Available at https://www.indiacode.nic.in /bitstream /123456789/7798 /1/201023_ clinical_establishments_%28 registration_and_regulation%29_act%2C_2010.pdf, visited on April 30, 2024.

E. The **Consumer Protection Act, 2019**[57] though not directly addressing workplace safety, does mitigate the burden of false allegations—an indirect safeguard that reduces stress and harassment of medical practitioners. However, it does not tackle direct threats or gender-based violence.

F. India's legislative landscape shows multiple lapsed private member bills; from the **Protection of Medical and Health Service Professionals from Assault Bill, 2019**[58], to the more recent **Healthcare Personnel and Healthcare Institutions (Prohibition of Violence and Damage to Property) Bill, 2023**[59]. Each sought to criminalize violence, establish special courts, and ensure swift justice. Yet repeated lapses with each Lok Sabha dissolution underscore a disturbing policy neglect toward the safety of medical professionals, especially women who face unique vulnerabilities like sexual harassment and gender-based violence.

In India, while general workplace laws and penal provisions offer broad protection, they fail to address the structural and environmental aspects that uniquely expose women medical professionals to harassment and violence. Laws focusing solely on punishment *after* the fact do not tackle the root causes: poor hospital security protocols, inadequate duty room standards, lack of safe transport for night shifts, and the absence of gender-sensitive facility design. There is a compelling case for a dedicated, gender-sensitive Healthcare Workplace Safety and Dignity Act providing for secure, gender-segregated rest rooms with attached bathrooms, CCTV coverage, panic alarms, deployment of trained security personnel, police (where needed), safe transport for female staff working late hours, institutional gender sensitization training, institutional grievance redressal system, dedicated ombudsman offices, and special

57 Available at https://ncdrc.nic.in/bare_acts/CPA2019.pdf, visited on May 24, 2024.

58 Available at https://sansad.in /getFile /BillsTexts /LSBillTexts /Asintroduced /947LS%20As%20Int ....pdf?source= legislation, visited on Sept. 12, 2024.

59 Available at https://sansad.in /getFile /BillsTexts /LSBillTexts/ Asintroduced/ 99%20of%202023%20AS 84202371745PM.pdf?source=legislation, visited on Oct 23, 2024.

courts for speedy trial of violence or harassment cases against medical professionals.

By combining these measures under one comprehensive law, India can shift from a patchwork of crisis-driven or lapsed measures to a robust statutory guarantee that prioritizes the well-being of its women healthcare workforce.

VII. Protection of Women At Workplace: State Laws

In India's federal structure, workplace safety, particularly for medical professionals, has found some of its strongest statutory protections not in national law but in state-level legislation. Several states have enacted sector-specific laws to curb violence against doctors and healthcare personnel, recognizing that safeguarding frontline health workers is vital for public health security.

The state-specific laws Tamil Nadu's 2008 Act[60], Karnataka's 2009 Act[61], Maharashtra's 2010 Act[62], and similar statutes in Uttar Pradesh[63] and West Bengal[64] pioneered a legislative approach criminalizing violence against Medicare Service Persons and damage or loss to property in Medicare Service Institutions. However, these laws differ in scope, penalties, definitions, and enforcement mechanisms, creating uneven protection across the country. This legal inconsistency not only undermines the fundamental right to workplace safety but also creates confusion for hospital administrators who often run multi-state institutions. More so, despite the statutory framework, these state laws have not translated into robust ground-level protection. Further, while

60 Available at https://prsindia.org /files/bills_acts/acts_states/tamil-nadu/2008/2008TN48.pdf, visited on May 22, 2024.

61 Available at https://www.indiacode.nic.in /handle /123456789/ 7086?locale=en, visited on June 30, 2024.

62 Available at https://www.indiacode.nic.in /bitstream /123456789/19822/1/the _maharashtra_ medicare_service _persons_and_medicare_service_institutions_act%2C_2010.pdf, visited on June 23, 2024.

63 Available at https://www.indiacode.nic.in /bitstream /123456789/17563/1/ act_16_2013_pdf_merged. pdf, visited on July 23, 2024.

64 Available at https://prsindia.org /files /bills_acts /acts_states /west-bengal/2017/2017WB4.pdf, visited on June 23, 2024.

these laws address *violence* against medical personnel in general, they fail to sufficiently account for the gender-specific threats women healthcare workers face.

West Bengal has gone further by addressing the root cause of gender-based violence through the **Aparajita Woman and Child Bill, 2024**[65]. This is not limited to medical workplaces but marks India's first attempt by a state to amend central criminal laws for crimes of a sexual nature against women and children. Its introduction of the death penalty for heinous cases, time-bound trials, penalties for delay, and a female-led special task force shows an integrated approach combining deterrence, speed, and gender sensitivity. This represents an innovative model of how states can supplement central protections through legislative and institutional creativity. By creating dedicated courts and setting strict timelines for adjudication, the Bill recognizes the urgent need to address the prolonged trauma caused by procedural delays.

VIII. Protection of Women At Workplace: Judicial Response

The Indian judiciary has played a pivotal role in shaping workplace safety standards for women, especially in the absence of robust legislative frameworks for emerging sectors like healthcare. Landmark rulings and proactive judicial interventions demonstrate the Court's progressive stance in recognizing sexual harassment, violence, and institutional neglect as serious violations of women's fundamental rights at work in general and not specifically toward medical profession which demands special treatment.[66]

The *Vishaka v. State of Rajasthan*[67] judgment laid the essential groundwork for combating sexual harassment by mandating employer obligations to create safe workplaces, later codified into the POSH Act,

65 Available at https://en.wikipedia.org /wiki /2024_Kolkata _rape_ and_murder #:~:text=On%209%20August% 202024 %2C%20a,and%20 nationwide %20 and %20 international %20 protests, visited on Nov. 22, 2024.

66 Gupta Ritu, Sexual Harassment at Workplace, Lexis Nexis, 1st Edition, 2014

67 AIR 1997 SC 3011.

2013. In the healthcare sector, this was vital: women doctors, nurses, and trainees often work in secluded wards, isolated duty rooms, or night shifts; making them more susceptible to harassment not only by co-workers but also by patients and their relatives.

Judicial oversight through *Medha Kotwal Lele v. Union of India*[68] and cases like *Anusha Deepak Tyagi*[69] reaffirmed the binding nature of Internal Complaints Committees (ICCs) and the duty of medical institutions to ensure impartial investigations and protect complainants from retaliation. These judgments extended the constitutional mandate of equality and dignity into healthcare workplaces, where patriarchal hierarchies often stifle reporting. However, implementation failures persist. In many hospitals, ICCs exist only on paper, composed of members dependent on the same management they must hold accountable. In medical academia, where students and trainees are particularly vulnerable to exploitative power dynamics, the judiciary's reiteration of the need for independent and trained ICCs remains a goal far from reality.

The RG Kar Medical College and Hospital incident (2024)[70] starkly exposed the failure of institutional safeguards. The *Suo motu* action by the judiciary was critical: the brutal rape and murder of a postgraduate doctor during a long duty shift symbolized how poor infrastructure, unsafe duty rooms, and neglect of women's security remain the tragic norm rather than the exception. By ordering the creation of a National Task Force (NTF) for safety recommendations and Employees Safety Committees for quarterly audits, the Court rightly shifted focus from punitive measures alone to systemic reforms. Sentencing life imprisonment rather than the death penalty, to the accused, prompted mixed reactions. Award of ₹17 lakh compensation acknowledges state liability for failing to protect a

68 AIRONLINE 2012 SC 632.

69 *Anusha Deepak Tyagi v. State of Madhya Pradesh,* 2022 INSC 798.

70 *In Re: Alleged Rape and Murder Incident of a Trainee Doctor in RG Kar Medical College and Hospital, Kolkata, and Related Issues*, SUO MOTO WRIT (Crl) No.2/2024, available at https://api.sci.gov.in/supremecourt/2024/37351/37351_2024_1_1_55004_Order_22-Aug-2024.pdf, visited on 23.09.2024.

woman at her workplace.[71] However, this is reactive compensation, not a substitute for robust, enforceable obligations on hospitals to implement preventive measures. While the courts rightly resist capital punishment except in the rarest of rare cases, the broader concern is whether the symbolic severity of sentencing alone can deter such crimes without parallel structural safeguards. Despite progressive interventions in select cases, the judiciary has yet to develop a consistent, proactive jurisprudence addressing the routine physical assaults faced by medical staff and inadequate safety infrastructure in hospitals. The repeated attacks in West Bengal[72], Bihar[73], and Hyderabad[74] in 2024 reflects a terrifying trend.

Concluding Observations

The protection of women in the medical profession must no longer be viewed as a peripheral human right concern or a reactive law-and-order measure. It is a core question of constitutional governance, workplace justice, and systemic accountability. The unique environment of the medical profession with its long, isolated night shifts, rigid hierarchies, emergency duties, and intense patient-family interactions amplifies the vulnerabilities women face at work.

While Parliament has attempted broad frameworks like the POSH Act and has, in extraordinary situations like pandemics, strengthened protections through special ordinances, these measures remain fragmented. States have stepped in with Medicare Protection Laws criminalizing violence against doctors, but these laws overwhelmingly

71 Available at https://images.asset type.com /barandbench/2025-01-20/eob14cyw/RG_Kar_Case___Judgment.pdf

72 Available at https://medicaldialogues.in/news/health/doctors/mob-attack-2-surgeons-brutally-attacked-after-patient-death-admitted-in-icu-128063, visited on Nov,24,2024.

73 Available at https://timesofindia.indiatimes.com/india/pregnant-womans-death-sparks-violence-by-kin-nursethrown-off-1st-floor-of-bihar-nursing-home/articleshow/110475737.cms, visited on Nov,24,2024.

74 Available at https://indianexpress.com /article /cities /Hyderabad /hyderabad-doctor-attacked-in-hospital-by attendants-after-patient-dies-8604280/, visited on Nov,24,2024.

focus on physical assaults by third parties and do not address the deeper, gendered layers of workplace violence from harassment by colleagues to unsafe institutional design.

The judiciary's intervention, beginning with *Vishaka,* continuing with *Medha Kotwal Lele*, and extending through tragic cases like *RG Kar Medical College,* has repeatedly recognized that workplace safety and gender dignity are not negotiable. Yet, its response has often been crisis-driven, dependent on isolated petitions or PILs, and has lacked robust monitoring mechanisms to ensure that directions translate into lasting change on the ground.

It is therefore imperative to acknowledge that piecemeal protections; central, state, or judicial cannot by themselves guarantee safe workplaces for women medical professionals if they operate in silos. Legal frameworks, institutional infrastructure, administrative vigilance, and cultural change must converge. Laws must recognize that harassment and violence are not just about individual misconduct but are deeply linked to structural deficiencies, unsafe premises, gender-insensitive duty allocations, lack of grievance redressal, and weak institutional accountability.

The time has come for India to move from guidelines to guarantees, from reactive orders to enforceable norms, and from ad-hoc institutional fixes to a coherent national framework that makes the protection of women in the medical profession an inseparable part of our constitutional promise of equality and dignity at work.

Access To Justice Against the Atrocities Exposed in The Region of India

Dr. Jaykumar Bhongale*

Abstract

The Caste will persist and endure until the demise of the individual, remaining deeply embedded in Indian society despite the advancements of the twenty-first century. Social backwardness, rather than economic or political status, can be associated with an individual's position within the caste system in India.

The current research endeavors to elucidate the rise in recent instances of unaddressed atrocities within India, a nation known for its democratic principles. This article presents findings from an empirical study conducted by the author, shedding light on the challenges faced in implementing legislation aimed at eradicating such atrocities. It also delves into the systemic issues contributing to widespread occurrences of violence in the country.

Keywords*: Atrocities, Economic Boycott, Patriarchy of religion, witness protection.*

I. Introduction

It is the one of the principles of the law is that there shall equality before law and equal protection of law. If we expect the growth of the society then it has to gain by the all social groups of the society which has to be produced by the state an equal opportunity in social, economic and political aspect. But the concept of justice is not similar for some belonging groups of the society and they are facing different kind of injustice because they are belonging from some kind of groups. The meaning of justice is not the same for marginalized communities as it is

* Associate Professor, New Law College, BVDU Pune

for the dominant layers of society.[1]Parliament had passed legislations to have equality in the society in India but lack of awareness, ignorance and improper implementation of laws are these two tragedies always stand in front of the door of justice for disadvantaged group. Indian society is divided in different class and sect. some people are backward because of the poverty or because they took birth on different kind cast, different sex or occupation. This backward class also being called as vulnerable class because they can easily besiege and discriminated. This backward people are deprived in camper with other people, they may be deprived socially and economically, politically and educationally. They are politically deprived because they live in remote areas. These people specially included in SC (Schedule Cast) ST (Schedule tribe-adivasi) and other backward classes of society.

These disadvantaged groups include Scheduled Caste (Dalit), Scheduled Tribes (Adivasis) and other backward Classes who are said to be historically disadvantaged, vulnerable and socially oppressed but this list is not exhaustive but rather it is still inclusive. There might be a question among the educated class of the society that although these groups earning more, learning more and they are getting more and more facility of luxurious life. How they we will be considered disadvantaged, vulnerable and oppressed class of the society? But answer of this question will not be satisfied until the social structure and mentality of society will not be changed. An entire generation of lawyers, social activists, judges, policymakers, and executives has proposed their remedies to make justice more accessible to the public, but the difficulties with access to justice have baffled them all. However, despite the fact that the end result is still a long way off, this constant pursuit has helped to achieve a few significant milestones. Access to justice is a problem that goes beyond the law because it has far-reaching social and economic effects that have contributed to the issue India is currently dealing with. Therefore, it is

1 Badri Narayan Tiwari, "*Ethnography of Social Justice in Dalit Pattis(Hamlets) of Rural UP*", State of Justice in India issues of Social Justice, Volume III, edited by Paula Banerjee and Sanjay Chaturvedi, 2009.

clear that access to justice is a problem, one that is getting worse by the second due to major factors including the population growth, illiteracy rate, and poverty rate. Because of all these factors. All of these factors contribute to the failure of key policy decisions made for a certain year to solve the issue since it is escalating so quickly that the policy itself becomes in fructuous.[2]

Justice is the outcome of law, and in order to attain justice, we must have an organised legal system that offers justice to everyone, regardless of caste, creed, religion, or race. We the people, who stand for the general populace, are represented in the prefix of our constitution, and it is the state's duty to ensure that everyone has access to justice. For the public to have faith in the country's administrative structure, the rule of law requires an efficient and well-organized judicial system that can quickly and fairly enforce rights. Thus, access to justice evaluates whether a person's right to justice is being upheld within this framework to guarantee that legislative reform does not become a domain of a select few. It stands for the idea that everyone has the right to practise the freedoms and fundamental rights protected by the law. A whole generation of lawyers, activists, and members of the executive and judicial branches has been baffled by the impediments to access to justice that have arisen. Individuals nowadays must overcome numerous obstacles connected to legal, societal, and economic considerations in order to access justice. As a result, it is clear that access to justice is an issue. Major causes of the problem include the prevalence of poverty, illiteracy, and population growth. These issues are what have caused a chasm between the victim and justice.

II. Origin of the problem:

The Indian Constitution provides justice social, economic and political, injustice done to any of these three aspects will be considered as negation of access to justice. Actually access to justice concept is not

2 MHRD, "Barriers to Access to Justice" (2013). http://epgp.inflibnet.ac.in/epgpdata/_uploads_/epgp_content_/law/02._access_to_justice/20._barriers_to_access_to_justice___/et/5645_et_20et.pdf (last visited 22/09/2022).

limited to physical access to court or judiciary only it has many shades and many aspects to inclusion. This includes identification and recognition of problems of deprived class, awareness about discrimination and laws available relating to, access to judiciary, adjudication and relief. In between of this complete process lot of hurdles arrive in the way of justice to this deprived class so they are being neglected to have justice.

Societal Relevance:

The present research is beneficial through remove sluggishness in the justice delivery mechanism including awakening the various stakeholders in legal system including state. The present research is beneficial for the lay people, government and the academicians to have first-hand information, observations and knowledge about the actual impact of Justice Delivery mechanism on the society. Outcome of this research spread awareness among the member of society; provide details of judicial mechanism and its pros and cons.

Relevance to National Missions / Priorities:

Our national missions and priorities are reflected in the preamble of our constitution. Justice social, economic and political is the ultimate goal of the Constitution. It clearly states to make India a nation based on equality, fraternity and brotherhood.

Significance of the study

In recent judgement of the Supreme Court of India on right to life where SC was held that Access to justice is integral part of Article 21 of the Constitution. Violation of this will be violation of rule of law so justice is going to violate and denied on account of accessibility and quality only because they belong to different cast, class, religion or different ethnicity. The Government of India is constitutional oblique to empower the weaker sections of Society by providing equal opportunities to them to create a just social order. After independence various protective measures and legislative measures have been undertaken by the government to safeguard the interest backward classes. The role of the police, the role of judiciary and the role of the government machinery have also been questioned by many. Maharashtra despite of being the most progressive and developed state is lagging behind some other state in provide justice

to them. Where citizens got apprehension about system, where economically inaccessible then there is absence of access to justice and whenever there is absence of justice absence of Rule of law.

III. Objective –

a. Understanding the concept of caste system in India, including various Constitutional and Statutory provisions regarding Backward Classes.

b. Expound the Constitutional safeguards in protection of these deprived classes and the legislative attempts in eradication social, political and economic deprivation.

c. To make an empirical enquiry into the problems and hurdles in implementations of laws related SC and ST and other backward class legislations.

d. To study and investigate the Justice mechanism to deprived classes of society.

e. To understand the nature of remedy available, discussion relating to suitability and non-suitability.

The study is expected to pitch new incite towards the burning issue of backward class to the legal field it also will concentrate attention of legal luminaries and expert in the field of legislation and judges. The report of the study can be of immense importance for the governments specially the ministry of social justice and empowerment for the purpose of planning.

Scope and limitations

The present study can be guiding tools for several peoples who are seeking justice but denied, it will be awakening call for those people on the shoulder the responsibility has been arranged by the Constitution of India. It will also benefit to the student and academicians to understand core understanding of this subject. There will be hope to understand and implementation of basic right of the individuals. It will be guidelines for the National human right commission and other backward class commission including SC and ST National commission established under the Constitution of India.

IV. Legal Materials and Methods

A proportionate stratified random sampling method has used to collect quantitative data.

Research is based on both Qualitative and Quantitative method applied to arrive on final conclusion. Total 106 (respondents) were examined through Questionnaire. 60 respondents were from rural and adivasi district of Maharashtra (India) against them justice denied and 56 (Respondents) from urban area of Maharashtra has selected during the period of 2019 to 2023 are examined.

That means total 60 respondents (Victims) and 56 respondents (student + Judges +Advocate + officials), in all 106 primary stakeholders investigated. This followed by in-depth interviews of the 30 government officials involved in the implementations of the Access to justice to backward class.

V. Observations of the Process And Facts

All the cases where researcher found that the backward class had to suffer from violence or disparity from the upper strata of the society even in today's modern world where the caste system has been abolished legally long ago in India. As we found from the police database, 25 cases were registered in the month of February, from a single District of Maharashtra.

The researcher estimated that each month there have been a big proportionate number of cases registered under the SC/ST POA Act. Most of the time the researcher come across and see that mostly the cases were being registered under IPC Act and not under the SC/ ST Act even if the matter directly comes under this present legislation. Sometimes because of the complexity has to be faced by the police personnel they hesitate to register the cases under POA Act.

It is also found that the judiciary not giving respect to the POA Act and punishment may transfer from POA Act to IPC. Even if the police officials are taking interest and charging the accused under SC/ST POA Act, they are getting away with bail. We found that, even after filing the case under POA Act, and the charge sheet filed, still offender not getting punishment under this Act because of several reasons. One of the reasons

is that the victim and witness get hostile due to the lack of witness and victim protection facilities by the government. In recent amendments to the POA Act 2015, where it is the duty of the government to protect the victim and witness but in reality, government and police officers are negative about this scheme.

On the basis of data collected by the researcher may estimate that around 300 cases are registered under SC/ST POA Act in a year and that is also in only one district of Maharashtra. If we estimate the total expected cases under this law from the whole of Maharashtra that would be 7500 cases. But in reality, is not the same. From the above data it can be deduced several observations like, the offender was not arrested in several cases and even if there is an arrest still, they are delayed in filing the charge sheet which results, in the offender getting bail. The punishment ratio under this Act is only 2% in the Districts of Maharashtra so, it may presume that 98% of cases are either wrongly registered or there is some lacuna in the administration of the justice system.

The researcher investigated various SC/ST POA Act cases and found that most of the time the offenders are not being arrested unless the case is under the nature of a heinous crime under the Indian Penal Code.

VI. Problems In Implementations of Legislations Relating Atrocity.

In India, implementation of law is the most crucial issues as far as imparting the justice concerned. We have the legislation but implementing machinery is weak and corrupted. In relating with the justice to the weaker sections or backward class, it is so rampant because less representation in political institution. Police officer, government officer inclined to reject their claims of implementation even in the urban areas.

Researcher find out some of the reason in respective legislation based, these are following:

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

1. POA Act is not misused; it is underused by the legal system. In reality that there are many cases which go unreported and then even after registration of cases.

2. It takes so much of years to come for trial and then to the High Court. And not many cases come for, appeal in the Supreme Court. In this circumstance just simply to reflect the public opinion that the act has been misused is simply the prejudice of the Indian judicial system against the observation.

3. To register a case deliberately, the police force try to register the case under either certain IPC sections or they try to register the case under less stringent act like a PCR Act. So, therefore there is a kind of, kind of underused by the police because deliberately police are not registering the case under that particular act. There should have a kind of a deliberate effort on the part of the police and the criminal justice system.

4. Indian criminal justice system not really addressing this issue properly, are not registering the case properly.

5. There is an enormous delay in filing the charge.

6. After a discussion with the police authorities, the researcher conclude that due to heavy work load and pressure of the officials they don't file the cases under the POA ACT because they felt that they have to do their law and order work.

7. The Public Directorate of Public Prosecution has to file the appeals before the higher courts and mostly it is found that it is not well organized and even some of the State Director Directorate of Public Prosecution even doesn't have proper Technical facilities like computers and various facilities.

8. Now what we found is you know they have to; they are supposed to give Travel Allowance to the witnesses of the trial. The problem is the court is situated in one area and the revenue department situated in another area. These people have to really travel a lot to receive their TA and which is actually affecting their livelihood.

9. There is no protection for witnesses in the court premises. If they are speaking against or if they are willing to really support dalits victim.

These kinds of weaknesses are completely exposed by the dominant caste violence.

7. 10. The researcher found that the non-submission of cast certificates is also ground for being a barrier in implementing the legislation. Dismissal of atrocity cases, when registration of cases happens and they have to invoke the provision of prevention of atrocities asked for the cast certificate of the victim. The police officials also do ask, but they don't submit in front of the court, so the study said, even if the judges are very much willing to do they are unable to proceed.

11. The prevention of Atrocities Act is not properly invoked by the victims because most of the time they have to face consequences in their villages and they don't want to come forward with it to only save their lives.

12. The social backgrounds of the judges, maybe from the Supreme Court or in the high courts, they all come from a very similar background and there is no diverse thinking or there is no diverse perspective. So the amicus Curie's who have been appointed in these cases are as same as public prosecutors who are appointed in the cases, who does not come from the background of the victims but from the background of the accused persons, so their entire judicial system is at fault.

13. There should be enough programs to train police officials because every time our victim of atrocity goes to the police station, they are not believed and counter cases are being filed against them and even they go to jail for campaigning against the atrocity they suffered.

14. The police officer de-cast the dalits or minorities at the filing of the cases.

15. Now, for the headlines, The SC/ST is amendment Bill makes discrimination against members

16. There is a no space for the victims to file a case against public servant. According to the bill garlanding, any member of the SC or ST Community with try compelling them to dispose, human waste or forcing them to do manual Scavenging.

17. Social economic boycott is most crippling thing that you can do to the victims and to their lives. So that the implementation on the ground becomes ineffective and becomes difficult to get convictions. Social boycott and economic boycott, what does it mean? You go to buy milk, you can't buy milk. You go to the shop to buy groceries. You can't buy groceries. You go to the field to do your morning, absolutions, you can't, you can't go to the field, you try and get work in the village, and you won't get with it. It's very easy to implement social and economic boycott by the upper cast members. In simple way, which leads to the withdrawal of cases by the victim? They can't stand it, they can't get jobs, they can't get employment, and the children can't go to school. They will be boycotted in school. Now, if you write that in your complaint that is social and economic boycott is taking place. And the judge says, okay, I'm appointing a commission to check and the commission says, yes, sir, they are being boycotted. Completely in the village and the villagers thing boycott is their inherent right God-given, right to boycott the Dalit community and stop them into, pull up the entire Village for it.

18. Second thing is protection for victims, survivors and Witnesses for want of this protection, severe pressure may create against them.

19. Question of speedy trial. It will not depend on lawyers mobilizing and using the law properly. The biggest impediment is the cast biases of public, prosecutors and judges, specifically in higher courts.

20. There are no activist judges for the Dalit community in the higher courts.

21. Now our media, given more space for foreign subjects rather than Indian crimes, atrocities etc.

22. There's the NDA government does not intend to implement. Because when you make social legislation, requiring courts, judges, lawyers, computers infrastructure, officers, chairs and tables. It must provide in the financial memorandum but it is not mentioned in that. But the NDA government has no intention of implementing this act and all the stuff.

23. Main reason for why Adivasi or SC/ST does not come upfront is the social structure of the state. Like Gujarat is a state where roots of it is

embodied in Bhramnical Patriarchy and God father being the RSS and BJP who work on this principle and always in tussle with non-Brahmins. In Maharashtra also there was struggle between Maratha and the Dalit's. If we follow the Maharashtra Political history where 80% power had been shared by the Maratha leaders. So, there is fight between Maratha and Dalit people. Since 1960, out of 18 Chief Minister, 10 have been found from the Maratha Community and half of the law makers in Maharashtra came from Maratha Community with who creates personal wealth and power.

24. Various data shows that state vigilant committee who look after on ground implementation of this act, hardly meet yearly.

25. State of Maharashtra has diverse population and Dalit and Adivasi population constitutes 90% in various districts of Maharashtra. 1% FIR registered only by the SC/ST members. Atrocities act was a plight below than 40% of the complete. 87% complaints are still pending for a trial and conviction rate is very low.

26. The victims had faced various hurdles in filing complaint in the police station where the police as an agency blame and shames the Dalit tribal victim womens on based of their caste or they do not lodge the complaint at all. Social ostracization, lack of will power, knowledge, lack of political will, these are the responsible factors which refrain from making complaint by the Dalits or Adivasi people.

27. Prosecution Failure is also prominent factor to hurdle to implement this legislation because most of the time accused being acquitted because of the prosecution fail miserably and not being able to prove before the court of law or failure to prove the accused was present at the time of offence, failure to show or failure to generate caste certificate of the victim and prosecution's inefficiency in examination of witnesses before court of law.

28. The institutional players like who play important role in filing of the complaint, investigation agency of the case often behaves apathetic where the female victims refrain from filing the complaint. Police normally refrain from filing the complaint to maintain law and order or

social harmony in the society. Police officer inclined towards to maintain the low crime rate in their respective jurisdiction. Sometimes dominant class build a pressure among the victims and agency for creating obstacles in the reporting cases.

29. One of another reason is that the official state website has a major technical glitch like login issue, special ID and password. Language is another barrier which arises out due to absence of presence of English language in the state's website.

30. In case of *S.K Mahajan* V. *Union of India*, 2018 judgement laid down some principles which also limited the implementation of this Act.

a. Supreme Court held that against the public servant the arrest cannot be made out without the permission of the superior authority or appointing authorities and for non-public servant approval of SSP is necessary. It was argued before the court that the Act, it is heavily misused by that community to file false cases against public servants. In India the appointing authority for public servant is President/Governor so sanction from the President/Governor becomes impractical.

b. Supreme Court also held that there is no absolute bar against grant of anticipatory bail under this Act, actually legislation intend to obstruct anticipatory bail against the offences registered under this Act. So, this is one of the means to obstruct the proper implementation of Atrocity Act.

c. Before making an arrest of a private person the preliminary enquiry, has to be investigated by the DSP.

d. Supreme Court has diluted the effect of *Lalita Kumari* v. *State of Uttar Pradesh*[3], where Supreme Court held that FIR is a fundamental right of every citizen which can be curtailed only in exceptional circumstances. If before making a complaint primary enquiry will be the general rule under this Act, it means it is a violation of the vested rights of the complainant.

31. The Supreme Court has to harmonize their judgement on the basis of recent public standards and individual rights which are being in conflicting interest. In same society where a Dalit boy murders on account

3 *Lalita Kumari* v. *State of Uttar Pradesh* (2014) 2 S.C.C. 1 (India).

of sitting on a horse "For riding horse, upper caste men kill Dalit youth in Gujarat," *The Indian Express*, 2018 *available at*: https://indianexpress.com/article/india/for-riding-horse-upper-caste-men-kill-dalit-youth-in-gujarat-5117872/ (last visited October 19, 2022). and a Dalit girl was assaulted only because her shadow fell on a upper Caste menchpadmin, "Dalit girl thrashed as shadow falls on upper caste man" *CJP*, 2015*available at*: https://cjp.org.in/dalit-girl-thrashed-as-shadow-falls-on-upper-caste-man/ (last visited October 19, 2022). a Dalit girl was gang raped by some upper caste men "Dalit girl 'gang-raped' by upper caste men in U.P.," *The Hindu* (Ghaziabad, 24 September 2020), section Other States. and recently in 2022, a Dalit woman was stripped down by 4 Upper Caste Men. "Uttar Pradesh: 4 upper caste men try to 'strip' Dalit woman, booked," *The Times of India*, 28 July 2022. In most of these incidents the offences were booked under Indian Penal Code and not under SC/ST Act (Atrocity Act). It means Police officers incline to register offences under IPC and not under the SC/ST Act and this is unfortunate. Supreme Court decision may encourage this kind of police officer to repeat same kind of behaviour.

32. There is a scheme for the availability of the funds from the Center Government is which to be set out for the State Governments to implement the Atrocity Act in its own jurisdiction. Although the provision is being there, the Center Government is bringing a halt to the flow of regular funds to the State Governments which is leading to the cessation of the implementation of the said Act.

33. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, which went into effect 31 years ago, is allegedly not being implemented efficiently despite the fact that violence against those who are socially marginalised continuing. The problem is in the implementation of the legislation, just as in the case of other similar enactments like the anti-dowry law, this is as a result of the fact that attitudes in society have not altered.

i. Despite the fact that discrimination and untouchability are widespread in Tamil Nadu, Section 16 of the Act grants State

governments the authority to impose a "collective fine." However, this provision has never been used. Despite the cruel form of untouchability being practised all over India, "the 'collective fine' clause has never been invoked in any of the incident so far." The researcher referring to documented instances of Dalits being denied access to common burial grounds and Dalit cooks being boycotted by non-Dalits in government schools, among other things.

ii. Likewise, Rule 8 requires the State to set up an SC/ST Protection Cell at the State headquarters under the charge of a DGP/ ADGP/IGP but there was no information about any action in public domain. “If these protection cells are functioning effectively, then why has the number of atrocities increased especially during a pandemic?

iii. The Act mandates that each district have special courts, special judges, and special public prosecutors. Tamil Nadu only has special courts in seven districts. The execution is really poor.

34. One of the major reasons is that many SC/ST victims do not initially file complaints out of fear of reprisals from members of upper caste groups, ignorance, or police indifference, further thus causing harm to themselves as not allowing the legislations to act upon.

i) The researcher noted that atrocities committed against members of Scheduled Castes and Scheduled Tribes (SC/STs) "is not a thing of the past" and emphasized that India's low conviction record for SC/ST cases was not a result of fabricated allegations but rather sloppy investigations. These sloppy investigation and failure in the part of the Police authorities makes the legislation under-used. The SC/ST community faces insurmountable hurdles in accessing justice from the stage of filing the complaint to the conclusion of the trial, and they "specifically suffer on account of procedural lapses in the criminal justice system. It was noticed that many SC/ST victims do not file complaints in the first place due to police apathy, ignorance, or fear of reprisals from members of upper caste groups.

ii) According to data supplied by the National Crime Records Bureau, crimes reported under the SC/ST Act increased by 9.4% (for SC) and 9.3% (for ST) in 2020 compared to the prior year (NCRB). Last year,

50,291 cases of crimes against SCs were reported. In 2019, there were 45,961 people. In contrast to the 7,570 occurrences in 2019, 8,272 cases of crimes against STs were reported in 2020. The highest rates of crimes against SCs were found in Madhya Pradesh, Rajasthan, and Bihar. The states with the highest rates of crimes against STs were Kerala, Rajasthan, and Telangana. Out of the 50,291 crimes committed against SCs in 2020, only 216 cases led to convictions. 3,192 different instances ended with acquittals.

35. In the case of *Hitesh Verma* v. *State of Uttarakhand and Anr*[4], a woman who belonged to the lower caste claimed that an individual from the upper caste entered the "four walls of her building," hurled castes insults at her, and threatened to kill her. A non-SC/ST person who "intentionally insults or intimidates with intent to humiliate a member of a SC and STs in any place within public view" is subject to punishment under Section 3(1) (x) of the SC/ST Act, which was the basis for the filing of the case. Because of this clause, the Supreme Court dismissed the suit on the grounds that intimidation wasn't carried out in a public setting.

This decision was again a major setback for the SC/ST Community as the judgement again barred the implementation of the act and limiting the jurisdiction of the provision. The researcher concludes that, Legislation that prohibits caste-based intimidation and humiliation when it happens "in public view" but allows it to continue in private defies logic. It is a failed attempt in making the Act purposeful.

36. The government's legislation pertaining to citizens' rights contains three key weaknesses, which render it less than suitable, according to reports by the National Commission on SC and STs.

i) The biased nature of bureaucracy — Ignorance of complaints, discouragement and even rejection of them, ignoring the version of victims or verifying the story of the victimizers, purposefully discrediting victims Bias can be seen in a number of ways, including by creating

4 MANU/SC/0843/2020.

loopholes that benefit the accused, enticing victims to drop their claims, pressing them to make concessions, delaying the conclusion of the investigation, and most importantly failing to provide protection before or after the offence.

ii) There aren't any special courts or prosecutors. Because there aren't enough special courts and prosecutors, most cases become stuck. Each state's revenue district must select a special court to hear these issues. According to Lawyers of People Unions for Civil Liberties, the majority of Atrocities Act cases are referred to normal session's courts, which are already overburdened with original and appellate jurisdiction.

iii) Influence of Mass Media: SCs and STs make up around 25% of the population as a whole, but neither print nor electronic media adequately portray their predicament or concerns. Undoubtedly, large acts of violence are covered by the media and receive some investigative investigation for some time after they happen. However, there aren't any ongoing efforts that draw attention to their problems or any deliberate, methodical attempts to provide their views a platform.

37. A notable barrier which is still in existence is that the SCs and STs do not adequately represent the bureaucracy in the states that are putting the POA Act into effect. Upper caste officials who are insensitive to the issues facing SCs and STs continue to hold the power of implementation. Many times, the accused is not booked because of the resentment and hatred of members of upper classes.

38. One crucial element in putting the POA act into practice, the judiciary, is moving more and more in favour of the system and the elites. In terms of the empowerment of SCs and STs, several past rulings that were landmark in spirit have been overturned. This demonstrates that the judiciary itself has prejudices and preferences towards social, economic, and legal matters. The judges' backgrounds, philosophies, and personal interests and disinterest can all be linked to the greatest acquittal rates in atrocity cases. In the current survey, the majority of victims and officials claim that the judiciary is biased towards SCs and STs. In the POA Act, the police's function as an investigative agency is of utmost importance. This study reveals that the upper castes are likewise overrepresented in

the police force and, more significantly, are in positions of greater authority. In this study, the majority of the atrocity victims expressed their severe dissatisfaction with the police's ambiguous and suspect responsibilities, their lack of cooperation in the registration of cases, and the caliber of inspection and inquiry.

39. The POA Act's precise punitive and preventive provisions have yet to be put into action, which has significantly weakened the Act and, in turn, the Constitution of our country.

i) Lack of adequate Executive Special Courts: The State governments may establish Executive Special Courts under Section 14 of the POA Act in order to expeditiously try cases filed under the Act. Executive Special Courts would solely handle atrocity cases and administer justice within two months of the charge-sheeting in order to reverse the worrying pendency rate.

Only 12 states, nevertheless, have been able to establish these courts. In these states, there are 423 districts altogether, but only 170 Executive Special Courts have been established.

Regular courts are now referred to as "special courts" in the remaining states. These courts must also hear cases from other parties, which cause the typical side-tracking of atrocity claims. Additionally dismal is the Special Courts' conviction rate. Figures from the Ministry of Social Justice and Empowerment, estimated conviction rate at 2.3%.

ii) Exception allowing bail: Despite the fact that the 2018 amendment explicitly prohibits anticipatory bail provisions for cases covered by this Act, "notwithstanding any judgement, order, or direction of any Court," High Courts frequently file direction petitions in inferior courts, which is an implicit order to take the accused's bail request into consideration. The SC/ST courts, which are lesser courts, grant bail.

In a decision by the Madras High Court in December 2019, it was made clear that High Courts still reserved the right to grant anticipatory bail in PoA Act matters. This judgement can be abused and sets a dangerous precedent, says attorney Pandiyan.

There is a severe lack of judges from Dalit and tribal populations in courts at all levels. After a decade, Justice B.R. Gavai became the Supreme Court's first Dalit justice in 2010.

iii) Failure to acknowledge atrocity-prone areas: State governments are required to identify locations that are prone to atrocities and have already experienced casteist violence under Rule 3 of the SC/ST POA Rules (1995). Only 11 states, nevertheless, have classified some districts under this heading.

iv) Any programme must have both a physical and virtual infrastructure in place in order to be effective. There are numerous functions for the government apparatus. Due to a shortage of space, they are unable to completely focus on the PCR and POA Acts' execution; in addition, vehicles, phones, and other objects are determined to be significant obstacles. The study shows that the government's efforts to provide assistance and rehabilitation to victims of atrocities are insufficient, either do not reach them or are refused to them. A village-level committee made up of social leaders from various communities should be established to oversee the relief and rehabilitation efforts and assess the veracity of any incidences.

VII. Conclusions and Recommendations

To provide easy access to justice to weaker section of the community and to combat exploitation and injustice and to secure to the under-privileged segments of society their social and economic entitlement procedural technicalities be removed. Such procedural technicalities are also relaxed in petitions filed to redress public injury, enforce public duty, protect social rights, and vindicate public interest and rule of law, effect access to justice to economical weaker class and meaningful realisation of fundamental rights.[5]

The Supreme Judicial has dealt with the problems of those disadvantaged persons who would not typically have had access to the court system, such as convicts, tribe members, women, and children in

5 *Vedire Venkata Reddy and Ors.* v.*Union of India (UOI) and Ors*. (17.11.2004 - APHC): MANU/AP/0946/2004.

juvenile institutions, thanks to the dilution of locus-standi and other creative remedies.

To have effective remedy and to have easy mechanism to surrender this remedy to the victim is equally important as important codified it into the legislation. Without this proper arrangement rule of law won't be uphold in any democracy. And any democracy won't be considering a proper democracy without this arrangement. SC/ST (Prevention of Atrocities) Act, passed before passed before 30 years ago but rights and security which are provided under this Act being usually neglected, this Act is not misused but it is underused legislation. The enforcement of this legislation is made ineffective in modern India. The police system is very silent in implementing the legislation, extensive discrimination on account of caste, threatening to the victim and witness, daily lifestyle of victim and witness which prone to leave the case, these are the apparent reason to frustrate the access to justice to SC/ ST community.

Unfortunately, after the century to centuries this old caste system still being continued and it take diverse shapes according to modern time, without diluting this caste system the democracy and rule of law will not be continued in India. While members of the judiciary and legal system not serious about SC/ST right, moreover their behavior crate major hurdle to access to justice under Atrocity Act.

A significant amount of pressure is frequently used on SC/ST victims and witnesses of atrocities as soon as the atrocity occurs, once cases reach the criminal justice system through the police filing of a FIR, and during the trial of cases. This is due to the fact that once an atrocity occurs, the social climate in the villages is so hostile and the power dynamics between the castes are so unbalanced that the possibility of more violence is frequently extremely real. Victims and witnesses reported the following behaviours by the accused throughout the court trial process notwithstanding the rights to non-discrimination and security of life:

i. In an effort to sway the jury, the accused from the dominant caste would sometimes choose a defence attorney from the same group as the judge.

ii. Victims and witnesses endure persistent teasing, pressure, and threats. The following results from the accused and the accused's community, including through the defence attorney: pledge, conviction, or dismissal.

Chief Conclusions

Right to speedy Trial: the right speedy trial is the intension of the statute, but it is being deprived due to special courts being not appointed in several districts of Maharashtra. Instead of the Special Court, this responsibility surrendered to the session courts, which already is overburdened. The Act said that there should have the Special Court, special judges and special SPPs but in reality, this is not happening. The Session court judges could not concentrate properly on Atrocity cases because of the overburdened of the cases. The SPPs not serious about the atrocity cases or they are also overburdened by different cases which allotted to them, so, they could not invest their quality time upon these cases. The supported staff also may not usually available to carry the functions under Atrocity Act, without supporting staff or no intent to work for these kinds of cases, discourage the SPPs and victims to move forward for justice.

Misused rather than less used

Mechanism to protect the right of backward class and operative agency, mechanism to prevent the discrimination is to be present in every district. In Atrocity Act why there always have low conviction rate? In IPC is having high conviction rate. Researcher through study and observation concluded that there are several reasons that Act under used;

- False premise among the society that Atrocity Act is being misused by the SC/ST community, false case are being registered usually by the SC/ST people to take the benefit of the legislations. Actually, the conviction rate under this Act is very low, not because of false cases being registered but because of poor investigations and poor prosecutions before the court of law.
- **Discrimination between proceeding**: This is also shocking observations by researcher that during the trial, the victims, witnesses faced to the various forms of discrimination including treatment by the

staff members or by the SPP office, seating arrangement or comments laid by the officer in relating to the Atrocity cases. The victim is being harassed to make compromise, threats to them their family or threats to the witness to turn hostile. SPP behavior also not being in favour of the victim, not preparing case properly, not supporting the prosecution witness, taking the bribe from defence lawyer client, conspire with defence lawyer and looting the litigants. There may not be direct intension of the all the heroes of the court room but it is prime reason to have negative behavior towards SC/ ST community.

- **Erroneous framing of charges under Act**: This is also, loophole in the system and reason improper implementations of the Atrocity Act that while framing charge police officer or investigating officer lacked the proper framing of charge against the accused. Like even the in the case of grievous crime police officer laid the charges under Atrocity Act, this is totally violation of victims' rights.
- **Witness and victim protection**: The Atrocity may not end up to the final conclusion of the trial because in between victims and witness being harassed by the accused or member of the accused family. Threat to life, harassment to the victim and witness by the accused, accused community, society, defence lawyers, and even by the private lawyers and from SPP. So forced compromised usually resulted because either victim make compromise or victims may force to turn hostile before the court of law. In recent amendments in 2015 to the Atrocity Act, Section 15 A was added in the name of 'Rights of victims and witnesses', wherein it is duty of the State government to make arrangements for the protection of the victims, their dependents, and witnesses against any kind of intimidation or coercion or inducement or violence or threat of violence. The section 15 A clause 7, says that, "the state shall inform the Special Court of Exclusive Special Court about the protection provided to any victim or ….....and such court shall periodically review the protection being offer and pass appropriate orders." But in reality, to maintain this mechanism which is created under this Act, not properly funded by the Center government and State government. Without fund the implementation of

these provisions is like tiger without tooth. Government has amended this Act only to gain political benefit; they did not have intension to implement it.

- **Mechanism under Act**: there are number provision are being created under Atrocity Act, there are several protections also being created. Act is also amended in 2015 with great prospects, amendments minutely were drafted with reality basis, Act create State and district mechanism to supervise the implementations of this Act but in reality, all this machinery and mechanism are not functional or least nominally functional. All this machinery only concentrating on the low conviction rate but they have not intent to find out why there is low convictions rate. Even in the most of the District Special Court is not created, SPP not appointed only on the shoulder of session court of the district, this responsibility was deposited.
- **Victim, Witness protection and Social Boycott:** The success rate of Atrocity cases are very lower rate, the one of the reasons among several reason is that social boycott, if case registered against any upper-class member of the society. In some of the case, whole village make boycott against the victim and it became impossible for the victim to live in same village where he has to get his livelihood in there, he has to purchase household goods in same shop where he usually went. Filing an atrocity case is easy against accused as compared to social boycott, threats, and fear has to face by the victim or his/her dependent.
- **Media**: there is no time, patience, interest to the media in Atrocity matters, media gives more coverage to only those cases or incidents which will increase their TRP. Media also make discrimination in circulating coverage. It seems because only, the caste system is pervasive in all level of society.
- The defence attorney is a crucial player who has significant influence on the outcome of a criminal trial. According to the Advocates Act, they are required to refrain from negotiating or requesting a settlement directly with the victims and from acting improperly toward them and the prosecution's witnesses. As was previously established, the defence attorneys frequently purposefully dragged out the trial process.

Atrocity victims and witnesses characterised these and other impediments as follows:

- Multiple adjournments in atrocity cases are requested by the defence attorney, but the victims and witnesses are never notified of the justifications.
- The defence attorney is permitted to misrepresent the testimony of the victims and witnesses during cross-examination, and neither the SPP nor the judge steps in to stop them. The SPP, who should step in to pursue the facts of the matter and secure a fair trial procedure on behalf of the victim, as well as the defence attorney both broke their obligations in this case.
- In the courtroom, the defence attorney taunts or threatens witnesses and victims in an effort to make them hostile or damage the case.
- The Government of India has made amendments regarding the POA Act but there is no overlook on the part of Financial Memorandum. The Center has relied upon different States for the implementation of the Act according to its convenience. The implementation suggested by the committee requires a huge sum of money which is been not sanctioned by the center to provide all the states for the better implementation.
- There has always been a prevalence of caste biasness in the Special public prosecutors or the judges.
- The absence of special public prosecutors and the judges from the backwards community makes it difficult for the individuals to get access to justice. In India total population of SC/ST ratio is 24.16 and other backward class is 25.84. So total population ration of the backward class is 50% according to the 2011 census, but ratio in judges of the Supreme Court is below 2% and in High Courts ratio, below the 5% and in subordinate court below 14%.
- There have always been a major held back in regards with addressing the issues of 'protection of victims of atrocities act'. It has been amended in 2016 that all the victims of atrocities should be protected from being hostile but it created a gap in recognizing the desire official or the

police authority who will take the responsibility on the in regards with the aspect of the protection. The Act being a Center act puts the responsibility on the States but the states or the center fails to appoint the designated officers.

- Responsibility of protection of victims, survivors, witnesses is provided to the State government thorough the amendments to Atrocity Act but Act fails to laid down the guidelines relating how and which officer will responsible to protect the Witnesses and victims. So, at least Center government shall clarify this issue or the Supreme Court has to specify guidelines relating to victim and witness protection.
- Travel allowance to the witnesses shall be provided near the Court or the Court office shall make arrangement to provide travel allowances in the corridor of Court itself to the witnesses.
- Court employees must be given better resources to respond to claimants' questions about the litigation process and must be discouraged from asking for additional attorney expenses.
- Media shall provide better coverage to the Atrocity incidents and to the Atrocity trials, only then this topic will be discussed more and more among the general masses.
- The legal system should be simplified, and both claimants and attorneys should have access to clear instructions on how to proceed.
- We as researcher observed it and recommend that there should be designated boards of members which will determine the fund flow from the center to the state governments for the implementation of the Atrocity Act. The funds flowing from Center government to State government should be regulated/monitor by Controller general of India, such audit will enable the executive and law members to understand the loopholes in present system and it will help to proper implementation of the Act.
- The researcher proposed that there should be a SC/ST judges in the Atrocity case. The appointment of Special Public Prosecutors and Judges in the Exclusive Special Court shall be given more preference to the SC/ST judges.

An Analysis of the Intersection of the Right to Reputation and Freedom of Speech

Maish Vijayvargiya*

Abstract

The right to reputation is one of the fundamental rights recognized in various constitutions around the world, although it is not explicitly mentioned in the Indian Constitution. This research paper aims to explore how this essential fundamental right is intertwined with other fundamental rights, particularly Article 19 & 21. Over time, various high courts and the Hon'ble Supreme Court have delivered decisions affirming that the right to reputation is essential for individuals to live with social dignity, and any infringement on this right is protected under criminal law, allowing for claims of damages. Section 356 of the Bharatiya Nyaya Sanhita, 2023 (corresponding to Sections 499 and 500 of the Indian Penal Code), imposes criminal liability. This paper also examines the explanations, illustrations, and exceptions related to defamation in detail. Additionally, it discusses important case laws concerning defamation. In conclusion, this paper evaluates the need for a separate defamation act.

Keywords: *Right to reputation, Defamation, Free speech, Freedom of speech, Reasonable restriction*

1. Introduction

The right to reputation is very much enshrined in Part 3 of the Constitution of India. It's not only Article 21 but also various fundamental articles that intersect the right of reputation. Article 14, which talks about the right to equality. So the right to equality is not only the equality as given in the constitution. It can also be interpreted as the right to equality in terms of reputation. Whatever economic class one is, his or her value of reputation must be treated equally. Very often it has been seen that house helpers are losing their jobs because of one's bad experience, and these people are not getting the opportunity to be heard. This is not the case with maids but with everyone who is not income-influenced. In

* Manish Vijayvargiya is a Research Scholar in Ph.D. in Law for NMIMS University, Mumbai

administration, action is also seen in the same way. In various organizations, public and private, it has been seen that no proper disciplinary action is being followed. Most of the time, if any Group D employee is charged. So the inquiry officer without conducting a fair inquiry pronounces his judgement. The whole processor takes the employee's reputation at stake and is involved and faces an unfair disadvantage. In the corporate world to defame someone else's product it is very common that companies write bad reviews about their competitors. The big players are always trying to control the market by using this common and easy way to damage or even shut down the small ones. Corporates are no other exceptions; they take undue advantage of staff to terminate their services without any valid reason. Terminating from the job is a big stigma and it is difficult to get them a new job but their reputation is on the stack. When they go for the new job interview one question, they hesitate to answer why they left their last job.

2. Fundamental Right and Protection in regards to Right to reputation

Article 15 prohibits discrimination on certain grounds. However, when it comes to reputation, it is difficult to protect everyone against defamation. In a decision by the honourable Supreme Court, it was clearly mentioned that the right to reputation is part of Article 21 of the Constitution. Article 21 is not only limited to its headings, which include protection against life and liberty, but over time, various rights have been added, such as the right to a clean environment, the right to sleep, the right to shelter, the right to health, and many others. Various thinkers and authors have said, in a direct or indirect way, that if a man loses his wealth, he can always earn it back; if a man loses his health, there are chances to recover it. But if a man loses his reputation, it is the most difficult to regain. Hence, it is difficult to separate the right to reputation from the right to life; both rights are intermingled.

After the 86th Amendment, the right to education has explicitly become a fundamental right, with a separate section, Article 21A, in the Constitution of India. Our education system is part of the concurrent list, which means it is the duty of both the central and state governments to make laws regarding education and set regulations. In India, the central government has its own boards like CBSE, ICSE, and various central

universities and Institutes of National Importance. State governments have their own state education boards and state universities. The entire education system generally operates under their respective governing bodies. It is high time to include a chapter on how to respect others, which would be a true addition to the right to education as a fundamental right, and one of the most important lessons to be taught to our younger generations.

Articles 22 to 28 provide the Right to Freedom of Religion. Every religion teaches love for mankind and humanity. The Constitution of India allows every religion to live a peaceful life, respect elders, and love everyone. This concept is inherently built into religions as they teach individuals how to behave in society, including respecting everyone. To maintain this beautiful common feature, we have provided space for the right to freedom of religion in our Constitution. It indirectly advocates for the right to reputation.

Article 32, the right to constitutional remedies[1], always allows us to go to the Hon'ble Supreme Court or High Court in case of violation of fundamental rights. As discussed earlier, the right to reputation is a fundamental right enshrined in various fundamental rights. Hence, one can directly approach the Hon'ble High Court or Supreme Court for the violation of the right to reputation. One can file a writ that pertains to the right to reputation.

Article 21, as mentioned, talks about liberty, and personal liberty can only be achieved if everyone is free to live without fear of damage to their reputation without any reason.

Recently, a film actress Rashmika Mandanna's deepfake video came into the limelight, and the court took cognizance of the same. How can someone show such content without anyone's consent? This is clearly an infringement of personal liberty and a violation of Article 21 of the Constitution of India. In ancient times, when someone was involved in such wrongful acts, some people used to take their own lives because they couldn't handle social humiliation. Not only did the entire family have to face such allegations, but future generations also had to endure such torture.

1 Article 32 of the Constitution of India

3. Important Cases in regards to Right to reputation

Social media has various advantages, but at the same time, there are many negative aspects that automatically come with it. Sending or forwarding messages takes only 3-5 seconds. If anything wrong is forwarded, it is extremely difficult to erase it for everyone if you are not the admin. A very famous case is PepsiCo vs. Ashok Kumar. A wrong video was circulated on various social media platforms claiming that their product contained plastic and could burn. However, PepsiCo argued that their product contained some cereal, which also burns. Eventually, the Hon'ble High Court ordered the removal of all defamatory content.

3.1 Arun Jaitley vs. Arvind Kejriwal[2]

In the Arun Jaitley vs. Arvind Kejriwal case, an issue arose regarding who bears the cost when someone files a defamation case. Arvind Kejriwal, then the Chief Minister of Delhi, filed a defamation case, but his lawyer's fee was paid to the most expensive and senior advocate, Ram Jethmalani. Kejriwal claimed that he was defamed in his capacity as Chief Minister of Delhi, so the fee should be paid by the Delhi government. While the matter was sub judice and court hearings were ongoing, Arvind Kejriwal issued an unconditional apology and settled the case. However, the question remains unanswered: can a public servant use public funds for protection against personal defamation? Where is the line drawn, and what falls inside or outside that boundary?

3.2 Rajagopal v. State of Tamil Nadu[3]

In Rajagopal v. State of Tamil Nadu, it was decided that anticipatory defamation is not allowed. In this case, Mr. Rajagopal was writing his autobiography, and the Government of Tamil Nadu tried to restrain him from doing so, fearing that the content would defame various government officials. To prevent anticipatory defamation, they went to court. However, in India, the concept of anticipatory defamation does not exist. The court rejected the claim of the State of Tamil Nadu, stating that anticipatory defamation is an undefined term. If it were allowed, every second person would go to court out of fear that their reputation would be

2 Arun Jaitley v. Arvind Kejriwal (2015) 10 SCC 1. Available at: https://main.sci.gov.in/judgment/144500 (Accessed: 5 September 2024).

3 Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632. Available at: https://main.sci.gov.in/judgment/176992 (Accessed: 12 September 2024).

at stake after a publication or presentation. This would create numerous problems, leading to unnecessary legal battles driven by mere fear of potential statements.

Therefore, the Rajagopal case is considered a landmark case in defamation law, as it protects freedom of speech. The case also established that freedom of speech is a fundamental right, and defamation only applies when someone crosses reasonable restrictions. Fundamental rights always take precedence, and any violation, curtailment, or suppression of them is considered bad in law.

3.3 Subramanian Swamy v. Union of India (2016)[4]

In the Subramanian Swamy v. Union of India (2016) case, the constitutional validity of Sections 499 and 500 of the Indian Penal Code (IPC) was challenged. As per the IPC, defamation is a criminal offense, and anyone who defames another is liable for criminal prosecution. The question raised before the court was that on one hand, the Constitution provides freedom of speech, and on the other, the defamation provision, which imposes criminal liability, allegedly violates the fundamental right guaranteed to every citizen by the Constitution itself. Therefore, it was argued that Sections 499 and 500 should be declared unconstitutional.

However, the other side argued that freedom of speech is not an absolute right and comes with reasonable restrictions. If everyone were allowed to say anything against anyone freely, it would directly violate this article. We live in a modern society where criticism is allowed, but criticism meant to defame someone without any valid reason should not be permitted. We cannot expect a perfect society where, without laws or reasonable restrictions, everyone will behave in a disciplined manner. Morality, understanding, and reactions are variable for individuals. Some people are very aggressive and retaliate quickly, while others, who have more control over their behavior, wait to analyze situations and only react after fully understanding them.

The court heard the arguments and concluded that Sections 499 and 500 cannot be declared unconstitutional and that they have constitutional validity. It was also observed that the Emergency provisions, as given in

4 Subramanian Swamy v. Union of India, (2016) 7 SCC 221, Link: https://main.sci.gov.in/judgment/301048

Part XVIII of the Constitution, include Section 358, which allows the suspension of the provisions of Article 19 during emergencies. This highlights the sensitive nature of Article 19. If free speech were allowed without restriction during emergencies, it could worsen the situation. Thus, the court upheld the constitutional validity of Sections 499 and 500 of the IPC.

3.4 Tata Sons Ltd. v. Greenpeace India (2011) [5]

In this case, what constitutes defamation was described, and whether parody and satire fall under the right to free speech was examined. The question raised was whether parody and satire are protected under the freedom of speech. Tata Sons was planning to start a new port in Orissa. This port was designed to provide direct access to the Bay of Bengal, which was expected to give a significant boost to the Indian economy, especially the eastern coast, providing a direct connection to the Indian Ocean. However, as we are in an era of sustainable growth, development must not compromise the protection of our biosphere. For such projects, an Environmental Impact Assessment (EIA) is typically conducted. There is a proper process for conducting an Environmental Impact Assessment, where all concerned parties are consulted, their views taken, and a thorough analysis is performed. At the same time, all environmental laws are considered. In this case, an organization called Greenpeace India strongly objected to Tata's port project in Orissa. Their main reason for objection was the potential disturbance to marine life, particularly the turtles for which the Orissa coast is famous. They claimed that constructing the port would harm these beautiful creatures and impact their habitat. To protest, Greenpeace decided to create parody and satire, which soon became viral. They published a parody game titled *"Turtle vs Tata."* Their claim was that Tata, being a large company, had bypassed many procedures. Tata found the *"Turtle vs Tata"* parody to be defamatory to their company's image, leading them to file a defamation suit against Greenpeace India. The court heard both parties and concluded that parody and satire are protected under freedom of speech with

5 Tata Sons Ltd. v. Greenpeace India (2011) 14 SCC 150. Available at: https://main.sci.gov.in/judgment/276391 (Accessed: 23 September 2024).

reasonable restrictions. However, it was also emphasized that such parody and satire should not spread false information.

3.5 Khushwant Singh v. Maneka Gandhi case (2002)[6]

In the *Khushwant Singh v. Maneka Gandhi* case (2002), this case is considered one of the landmark cases in defamation. Khushwant Singh was a well-known writer, and whatever he wrote directly impacted people's way of thinking and ideology. He announced that he was planning to write a book that would reveal the inner life of Maneka Gandhi, who is a Member of Parliament and, of course, the daughter-in-law of former Prime Minister of India, Smt. Indira Gandhi. She had her own ideology and was fighting numerous legal battles against her mother-in-law on various issues. Apart from that, there were some other personal matters in her life.

Khushwant Singh was writing about her personal life in his book *Truth, Love & a Little Malice*.

Maneka Gandhi went to court and sought an injunction, stating in her submission that the content of his book would be defamatory and that she must be granted an injunction. However, the court refused to grant the injunction, stating that a remedy could only be considered once the book was published.

3.6 Ram Jethmalani v. Subramanian Swamy (1995) [7]

In this well-known case, economist and former professor of IIT and Member of Parliament Subramanian Swamy made allegations against the country's then most famous lawyer, Ram Jethmalani, claiming that he took money to defend corrupt politicians. This was a direct challenge to someone's profession and was made without any valid proof. Mr. Swamy stated this accusation publicly. Mr. Jethmalani took this matter to court, and the court heard both sides of the arguments. Mr. Swamy claimed that this was protected under freedom of speech. However, as mentioned in Article 19, freedom of speech comes with reasonable restrictions. The final outcome of the case was that Mr. Swamy was fined for making a

6 Khushwant Singh v. Maneka Gandhi (2002) 6 SCC 1. Available at: https://main.sci.gov.in/judgment/267818 (Accessed: 29 September 2024).

7 Ram Jethmalani v. Subramanian Swamy (1995) 5 SCC 1. Available at: https://main.sci.gov.in/judgment/292272 (Accessed: 30 September 2024).

defamatory statement. This is a perfect example of how someone's rights can be protected. The beauty of the Constitution is that it balances the granting of rights.

3.7 Kangana Ranaut Emergency Film Case, 2024 (Jabalpur Sikh Sangat v. Union of India)

Recently, in September 2024, Kangana Ranaut acted in and produced the film Emergency, which entered into controversy. After the release of the movie's trailer, it caused an uproar across the country. Several Sikh community associations raised concerns and called for a ban on the movie, as they felt that the Sikh community was portrayed in an aggressive and offensive manner. Various petitions were filed in this regard in multiple courts. The Punjab & Haryana High Court gave its observation, but the Indore bench of the Madhya Pradesh High Court, after hearing the arguments, issued notices to the Government of India and the Central Board of Film Certification (CBFC). The most important question raised by the court was whether the film had received CBFC certification or not. The court noted that they could only pass an order regarding the issue once the film was ready for release and had obtained clearance from the CBFC. Once again, it was established that defamation only comes into play once content is published or enters the public domain. The court further cited that prior to certification, the CBFC advises on necessary cuts to ensure the film complies with the Cinematograph Act, 1952. This case has also become a perfect example of the balance between Article 19 of the Constitution of India, which protects certain rights regarding freedom of speech, and defamation.

4. Section 356 of the Bharatiya Nyaya Sanhita, 2023[8]

Section 356 of the Bharatiya Nyaya Sanhita, 2023, gives the protection against the person, who defames and imposes the criminal liability to the person who does it. Any one defamation of a character has its basic principles in the greater and more conclusive right to freedom of expression, which in our time, when means of communicating are overwhelming, takes custodial functions. Defamation is quarterbacked around in some specific discussions, but it is not limited to history only — if at all – it is more a survival within. Appreciating the finer details of

8 Government of India. (2023) *Bharatiya Nyaya Sanhita, 2023, Section 356*. Available at: https://www.indiacode.nic.in (Accessed: 1 October 2024).

defamation provisions particularly in Section 356 of the Bharatiya Nyaya Sanhita, 2023 is key when addressing this complicated issue. Defamation occurs when a person makes or publishes a statement about another person which was designed for the purpose which would injure that other person's reputation. According to Section 356 however, this can be in the form of a speech, writing or graphic expression of intent and these statements are intended to injure or are known to injure, subjective diphenol. This is even more limiting on legal research because sentimental implications affect more than just the individual being defamed and include the relatives of that person even if they are dead. Let's assume Person A tells Person B "Z is an honest man; he never stole B's watch," when in fact A wants to convey that Z stole it. Statement could definitely fall within the definition of defamation if none of the exceptions encompassed are met

4.1 Explanation, Exceptions & Illustrations to Section 356, BNS, 2023

Despite the balance that defamation law tries to achieve between freedom of expression and protection of the reputation, defamation law does include a number of defences. In particular, defamation does not occur when defamatory meanings, if any, are untrue but which have some public benefit. Same is the case with the opinions with respect to the exacerbated conduct of public officials, if such opinions are formed sincerely.

A's opinion in relation to Z's conduct is expressed in the course of proceedings held in public. For instance, A observes the conduct of Z, and says, "In my view Z acted in a questionable manner," which may be lawfully permissible. However, if A should declare in court that, "Z is a thief," A has to be prepared to furnish evidence to prove the assertion.

The Importance of Context Inquiries determine whether the statement is defamatory or not. Courts and court documents as long as they are at least substantially true are able to avoid defamation liability. This is important in order to ensure that the justice system and free speech can go hand in hand without fear of unjust retaliation. The Impact of Defamation In other words, the offense of defamation is regarded as serious in law. Anyone found guilty of defamation of another person in this case is liable to two years in imprisonment, fine, or community hour

services. There are also other forms of offences, "furthermore, the distribution of libellous materials, whether in traditional pamphlets or on the Internet, is no less punished." This brings to attention the fact that our communications should be exercised with a lot of care. A Courtesy outreach than One Awareness The global economy in which we live in now requires if not calls for some level of awareness on defamation law. Freedom of expression must not include the free and unrestrained destruction of another person's honor. This is why it is very important to prepare yourself for engaging in these types of talks. Section 356 of the Bharatiya Nyaya Sanhita argues how the right to a person's name and reputation goes systemically with the right to free speech. It is not only important from the point of view of law but also very much required from the point of societal view—people understand these ins and outs, thereby contributing to a responsible culture.

5. Conclusion

Although both criminal and civil remedies are available for the right to reputation, we need to overhaul the system and work on educating everyone to behave responsibly on social media. Our Constitution provides Article 19, which protects freedom of speech; however, this is not an absolute right and comes with reasonable restrictions. It is imperative that our Parliament pass specific legislation, known as the Defamation Act, to address this issue. In a democracy, everyone should be individually protected regarding their right to reputation.

Understanding of Acid Attack in India and Bangladesh Through the Lens of Gender Based Violence

Prof Dr Shaveta Gagneja*

Dhruv Kaushik**

Abstract

Acid violence is a reflection of society's gender inequality and discrimination. Acid attacks are frequently directed at women because they violate gender norms that relegate women to subordinate roles. Indeed, a sizable proportion of attacks in India occur as a result of a woman exercising decision-making authority by declining a suitor's marriage or love proposal. Acid attackers aim for a woman's face in an attempt to destroy one of her most prized assets—her beauty. Acid attacks rarely kill, but they leave lasting scars on victims' bodies, minds, and communities. The authors of this article will analyse the issue of gendered violence in India and Bangladesh by contextualising the acid attack discourse and counter-narratives. Additionally, victims of acid attacks frequently lack legal recourse, medical and psychological assistance, and financial resources. The article will examine contemporary laws governing acid attacks in order to get a better understanding of the measures that can be taken to curb them.

Key words: *Acid Attack, Gendered Violence, Inequality, Violation, Victim, Woman*

1. Introduction

Bina Akhtar's story is very simple and encapsulates the very core issues with acid attacks in South-Asia. The cheaply available acid and the deeply insecure and patriarchal society which fuels violent crimes against

* Director ,School of Law , Fairfield Institute of Management and Technology Affiliated to GGSIPU New Delhi shavetagagneja78@gmail.com

** Dhruv Kushik , Student of LLM Central European University, Vienna dhruvkaushik61@gmail.com

women who “step out of line”. They are met with an inhuman crime that we call acid attacks, which leave the victim scarred for life. If the physical and mental trauma of such a violent crime is not enough the stigma that one has to live with for the rest of their lives piles on an endless misery with a simple act of splashing acid by a jealous and vengeful man. One such instance was that of Bina Akhter, age 18, who resided on the outskirts of Bangladesh's capital city of Dhaka. She frequently overheard a passer-by asking, "Why bother travelling to the zoo when you can see a monkey right here?" as someone who had survived an acid assault. In the same hamlet, where a young man named Dano developed a crush on Bina's cousin Mukti, the tragic story of her injury began, since Dano's devotion was never returned. He tried to charm Mukti by giving her flowers and pricey jewellery. "Mukti refused to accept flowers from a man she hardly knew," a messenger said when the suitor was told his gifts had been rejected. On the evening of August 26, 1996, Bina and Mukti were sleeping together. In order to confront Bina's cousin, Dano entered the room. When Bina felt what she initially believed to be hot water splashed into her eyes, she jumped in front of her cousin, who was now awake and standing. However, what Dano actually hurled at Bina was sulfuric acid, which melted her eyeballs to the sockets and left little of her face. Her lips and nose fell off, and one of her ears was severely deformed. She was only fifteen at the time, but her life would soon be irrevocably altered. Because sulfuric acid is readily available and inexpensive, unhappy spouses or rejected suitors frequently use it for destructive purposes, hence Bina's attack is neither unusual nor particularly startling to the people in her village. Such attacks frequently involve caustic acid, which is found in automobile batteries and can be purchased for as low as fifty cents per litre. The acid sellers who sell it in car garages claim that it is so potent that it can dissolve iron and eat holes in wood.[1]

1 Taylor, Lisa M., "Saving Face: Acid Attack Laws After the UN Convention on the Elimination of All Forms of Discrimination Against Women," 29 *Georgia Journal of International and Comparative Law* (2000)

In this paper we will look at some practical and normative discussions around the root causes of acid attacks in primarily India and Bangladesh. We will analyse the after-effects of such attacks to emphasise the sheer cruelty of a crime which is unparalleled to any other for violent crime. We will finally attempt to analyse the laws and jurisprudence around this crime in both India and Bangladesh and evaluate the manner in which this evil can be dealt with. It is no secret that the number of acid attacks in India have increased in recent years, despite some laws and policy level changes in the early years of this century. The case of Laxmi v. Union of India[2], the state compensation schemes, the state poison possession and sale rules, and the Criminal Amendment Act of 2013 all fell flat against the rise of cases post 2016. The following graph illustrates this trend, as seen through the National Crime Records Bureau (NCRB) data.[3] It is interesting to note that according to the Acid Survivors Trust International the data provided by NCRB is skewed and the real number is close to 1000.[4]

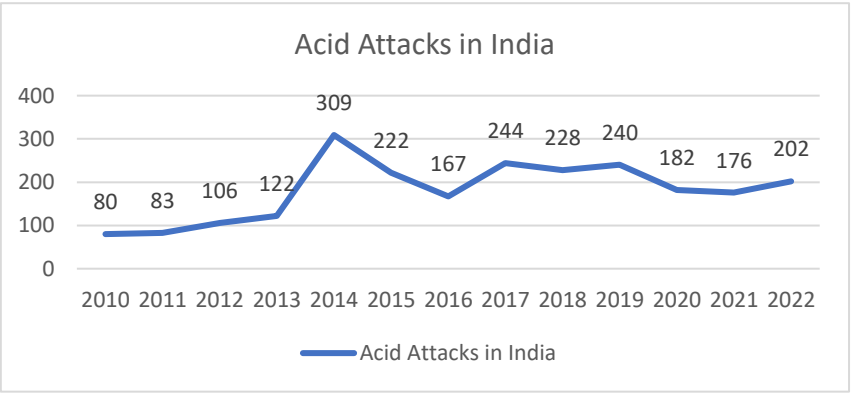

Figure 1.1 – Number of Acid Attacks in India

Source: NCRB Data as provided by the National Crime Record Bureau of India; Vidhik Kumar's 'Acid Attacks in India: A Socio-legal Report

2 Laxmi v. Union of India, (2014) 4 SCC 427

3 Vidhik Kumar "Acid Attacks in India: A Socio-Legal Report," 6 *Dignity: A Journal of Analysis of Exploitation and Violence* 1-2 (2021).

4 Ibid. p. 2

2. Possible Causes of Acid Attacks

The case study of Bangladesh is a good example to understand the context in which acid attacks have emerged as a modern form of gendered violence. This emphasis is crucial because Bangladesh is one country in the sub-continent which saw an unprecedented growth in acid related violence against women and was able to control it to some extent with strict laws and enforcement of the same.

The genesis of acid attacks in South-Asia has very similar roots which Elora Halim Choudhary has alluded to with utmost precision. She emphasises that behind the complexities of acid attacks, various socio-economic, political, and historical forces are at play. These forces put a particular group in the most vulnerable position when it comes to acid related violence. Acid violence is directly linked to broader structural societal inequalities stemming from poverty and patriarchy.[5] In Bangladesh, Sukhibanu's story really illustrates and encapsulates our further discussions and emphasises a very simple but emphatic point that Chowdhury has alluded to.

Sukhibanu was an orphan, raised by her elder siblings. She did not want to continue being a burden on them and thus decided to move to Dhaka to make a living for herself. She met 'Apa' in Dhaka who helped her get a job in a garment factory, but the catch here is that Apa would keep all her earnings in exchange for food and shelter. Later, Apa arranged her marriage to a day labourer, but Sukhibanu later found that this man already had a wife in his village, with whom he also had two children. Sukhbani ended up having to take care of her own daughter and the other two children. She continued working in the garment factory and now her earnings were controlled by her father-in-law. One constant in her life was the verbal abuse and beatings by her in-laws, especially her husband. She was often pressured to bring home money from her brothers because her earnings from the factory were not enough. When she moved back with

5 Halim Elora Chowdhury, "Rethinking patriarchy, culture and masculinity: transnational narratives of gender violence and human rights advocacy. 16 " *Journal of International Women's Studies* 98-114. (2015)

her brothers, she was forcefully taken by husband despite her brothers' objections. In this matter Sukhbani actually responded to her brothers' concerns by saying, *"He is my husband. If I do anything wrong, he has the right to punish me."*

Soon enough, Sukhbani's husband brought his first wife home and when Sukhbani and her brother objected, the father-in-law responded by saying, *"This is what is called punishment for not bringing money from your father's house. From now on, you two wives will have to be in this house together. You both have to work in the garments factory. It will be judged who is good, who is bad, and who can survive the test."*

After years of abuse, she declared that she would give all her earnings to her husband but she would not 'provide any services as a wife'. Sukhbani started living with her landlord's mother and denied herself to her husband. This is when one fateful night, the husband poured acid on her face while she was sleeping.

Goswami and Handa are able to pinpoint Chowdhary's approach into specific causes which are found to be common across different cases of acid attacks, especially in the South-Asia region.[6]

First and foremost is the male domineering society, which has historically imbibed one idea in the minds of most men, i.e., women are inferior to men and oftentimes to be treated as their own property. A woman starts her life as the property of her father and upon marriage her husband. Perhaps, this implicit dynamic has not truly left society, which is why rejected marriage proposals are one of the leading causes of acid attacks. Women refusing to enter into a conjugal relationship with a man who approaches her, is met with violent crimes like acid attacks. Not just refusal of a marital offer, even a refusal of relationship offers or even withdrawal from a relationship is often met with the same consequence. Men are not used to hearing a 'no' from women and their hurt turns vile and vengeful and eventually results in one of the most gruesome crimes one can fathom. It is key to understand that these vengeful crimes are pre-

6 Shivani Goswami, and Rakesh Kumar Handa. "The peril of acid attacks in India and susceptibility of women." 3 *Journal of Victimology and Victim Justice* 72-92 (2020).

meditated and committed with one very specific motive, i.e., to disfigure the woman who rejected their advances. The perpetrator only wishes to destroy the physical appearance of the woman who rejected him so that nobody else would marry her.

There have also been examples where acid attacks came from within the family, in order to 'protect the honour' of the family. Peer jealousy is also pointed as a reason for acid attacks by Goswami and Handa. In the business, service, or education sector if a man sees another woman who is excelling and is unable to accept that. Out of pure jealousy, he resorts to throwing acid on her face to hamper her progress.[7] These causes stem from the historically perpetuated inequalities in a male dominated society, but one cause remains consistent in the steep rise of acid related violence in South-Asia. This is the cheap and easy availability of acidic substances which can be used as a deadly weapon. Nitric, Sulphuric and Hydrochloric Acids are often found in the market and used for a variety of purposes, mostly commonly for cleaning toilets etc. Their cheap and easy availability has made it a very convenient weapon for a perpetrator to use against women in any type of familial or other disputes. The easy and cheap availability also meant that with time acid was used against men too in a variety of disputes.

We must not stray from the fact that acid attacks are primarily still a gender specific crime committed against women. The lopsided unequal society which historically maintained an inferior position for women has sustained for centuries and it is true for today as well. This does not happen without active ignorance of women's rights and relegation of their rights as lesser priorities of the state. In this context we must return to Chowdhary's three causes of acid violence and discuss the socio-economic and political factors. The gender specific roles insisted in society preferred women to be homemakers and men to be bread winners. Not only were women denied property rights, but they were also actively prevented from taking up jobs which would enhance their economic independence. Naturally, women were economically dependent on the

7 Ibid. p. 75-76

patriarchs of the family and never really made roads to have economic equality in society. This economic inequality has been at the heart of sustaining women's inferior position and maintaining the presence of a male domineering society. With less economic independence, women have been relegated to a position of no influence over policy decisions for the majority of modern history. The political imbalance is palpable as a direct consequence of the social and economic

3. Ramification of Acid Attacks: India And Bangladesh Scenario

The consequences of acid violence are grave both in the short term and the long term. There is ample research in the medical field, outlining the dire impact of acid violence on the human body. The most commonly used 'acid' in such violence can vary between the likes of Nitric, Hydrochloric and Sulphuric Acids. These are highly corrosive substances which are most commonly used in cleaning toilets due to their cheap and easy availability. When these substances come into contact with the human skin, they can rapidly burn and corrode skin tissues. The corrosive nature of the acid causes visible death/necrosis of skin tissues. These acids are so corrosive that they can even lead to corrosion of metal. In cases of acid attacks, they lead to melting of the flesh and sometimes even bones. This causes an unimaginable amount of pain to the victim. If the acid stays in contact longer, it can continue to penetrate deeper into the skin and may even eventually damage organs it comes into contact with. The acid penetrates into the skin rapidly and thus warrants quickly washing off the affected area in order to prevent excessive damage. This has to be followed by proper medical care as soon as possible.[8]

First aid remains extremely crucial in what the short term and long-term effects of an acid attack can be like. It is critical to wash the acid off the victim's body for at least 60 minutes. The duration of contact of the acid with the skin determines the extent of damage. There have been situations when wrong first aid has led to irreparable damage to a victim's

8 Law Commission of India, "226th Report on The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code, and a law for Compensation for Survivors of Crime" (2008)

body. Washing off the acid is of utmost importance, but there have been cases where a victim's burns were treated like any other injury and the affected areas were bandaged up. This left the acid in contact with the body for a very long time, which ended up affecting skin tissues and even led to organ damage.

Medical Consequences

It is most common for acid attacks perpetrators to target the face and upper half of the body of the victim. This feature of acid attacks is tied into the gender issues at the root of most acid attacks, which we will discuss in detail later in this paper. For now, it would be prudent to understand the medical consequences of acid attacks on the face and other parts of the body, especially in the long term. The 226th Law Commission Report documented some of the most common consequences of acid attacks on various parts of the face:[9]

- When acid is thrown on a person's face, it can blind the victim by coming into direct contact with the eyes. Even the acid vapours can lead to blinding the victim. There are long term issues that can adversely affect the eyes of a victim. Even during treatment, the victim remains susceptible to damage in her eyes. It is very common for eyelids to be burned off eventually leading to various complications.
- The acid can start eating into the skin on the face including cheeks and the chin. The longer it stays in contact, it can even start to dissolve the skin tissues.
- If the acid comes in contact with the ears, the cartilage can get deformed or destroyed completely and cause irreparable damage. Depending on the duration and extent of contact of the acid, deafness can occur immediately or a while after.
- Often the acid comes into contact with the skull and forehead which can lead to skin deformity and scarring. Hair loss due to burning is very common too.

9 Ibid. p. 10-11

- Lips and mouth are affected adversely. Shrinking and narrowing is most common. Lips especially, can be destroyed leading to further complications like impairment of movement, exposing teeth etc.
- The neck is often severely affected with damage to the skin and can even result in restricted movement and other complications. The chest region is also often targeted, which results in damage to the breasts. Breathing issues can occur because of inhalation of vapours, but more importantly a bigger risk is damage to the throat and airway.
- There is an important issue of infections which warrants mention. Infections like septicaemia and gangrene or other infections due to internal injuries can result in further complications and even death.[10]
- As discussed before, first aid and the emergency treatment are of utmost importance in all acid attack cases. If administered properly, it can potentially save the patient from any adverse long-term issues.
- The long-term treatment includes various procedures which can take years to complete. First, and most important step towards recovery is surgery. Various types of surgeries are involved in treating a victim. The most complex and costly part of the treatment involves skin grafting and other forms of skin reconstruction surgeries.
- The psychological scars are equally important to treat. All victims have to accept the disfigurement of their face which can be a very mentally difficult and tedious process. Gilli Paveley and Andrew Kirtley point to issues like self-hate, social detachment, depression, suicidal tendencies etc.

Socio-Economic Consequences

Gilli Paveley and Andrew Kirtley have brought notice to the two most common consequences an acid attack survivor has to face when she steps back into society after a horrific crime. First, we have familial and marital disruption and second, we have stigmatisation by society.

Before we proceed further, it would be important to understand that most acid attack cases have a similar background of marriage related

10 Kerry Mcbroom, Salina Wilson (eds.), *Burning Injustice* 18 (HRLN Human Rights Law Network, Delhi 2009)

issues. In many cases, young girls who reject the advances of a male love interest become a target in acid violence. Often, even after marriage, a rebellious bride is met with the same fate. Such situations leading up to acid violence can have major implications on the life of a victim after an attack. For a young woman who is scarred in such a heinous crime, the prospects of marriage are damaged. In fact, for the perpetrator, this is usually the motive behind acid violence, i.e., to scar and disfigure the facial appearance of a woman.

In cases pertaining to ongoing marriage disputes, it is common for the husband and his side of the family to use acid violence to threaten the wife in varied matters, but mostly related to dowry. For women attacked by their husband, or her in-laws the social consequences and stigmatisation is even more dire. The perception in society often is that acid violence is used to shame and punish a woman who has been adulterous.

Stigmatisation is a direct consequence of acid violence and is mostly tied into the changed appearance of a victim. This leads to a reduced social life for the victim. It is common for victims to be shunned in society and overlooked in employment opportunities simply because of their appearance.

The stigma overarches into being a major obstacle in providing victims with financial independence. Employment opportunities are drastically reduced for victims of acid violence. We must also acknowledge the background that precedes an acid attack, which affects the financial status of a survivor. The familial disputes which cause acid attacks often lead to the survivor being banished from both her paternal and maternal homes. In many cases, when the victim is not employed or has any personal sources of income, she is stranded with no means to tend to her basic needs. In situations, where she has some support from her family members, it becomes difficult to maintain her since the treatment costs are very high and they cannot be avoided. These costs become a serious burden on a victim belonging to any class of society. But it is life altering for those who belong to a lower stratum of the socio-economic belt. More often than not, there is little relief provided by the government

and the survivor is all alone in her battle to achieve some level of normalcy.

4. **The Gender Aspect of This Issue**

There are two important aspects of gender violence we must understand in the context of acid violence. First, acid attacks like other forms of gender based violent crimes cannot be considered 'crimes of passion'. Instead, these are pre-mediated with specific motifs and intent. Acid violence is a more 'opportunistic' and 'retributive' form of violence. Dowry deaths by way of burning a woman alive was rampant and is still prevalent. Similarly, acid violence is well planned and thought out by the perpetrators. In this context it would be important to point out that acid violence cases are tied into gendered roles and how a patriarchal society views their position. Women are at the end of gendered violence and crimes in order to 'put them in their place' or 'in the name of honour'.[11]

The violence against women has a rationale embedded in the power dynamics between them and the patriarchal society around them. Women are expected to behave in a certain manner which conforms to the traditional ways set in stone by the socio-economic and cultural norms around them. These norms have perpetrated an unequal societal structure which leaves them in a weak position economically and also less capable of making their own decisions.

It is important to highlight those economic inequalities which are at the heart of many acid attack cases. These inequalities remain at the root of many issues which precede and succeed an acid attack. Many women are unable to take legal recourse against family members/in-laws who are perpetrators. Other factors like fear of stigma, mistrust in the legal system and also contribute to women not coming forward and fighting against evils.

Acid Attacks are not just a reflection of an unequal and patriarchal society which is lopsided in favour of men. It also exposes the fragile

11 Francis Kuriakose, Neha Mallick, and Deepa Kylasam Iyer. "Acid violence in South Asia: a structural analysis toward transformative justice" 2 *ANTYAJAA: Indian Journal of Women and Social Change* 68 (2017).

masculinity of men who are perpetrators. An obvious example is that of men who approach a love interest and resort to acid violence when they are rejected. Their insecurity which stems from their sense of entitlement towards any and every woman they are interested in reaches a climax in the form of vile acts of violence and the most heinous crime imaginable. They seek to disfigure the woman by throwing acid on her face which, according to society's notions, is the marker of conventional beauty traits. The masculine toxicity of one man and his insecurity takes precedence over a woman's freedom of making social, sexual, and marital choices.

As mentioned before, one of the key reasons for increasing acid attack cases is the cheap and easy availability of acidic substances. Initially, only used as a weapon against rebellious women, by men it has become a weapon in other types of disputes. Recently, men have also been victims of acid attacks. Elora Halim Choudhary gives us the example of Rahman, who was involved in a land related dispute and was at the end of a gruesome acid attack. This was one example where acid was not used by a male abuser to mark/scar and disfigure a woman.[12]

We must also understand that women being at the end of an acid attack is not only about that woman alone. The case of Rupabanu and Chandbanu gives us another insight into how women can be used as a means to punish an entire family. Rupabanu had a cousin who wanted to marry her, but in order to dismiss the advances made by him, Rupabanu's parents fixed her marriage with an NGO worker. Only twenty days after her marriage the vengeful cousin came back to haunt her and splashed acid on her face. Similarly, Chandubanu quelled the approach by Abdul for marriage after herself and her family did not think he was a suitable match. Enraged, Abdul threatened to destroy her face so that no one else would be able to marry her. Eventually, he followed up on his threats by slashing acid on her face.[13]

12 Halim Elora Chowdhury, "Rethinking patriarchy, culture and masculinity: transnational narratives of gender violence and human rights advocacy. 16 " *Journal of International Women's Studies* 98-114. (2015)

13 Ibid. p. 107-108

5. The Laws Related To Acid Attacks In India And Bangladesh

The 226th Law Commission Report

Prior to 2013, the approach of the judiciary towards acid attacks was very dispassionate. This is evident from the case of Lila Devi, who suffered from a gruesome acid attack in 1993. It took the trial court an astonishing 25 years to award a meagre punishment of 2 years to the main accused, while the others were acquitted. Later, this was converted to a fine of INR 5000.[14] There were no laws specific to acid attacks and only certain provisions covered this offence, but their punishments, as evident from Lila Devi's case, were too lenient.

This is mainly because, before the 2013 amendments acid attacks did not fall squarely within any specific provisions of the IPC. Incidents had to be interpreted through sections like Section 326 of the IPC which was most relevant in cases of acid related violence. This section talks about voluntarily causing grievous hurt by using dangerous weapons or means. In the case of Gulab Sahiblal Shaikh v State of Maharashtra[15], the accused, i.e., the victim's brother-in-law had poured acid on the woman while she was holding her two-year-old child in her arms. The woman died owing to her burn injuries and her daughter lost her eyesight after the attack. Eventually, upon conviction a meagre punishment was meted out to the brother-in-law. Under Section 326 of the IPC, he was awarded 5 years of imprisonment apart from a fine of Rs. 2000/-and 3 months of rigorous imprisonment.[16] But, more often than not, a more lenient approach was taken, and acid violence was seen through Sections like 320[17], and 322[18] of the IPC. These sections did not do justice to the gravity of a crime such as acid attacks. This kind of violence leaves a lifelong impact which cannot be undone and requires more serious punishments. The 226th Law

14 Shivani Goswami, and Rakesh Kumar Handa. "The peril of acid attacks in India and susceptibility of women." 3 *Journal of Victimology and Victim Justice 79* (2020) .

15 1998BOMCR(CRI)

16 Law Commission of India, " 226th Report on The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code, and a law for Compensation for Survivors of Crime " (2008)

17 *See* Section 320 of IPC

18 *See* Section 322 of IPC

Commission Report was submitted to the Hon'ble Supreme Court of India in 2009 for its consideration in Writ Petition (Crl.) No. 129 of 2006 by one Laxmi. The subject of the discussion was "The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime." In this report, two significant recommendations were issued, acknowledging the pressing necessity for state intervention to mitigate the alarming rise in acid attack cases in India. At first, the report suggested the inclusion of a provision that was exclusively dedicated to acid assaults. This report therefore suggested that Section 326A be incorporated into the Indian Penal Code. Additionally, suggestions were made regarding the deliberate administration or throwing of acid into another individual. This offense was proposed to be classified as cognizable, non-bailable, triable by court of session, non-compoundable, and minimum imprisonment of five years, extendable to ten years, with a fine. The report also provided recommendations for modifications to the Indian Evidence Act. This report acknowledged the substantial expenses associated with treating injuries sustained in an acid attack and suggested a policy framework that ensures victims receive adequate compensation. It was suggested that the central government enact the "Criminal Injuries Compensation Act ". The provisions of this act would guarantee interim and final compensation to victims of violent crimes, including acid attacks, sexual assault, and rape. The law should also include provisions for compensation for their medical and other expenses associated with rehabilitation, loss of earnings, and other incidents.

Justice Verma Committee Report and the Criminal Amendments

The Verma Committee took notice of acid attacks as a gender specific crime and acknowledged the 226th Law Commission Report in its assessment of acid attacks as a serious problem which needed urgent addressing. Upon the recommendations of the Verma Committee Report the Criminal Law (Amendment) Act, 2013 came into force. Section

326A[19] and 326B[20] were introduced into the Indian Penal Code which covered Acid Attacks and Attempt of Acid Attack respectively. Section 166A and 166B were also introduced in this amendment. These sections levied punishments on public servants for disobeying a direction under law.

Legal Provisions concerning Acid Attacks in New Criminal Laws

To overhaul the criminal justice system three new criminal laws were introduced in July 2024, aiming to enhance the effectiveness of the legal system. *The Bharatiya Nyaya Sanhita*, 2023; *The Bharatiya Nagarik Suraksha Sanhita, 2023*; and *The Bharatiya Sakshya Adhiniyam Act*, *2023* superseding the Indian Penal Code of 1860, Criminal Procedure Code, 1973 and Indian Evidence Act, 1872. The BNS imposes stringent penalties for acid attacks and mandates prompt investigations and trials for offenses against women and children. The fundamental difference between the IPC and the recently established criminal statutes regarding acid violence lies in the procedural enhancements and the introduction of harsher penalties for particular acts. The IPC specified regulations regarding acid assaults, but current legislation aims to enhance legal processes and impose harsher penalties to deter these heinous crimes.

Section 124(1) of BNS addresses cases of grievous harm caused by acid use, requiring intent or knowledge of the harm. The law mandates a minimum imprisonment of 10 years, which can extend to life imprisonment, to deter violent acts. In addition to imprisonment, the offender is liable to pay a fine to cover the victim's medical expenses. Offenses under BNS Section 124(1) are cognizable, allowing police arrest without a warrant, and non-bailable, making bail difficult due to the seriousness of the offense.

Section 124 (2) of BNS The section outlines the penalties for attempting to cause grievous harm by acid, which includes imprisonment for a minimum of 5 years, potentially up to 7 years. The offender must have intended to cause damage, disfigurement, or burns. They are also

19 *See* Section 326A of IPC
20 *See* Section 326B of IPC

liable to a fine, depending on the severity of the offense. These offenses are non-bailable and cognizable, reflecting the gravity of even attempting such an act.

The Law in Bangladesh

The foundation of the problem of acid attacks was that this was a strictly gender-based offence. In Bangladesh, many acid attacks were, in fact, related to gender roles associated with women. Attacks would occur if a woman raised her voice or attempted to make decisions for her family. If ladies rejected the marriage proposal, there would be attacks. At the heart of such attacks were issues like jealousy, resentment, hatred, and vengeance.

Zafreen's research analysis of 90 victims conducted in Bangladesh between January 2000 and June 2005 indicated that roughly 56% of the attacks were committed by rejected suitors. South-east Asia saw a lot of acid attacks, with Bangladesh experiencing the worst of all of them. Around 3,000 acid attack victims were documented in Bangladesh between 1999 and 2011, as per the Acid Survivors Foundation (ASF) Bangladesh.[21] The figures recorded from Bangladesh were far higher than those from other nations like Afghanistan and India, which experience somewhat comparable core causes for the ongoing issue.

The following table shows the number of incidents in Bangladesh.

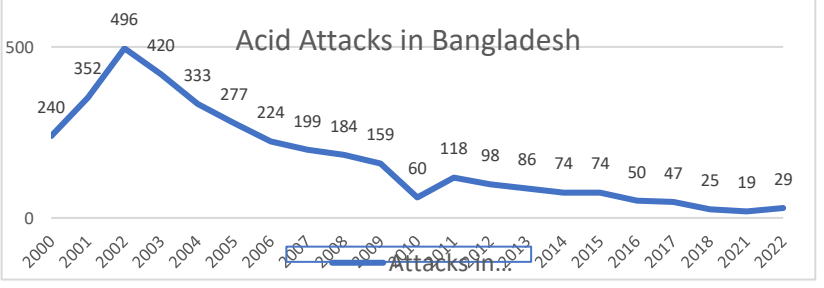

Figure 1.2 – Number of Acid Attacks in Bangladesh

21 F Zafreen, "Socio-demographic characteristics of acid victims in Bangladesh" 6 *Journal of Armed Forces Medical College, Bangladesh* (2010).

Source: Annual Reports of Acid Survivors Foundation

A tight legal framework was deemed necessary to stop the country's escalating acid attack rate. Two important pieces of legislation, the Acid Offence Control Act and the Acid Control Act (ACA), both passed in 2002, provided the answer. The graph shows that the number of reported instances did decline over time. These two actions, along with an expedited information campaign, were successful in lowering the figures. Other legislative initiatives to address this problem were made, however they had little influence. The penalty for acid attacks was increased in 1984. In that year, Bangladesh added a new section to its penal code that empowered judges to execute a victim if she had been rendered permanently blind or disfigured on the head or face. However, the frequency of acid assaults reported in Bangladesh increased until 2002 even after the death sentence was implemented for acid violence in 1984.[22]

'The Prevention of Oppression against Women and Children Act' of 2000 was a first in that it listed specific instances of violence against women and placed focus on the "punishment of offences committed with use of acidic substance," such as acid assaults. As the frequency of acid assaults in the nation continued to rise rapidly, the measure did not show to be successful. In an attempt to have a deterrent effect on the populus, the Acid Offence Control Act[23] brought in stricter and more severe punishment for acid attacks. Some of its key provisions are as follows:

i) Punishment for causing death by an acid attack, the perpetrator could be sentenced to death or rigorous imprisonment for life in addition to a fine not exceeding one lac taxa

ii) Punishment for causing hurt was divided into two sub categories:

- eye sight or hearing power is lost fully or partially or face, breast or sexual organ is defaced or destroyed, such person shall be punished with death or rigorous imprisonment for life and in addition to that shall also be liable to fine not exceeding one lac taka;

22 Ibid. p. 23

23 The Acid Offence Control Act, 2002. (Act II of 2002). The Parliament of Bangladesh.

- any other organ, ligament or part of the body is deformed or destroyed or any part of the body is injured, such person shall be punished with rigorous imprisonment for not more than fourteen years but not less than seven years and in addition to that shall be liable to fine not exceeding fifty thousand taka.

iii) Anyone who attempts to throw acid shall be punished with rigorous imprisonment for not more than seven years but not less than three years and in addition to that shall also be liable to fine not exceeding fifty thousand taka, though for his/her such activities the person is not affected physically, mentally or in any other way.

iv) Punishment for abetment in an offence committed under this act would amount to imprisonment provided for committing or attempting to commit the offence.

v) A provision has been made for punishment for lodging false reports. It states that if any person lodged a complaint against another person under this act knowing that there is no proper and lawful reason to lodge any case or complaint under any Section of this Act. Punishment was set at a maximum 7 years of rigorous imprisonment in addition to a fine.

Considering the immense costs involved with the after effects of acid attacks, certain provisions were enacted to provide a procedure for the recovery of a fine or compensation. To realise the fine or compensation, provision has been made for transfer of properties of the convict to the person affected or the heirs of the victim in an event of her death. If a fine is imposed under this act, provisions have been made for effective realization of the same. The Tribunal may give direction to the collector of the concerned district to attach and sell by auction or without attachment to sell by auction directly enlisting the movable or immovable property of the accused and to deposit the sold out money to the Tribunal who would take steps to give the money to the affected. (The Tribunal mentioned here refers to the Tribunal constituted under this act which would exercise special judicial powers in cases related to Acid Attacks and ensure smooth and effective investigation in such cases).

VII) Additionally, A need for more accountable and effective processing was felt and thus provisions were made for the investigation process. Furthermore, the Acid Offence Tribunal was created specifically for acid violence cases, and provisions were made under Section 23 of the act. Tribunals having local jurisdiction would be established through an official government notification. These tribunals shall be known as the Acid Offense Control Tribunal. Each Tribunal shall consist of one judge from the District Judges or Session Judges. The Tribunal has been given the power to try other offences committed in relation and connected to the offences under this act and requires both offences to be tried together. Any person aggrieved by the judgement of the tribunal may within 60 days appeal to the High Court Division. All verdicts of the death penalty must be confirmed by the High Court Division and executed only after the confirmation is received. Some other provisions which were meant to make the procedural aspects of the crime more effective are as follows:

i) The Investigating Officer must complete the investigation within 30 days of receiving the information of committing the offence or from the date of giving the order of investigation by the magistrate.

ii) If the investigation cannot be completed within 30 days, an extension of 15 days can be given if the investigating officer can justify "special reasons" in the interest of justice for extending the time period of investigation. But if the investigation is not completed within the extended period, any of the following actions can be taken by the tribunal:

- Direct the concerned authorities to complete the investigation within a further 15 days.
- Give directions to the controlling authority to take appropriate action against the officer who failed to comply with the time limit.

iii) The Tribunal can also, based on an application for the same, appoint a different/change the officer investigating an offence committed under this act.

iv) The Tribunal can direct a person listed as an accused to be a witness.

v) If upon submission of the investigation report the Tribunal deems that the investigating officer submit the investigation report with intent to

save any person from the liability of any offence or without collecting or considering any acceptable evidence to prove the offence by willful negligence making such person as witness instead of making him accused or without examining any important witness, then the Tribunal may give direction to the controlling authority of the said officer to take proper legal action.

vi) All offences under this Act shall be non-cognizable, non-compoundable and non-bailable.

Some other procedural rules put in place for the trial are as follows:

i) Offences under this act must tried by the tribunal established by the act;

ii) Hearing of a case shall continue every consecutive working day of the Tribunal;

iii) The Tribunal must conclude a case within 90 days;

iv) In case of absentia the Tribunal can order his arrest or take measures such as sending out public notices in newspapers for the accused to appear in front of the judge. If the accused fails to do so, the case can be concluded in his absence;

v) Provisions have been made for recording statements by a magistrate in any place. If the investigating officer at the time of the committing of the crime, feels it is important to record the statement of a witness immediately, can request any magistrate of first class to record the statement. Such statements can then be submitted to the Tribunal;

vi) Provisions have been made for accepting the signed report of various experts who can suffice important evidence for cases;

The issue of easily available acid also warranted attention of the lawmakers and they recognized the importance of a strictly regulated market which they envisioned from the Acid Control Act (ACA) of 2002. This act created national and district level entities which were tasked with the project of acid control in Bangladesh. The ACA creates a National Acid Control Council (NACC). The law requires that the NACC:

i) institute policies relating to the trade of acid;

ii) enact policies to prevent the misuse of acid;

iii) enact policies to favour the treatment and rehabilitation of victims;

iv) adopt measures to raise public awareness of the dangers of acid; (e) collect data regarding the use and misuse of acid;

v) coordinate the work of the various ministries with respect to acid regulation; and

vi) institute policies relating to proper acid waste management.

District committees are responsible for implementing the national guidelines and enacting local measures to further regulate acid.

vii) The Deputy Commissioner chairs the District committee.

viii) Other members include the district's Superintendent of Police, the Civil Surgeon (head of the district health department), the director of the district department of women affairs, the director of the district social welfare services, the district public prosecutors, NGO representatives, and, sometimes, acid users associations.

ix) The ACA mandates the creation of National Acid Control Council funds and district committee funds to finance awareness-raising campaigns and provide assistance to acid survivors for treatment, rehabilitation, and legal aid.

On the matter of acid regulation, the ACA provided for some basic provisions, which are as follows:

x) The Act punishes the unlicensed production, import, transport, storage, sale, and use of acid by a prison term of 3 to 10 years, and a fine of up to Taka 50,000.

xi) It establishes the central government as the licensing authority for import licenses and the deputy commissioner as the licensing authority for transport, storage, seller, and user licenses.

xii) It also requires license holders to keep informational records relating to all acid use.

6. **Judicial Approach And Victim Compensation Schemes**

The first landmark case that is of great concern for us is Laxmi v. Union of India.[24] In this case, Laxmi, the victim of an acid attack had filed

24 Laxmi v. Union of India, (2014) 4 SCC 427

a PIL which demanded legislative action in order to curb the menace of increasing acid attacks. Legislation regulating sale of acid, providing treatment, rehabilitation and compensation to victims was also called upon. The Apex Court ruled in the appellants favour and ordered the states to formulate rules for the possession and sale of poisons like the acid used in acid attacks. The judgment also increased the compensation for acid attack victims from INR 50,000 to INR 3,00,000. The court also provided for free treatment for the surgeries of acid attack victims.

In the case of Parivartan Kendra v. Union of India[25] The court reiterated the need for regulating acid sales. But the most important development came in the form of enhanced compensation for the victims. While interpreting the judgment in Laxmi's case, Justice Eqbal ruled in Parivartan Kendra's case stating that in Laxmi's case no limit/bar for compensation was levied. Justice Eqbal stated:

Having regard to the problems faced by the victims, this Court in *Laxmi* v. *Union of India*[26] by an order dated 18-7-2013, enhanced the compensation, stating that, "*at least* Rs 3 lakhs must be paid to the victims of acid attacks by the Government concerned". Therefore, a minimum of Rs 3 lakhs is to be awarded by the Government to each victim of the acid attack. In the present case, a minimum amount of Rs 6 lakhs has to be awarded to the sisters."

Furthermore, the court stated that when a court considers the application of enhanced compensation, some conditions must be taken into consideration. The compensation must not only consider the physical injuries but look at the victim's inability to lead a full life as well. The court also directed the states and union territories to consider the inclusion of acid attack victims in the list of people with disability.

At this juncture it would be prudent to point out that the situation in India with regards to compensation to victims is still dire and most states are uninformed. In 2018 the National Legal Services Authority (NALSA) came out with the 'Compensation Scheme for Women Victims/Survivors

25 Parivartan Kendra v. Union of India, (2016) 3 SCC 571
26 (2014) 4 SCC 427 : (2014) 4 SCC (Cri) 802

	Victims of Acid Attack	Minimum Compensation	Maximum Compensation
a.	In case of disfigurement of the face	INR 7 Lakhs	INR 8 Lakhs
b.	In case of injury more than 50%	INR 5 Lakhs	INR 8 Lakhs
c.	In case of injury less than 50%	INR 3 Lakhs	INR 5 Lakhs
d.	In case of injury less than 20%	INR 3 Lakhs	INR 4 Lakhs

of Sexual Assault/other Crimes'. In this scheme due consideration was given to the plight of acid attack victims and provided for a comprehensive scheme for compensation of acid attack victims.

It is important to note that the schemes provided for a special provision for acid attack victims, which stated:

"If a woman victim of sexual assault/acid attack is covered under one or more category of the schedule, she shall be entitled to be considered for combined value of the compensation."

This meant that other provisions in the act which included injuries like loss of eyesight, or any other disability the victims would be entitled to a combined value of compensation. What is unfortunate about the situation is that very few states have modelled their compensation schemes around the NALSA guidelines. This resulted in a very tame implementation of compensation schemes across the country.[27]

7. Recommendations

When we analyse the situation in Bangladesh, where the rate of acid attacks reached a peak at the beginning of the twenty-first century, there were four significant fundamental challenges that could be proven as primary sources. In a patriarchal society, women are expected to conform to gender stereotypes, and any form of backlash directed against them is considered negatively by men. Acid attacks have become more common and are no longer taken seriously due to the availability and low cost of

27 National Legal Services Authority (NALSA). *Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes (2018)*

acid. A time-consuming and dishonest method of prosecuting offenders. The two laws that were passed in 2002 addressed a lot of these issues in part. Acid production, sale, and distribution were all carefully regulated, which had a favourable effect. The number of attacks did see a decline, as mentioned earlier but this evil has not been uprooted completely. We can attribute that to time, but it is also true that no follow up legislation or executive action has been brought out to deal with the shortcomings in the new system instituted post 2002. For eradication of this evil the delinking of gender roles between men and women is important but for now strict legislations and effective and accountable processing of perpetrators is definitely the way forward.

When we juxtapose the developments in Bangladesh with the jurisprudence around acid violence in India, the latter seems half hearted at best. India needs a more proactive approach to tackle the rising number of acid attacks in India, and that must include proper regulation of over-the-counter sale of acidic substances. The trial process also needs to be faster and made more accountable. The lack of acid sale regulation and proper trial procedure are two obvious differences in India and Bangladesh's approach towards this evil of acid attacks. The latter's policy brought a discernible change in the numbers. The Bangladesh model emphasised on tackling this evil from all fronts and did so through two very thorough legislations. On the other hand, India has seen little to no change. If we refer to the NCRB data on convictions in acid attack cases, we can see very clearly how slow and cumbersome the process is.

The following table illustrates the same: [28]

Year	No. of cases that went on trial	No. of cases disposed by the Police	No. of cases disposed by the courts	Percentage of cases disposed by courts
2016	407	196	27	6.6%
2017	442	182	44	9.9%
2018	523	150	32	6.11%

The statistics from consequent years does not inspire confidence in the judiciary's ability to deal with cases swiftly. Cases have been piling up year on and the pendency rates shockingly high

Year	Total Pending Cases of Acid Attacks before Courts	Pendency Percentage
2019	394	94.3
2020	503	96.9
2021	585	97.5
2022	649	95.2

A thorough and sharp policy making process which does not end at one legislation is the way forward. A strategic approach, which will find solutions for every cause of acid attacks is needed.

(i) Firstly, there is a need for the policy makers to understand that stricter and more severe punishments do have an impact in deterring possible perpetrators. The study in Bangladesh is a clear example.

(ii) Secondly, more severe punishments alone are good for nothing as is evident from India's rising number of acid attacks. This move needs to be backed with a solid structure which apprehends perpetrators swiftly. The use of tribunals and a very strict timeline on investigation and putting

28 Vidhik Kumar, "Acid attacks in India: a socio-legal report. 6 " *Dignity: a journal of analysis of exploitation and violence* 1-2 (2021).

mandatory deadlines on disposal of acid attacks, as was done in Bangladesh are effective steps.

(iii) Thirdly, it is important to ensure that the officers in the executive and the judiciary comply with the structure and that can be ensured using punishments in cases of non-compliance as a deterrent effect.

(iv) Fourthly, the most critical part of effective legislation is regulation of acid sales. The manner in which Bangladesh brought in a policy which set up both national and local bodies to ensure proper regulation is a good place to start. But, like any other law/policy this must also be revised according to the newfound needs and effect of the law in reality. Like in India, after Laxmi's case[29] Many states enacted the Poison Possession and Sales Rules in 2014, but they remained ineffective in reality as the number of acid attacks have increased regardless. This situation thus warrants reevaluating the current laws and enacting a better one with more rigorous implementation behind it.

We also find ourselves in agreement with Kuriakose, Mallick and Iyer's findings, which focus on an integrated approach. This involves a sound policy reform and tackling structural problems in society at the root of all gender-based crimes.[30]

29 Laxmi v. Union of India, (2014) 4 SCC 427

30 Francis Kuriakose, Neha Mallick, and Deepa Kylasam Iyer. "Acid violence in South Asia: a structural analysis toward transformative justice" 2 *ANTYAJAA: Indian Journal of Women and Social Change* 78 (2017).

Freedom of Speech and Expression, Public Morality, and Tolerance: A Jurisprudential-Constitutional Analysis

Vinay Kumar Kashyap*
Madan Mohan Shahi**

Abstract

In the liberal democracies, freedom of speech and expression has been the essential attributes for individual autonomy, and for social progress and democratic values. This research elucidates the complex and more often argumentative relationship between free speech, tolerance and public morality. In India, the constitution of India specifically permitted the limitations under Art.19(2) of the Indian Constitution, which gives power to the state to impose reasonable restrictions on exercise of free speech on the ground of decency, morality, public order and other grounds mentioned under Art. 19(2). This research examines how the constitutional courts in India resolve the tension between the constitutional guarantee under Art, 19(1) and the imposition of limitations warranted on the ground of public morality. It critically analyses the restriction on the principles of tolerance and pluralistic values that enshrined under a democratic society. The study involves philosophical and jurisprudential point of view, including the harm principle of John Stuart Mill, theory of rights of Ronald Dworkin, and the constitutional morality enshrined under Indian Constitution. The study delves into comparative constitutional jurisprudence particularly the United states of America, the United Kingdom, Canada and South Africa, where courts are balancing the right of free speech with the societal values. This research involved the doctrinal research methods in examining the pertinent case laws such as Shreya Singhal v. Union of India which invalidate Section 66A of the IT act on the ground of violation of free speech, S. Khushboo v. Kanniammal which highlighted the tolerance in the face of moral disapproval, and Navtej Singh Johar v. Union of India

* Assistant professor of Law, Department of Law, Rajiv Gandhi University (A Central University), Itanagar, Arunachal Pradesh.
** Assistant professor of Law, K.N.V.S, Sultanpur, Uttar Pradesh.

where the Supreme Court of India discarded the conventional notion of morality in upholding the rights of LGBTQ+ community. These decisions of the Supreme Court elucidate the understanding of legitimate restrictions on free speech and how in democratic society morality could be interpreted so as to stand with new meaning and understanding.

Keywords: *Freedom of Speech, Public Morality, Constitutional Morality, Reasonable Restrictions, Majoritarian Morality*.

1. Introduction

In a liberal democracy, freedom of speech and expression is a linchpin of individual freedom, an engine of social progress, and a bulwark of democracy. It allows people to think freely, to express ideas without fear of retribution, and to question power. Free speech is not just a civil right, it is a precondition for a free and democratic society.[1] Free speech encourages discourse, promotes dissent, allows political participation, and encourages intellectual exploration. However, this right, as broad and fundamental it is, cannot exist in isolation.[2] It is often subject to competing values such as public order, decency, morality, and national integrity. The imbalance between freedom of speech and public morality is arguably one of the most contentious and evolving domains in the constitutional and legal sphere, especially in multicultural and pluralistic societies like India.

The Indian Constitution guarantees freedom of speech and expression as a fundamental right under Article 19(1)(a), however it is not absolute. Article 19(2) of the Constitution provides the State authority to impose "reasonable restrictions" upon the enjoyment of this right in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, or

1 T.M. Massaro & R. Stryker, Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement, 54 Arizona Law Review 375 (2012).

2 L.C. Bollinger, Free Speech and Intellectual Values, 92 Yale Law Journal 438 (1982).

in relation to contempt of court, defamation or incitement to an offence. morality and society's interests. The term "public morality" does not have a universally accepted definition, nor is there a universally accepted moral framework. Who defines the parameters of public morality, and do the courts follow society, or help guide and shape it? These questions are central to the contemporary constitutional debate. The Indian courts, particularly the Indian Supreme Court, have often been called upon to adjudicate competing interests.

The evolving jurisprudence of the court provides an interesting, and at times inconsistent framework for reconciling the constitutional right to free speech with society's moral values. The court's rulings in such cases do not appear to adopt a single approach, either relying on progressive constitutional morality or traditional moral values, which sometimes reflect the views and beliefs of a majority of societal members. This dilemma is not unique to India; many jurisdictions confront similar challenges — for example, the United States, the United Kingdom, Canada and South Africa — when drawing the line around speech, without unduly inhibiting democratic deliberation or infringing upon human dignity.

This research rests at the intersection of law, morality, and freedom. In attempting to provide a more holistic understanding of how Indian constitutional courts adjudicate the nebulous space around public morality, it will investigate the legal, philosophical, and social tensions created when the State restricts free speech in the name of public morality, and society's collective interests. The phrase "public morality," moreover, does not have a universally accepted definition, nor is there a universally accepted framework for morality. Who defines the boundaries of public morality? Do the courts follow society, or help define and shape public morality? The study initially explores the theoretical dimensions of freedom of speech, focusing on the work of important liberal theorists such as John Stuart Mill and Ronald Dworkin. Mill's harm principle, which proposes that limiting individual liberty for any reason other than

to prevent harm to others is not legitimate, is an important analytical tool.[3] Dworkin's concept of rights as trumps against collective goals, and his notion of principled interpretations of a constitution, is also incorporated in this way of thinking about the use of rights.[4]

Constitutional morality, and its importance is likely particular to the Indian case, is also a normative guide for the research. Originally coined by Dr. B.R. Ambedkar, and later taking shape in the shape of interpretive guidance by the court, constitutional morality introduces an important component of normative guidance over the principles of liberty, equality, fraternity and justice over the sway of usually inconsistent, and sometimes regressive, public opinions of morality.[5] The Supreme Court of India has used the notion of constitutional morality in various landmark decisions to excuse certain conventions recognized by broader societal norms, but impermissible by the Indian constitution.[6]

One important part of the research will engage with landmark Indian decisions, namely, those that have drawn the lines between protected, free speech, and impermissible, unprotected speech. The case of *Shreya Singhal* v. *Union of India*,[7] marked a significant development in this area, which saw the Supreme Court strike Section 66A of the Information Technology Act for being vague and overbroad, thereby frustrating the protections of Article 19(1)(a). A prominent finding in the judgment was the clear reaffirmation of the principle that inconvenience or annoyance alone will not justify interference with speech. Another key decision was *S. Khushboo* v. *Kanniammal*,[8] where appeal upheld the right to discuss and debate morality and the perceived obligation of the citizen to engage in discourse about morality on the basis that tolerance is crucial in a

3 A. Ripstein, Beyond the Harm Principle, 34 Philosophy & Public Affairs 215 (2006)
4 Ronald Dworkin, "Rights as Trumps" in Arguing About Law 335–344 (2013).
5 D J K Bhongale, “Dr. BR Ambedkar’s Constitutional Morality” (2023)
6 N Nayak, "Constitutional Morality: An Indian Framework" (2021) American Journal of Comparative Law.
7 AIR 2015 SC 1523
8 AIR 2010 SC 3196

mature democracy. Finally, in *Navtej Singh Johar* **v.** *Union of India*,[9] The Supreme Court struck down Section 377 of the Indian Penal Code as unconstitutional and rejected the moral framework supported by the criminalization of consensual same-sex relationships throughout the country. In doing so, the Court clearly elevated constitutional morality over social morality, which was reaffirmed again when it rejected any constraining versions of the scope of rights and liberties that are found in the Constitution.

The work also utilizes comparative constitutional analysis to bolster its arguments by exploring how courts have grappled with similar contextual questions in the United States, the United Kingdom, Canada, and South Africa, in order to situate India's legal pathway within a global discourse. For example, First Amendment jurisprudence in the U.S. has always been exceptionally protective of speech, even speech which is controversial or disgusting. Canada has a similar provision in that the Charter of Rights and Freedoms allows for limits on free speech because reasons can be justified under the "reasonable limits" clause.[10] South Africa, with its post-apartheid Constitution, prioritizes dignity and equality, but still balances out these values against freedom of expression in ways that are sometimes intriguingly different from the others.[11]

But besides being descriptive or comparative, the research hopes to offer a normative model for how courts and lawmakers in India might better conduct the balancing act between free speech and public morality. It contends that a normative model that is grounded in ethical pluralism, dialogue, and respect for dissident voices is more likely to yield desirable outcomes. The goal is not one that fosters the idea that there is an unqualified right to say anything without consequences, but rather seeks to resist censorship that is couched in vagueness, inconsistent or arbitrary standards, or ill-defined public moralizing. The study would urge the courts to exercise judicial restraint in limiting free speech on moral grounds rather than on constitutional morality.

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9 (2018) 1 SCC 791
10 Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(b).
11 The Constitution of the Republic of South Africa, 1996, s.16.

Ultimately, this study situated the right to freedom of speech into the larger framework of constitutional democracy. It reflects on how moral arguments have historically been used as both an instrument of oppression and liberation, and that the judiciary's job is not merely to mirror today's societal values, but to protect the constitutional promise of liberty, equality and dignity, which endures in time.

2. Philosophical foundation of Freedom Speech

The right to freedom of speech and expression has deep roots in the world of philosophy. It has been defended by many thinkers as a necessity not only for what we call autonomy but also for moral, social, and political progress for everyone. Thinkers from Immanuel Kant, John Stuart Mill, Baruch Spinoza, and Alexander Meiklejohn have all provided perhaps lasting rationales for the position of free expression as an essential component of a just society. Immanuel Kant's philosophy, particularly his work Groundwork of the Metaphysics of Morals, provides a strong foundation for the moral necessity of free speech. Kant argues that we are each ends-in-themselves, endowed with rationality and autonomy and the ability to act morally. While he does not explicitly speak of free speech, it is evident that free speech is necessary in order to make moral decisions—are there individuals allowed to think and reason freely? Freedom of speech is crucial because if it is suppressed or under threat, individuals cannot secure their moral autonomy to think, reason, and communicate without the constraints of external sources or coercive actors. Kant points out that speech is not just a procedure for communicating ideas as it is an expression of our inner rationality and inherent dignity. To refuse a person the opportunity to speak is to treat them as a means to an end, rather than as worthy of consideration as our ends-in-themselves. Therefore, censorship or simply restricting speech could be construed as a moral failure as it denies one the entirety of their rational autonomy.

John Stuart Mill provided some of the most impactful utilitarian rationales for our commitment to free speech in liberty. Mill not only claims that free expression is important to the search for truth, but he also emphasizes that even the expression of a false idea is important for testing

the truth of powerful established ideas and avoids established ideas becoming dogma. If the idea is true or only partially true, then society benefits from exposure to the idea. Mill emphasizes a marketplace of ideas with competing ideas available for successful discussion and agreement to prevail. He notes that rational development and moral growth depends on open, free discourse expression, and that inhibiting a single dissenting voice will negatively affect the sum of collective knowledge. Therefore, freedom of speech has instrumental value (by contributing to the development of truth and human progress) and intrinsic value by supporting individual liberty.

John Stuart Mill locates liberty as the essential element of human well-being. He divides liberty into three interrelated areas as follows:

A. Liberty of thought and freedom of expression—the ability to hold and express opinions free from the risk of censorship.

B. Liberty of tastes and pursuits—the ability to live life as one wishes, provided it does not interfere with someone else's ability to do the same.

C. Liberty of association—the ability to join up or associate with one or more persons for common purposes.[12]

A free society must protect these liberties because each form of liberty allows individuals to develop morally and intellectually.[13] Mill insists that freedom is not the absence of constraint, but rather the freedom to seek one's own good in one's own way.[14] Mill advocates for liberty as a wealth-generator for civilization. Liberty allows us to test various ways of living; the more difference there is, the greater the incentive to improve & innovate and the greater the amount of overall human happiness.[15]

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12 F. R. Berger, Happiness, Justice, and Freedom: The Moral and Political Philosophy of John Stuart Mill (University of California Press 2023) 42, 224, 239.

13 Jacobson D, "Mill on Liberty, Speech, and the Free Society" (2000) 29 *Philosophy & Public Affairs* 276.

14 Levi A W, "The Value of Freedom: Mill's Liberty (1859-1959)" (1959) 70(1) Ethics 37.

15 Freyfogle, E. T., "Property and Liberty", (2010) 34 *Harvard Environmental Law Review* 75.

One of Mill's most notable contributions to political theory is the harm principle, which he expresses in this way: "*The only freedom worthy of the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it*."[16] Mill's harm principle informs us that the only valid reason for a society or State to restrict an individual's liberty is to deter harm to someone else.[17] This is part of what makes Mill's harm principle so fundamental to our understanding of liberty. Mill makes an important distinction between harm and affront. Disagreeable or offensive opinions are not considered harm unless they infringe upon another person's rights or safety.[18]

The harm principle provides a distinction between self-regarding acts (which affect only the actor) and other-regarding acts (which affect other people).[19] An adult consuming alcohol in a private setting is a self-regarding act that society should not attempt to intervene in; but if that person is drinking and driving and endangering other people, the State may intervene. Mill's theory on liberty has had lasting implications and contribution to our liberal democracies.[20] His harm principle underlies our freedom of speech, self-regarding, collective autonomy, and government power, and it continues to act as the guiding principle in political debates concerning censorship or moral-policing between the State and individual rights.[21]

Ronald Dworkin, a renowned legal philosopher of the USA, has given the theory of rights as a trump card and his focus on tolerance provides a strong argument for freedom of speech and expression.

16 J. S.Mill, & Quincey De, *On liberty*.
17 P. N. Turner, "Harm" and Mill's harm principle, 124(2) *Ethics*, 299-326 (2014).
18 J. Feinberg, *Offense to others* (Vol.2, Oxford University Press, 1984).
19 A. Linklater, "The harm principle and global ethics" *20*(3) *Global Society* 329-343 (2006).
20 R. J. Arneson, "Democracy and liberty in Mill's theory of government" 20(1) *Journal of the History of Philosophy* 43-64 (1982).
21 B. E. Harcourt,"The collapse of the harm principle" 90 *J. Crim. L. & Criminology* 109 (1999).

Dworkin believed rights are not merely policies, but moral principles that protect the dignity of individuals against the demands of the majority.[22] Rights as Trumps, key idea of Ronald Dworkin, articulated in his important work, 'Taking Rights Seriously', is the idea that rights act as "trumps" to the goals of the collective. That is, even if a policy or action would benefit the most individuals in society, it cannot violate the basic rights of individuals. Freedom of speech in this regard is not just a privilege extended by the State, but a moral right derived from the equal worth of the individual. For Dworkin, protecting and respecting someone's right to free speech is important for respecting someone's human dignity by allowing them to express their ideas, challenge authority, and be part of meaningful public discourse.[23] Censorship, even when it purportedly promotes a public interest or public morality, has the effect of instrumentalising individuals for the collective good, not treating them as autonomous moral agents.

3. Deliberative Democracy, Public Sphere and Freedom of Speech: Habermas Contribution

The seminal work by Jurgens Habermas explicates the importance of the public sphere as an intermediate space between the state and civil society that is imperative to the adequacy of deliberative democracy that comprises the extensive exercise of freedom of speech and expression. Such an understanding conveys the fact that an active public sphere can serve as a venue of rational-critical discourse where people are given an opportunity to exercise their opinions, question authority, and establish public opinion collectively.[24] This is core to the legitimizing of political authority on an aspect of a communication action more than coercion, creating a situation where most people can come into the same page or

22 R. Dworkin, *Rights as trumps. Arguing about law*, 335-44 (2013).

23 Kai Möller1 Dworkin's Theory of Rights in the Age of Proportionality, available at https://eprints.lse.ac.uk/85642/1/Dworkin%27s%20Theory%20of%20Rights%20-%20LEHR%20-%20final.pdf

24 Habermas, J. The transformation of the structure of the public sphere. In Routledge eBooks 30 (2006). Informa, https://doi.org/10.4324/9780203020166-5.

rational agreement.[25] A democratic form of self-governance and societal integration tends to require such a communicative infrastructure as would allow the citizens to claim their existence, to demand their rights and guarantee that their interests will be balanced out in the discursive process instead of being aggregated.[26] The legitimacy of these beliefs, which is the fundamental aspect of the theory of Habermas, is ensured through the rational acknowledgement of validity claims inherent in communication, that is, distinguishing between real consensus and simply manipulable agreements. This makes it pertinent to create an atmosphere in which not only the right to free speech and expression are safeguarded, but the power of these capabilities is also fostered such that one can freely speak and express on issues of universal interest.[27] Such unhindered flow of ideas is what ensures that the public sphere plays its normative role as a space of public reason where the will of the people are arrived upon in argumentative but not strategic ways.[28] On the other hand, its lack or inhibition vitiates the entire principle of the deliberation machinery and makes the public sphere a place of power politics instead of a body representing normative public deliberations[29]. All the obstacles to free speech decisions through censorship, propaganda, or media ownership concentration, therefore, interfere directly with the effectiveness and

25 A. Gimmler, The internet and deliberative democracy and the public sphere. Philosophy and Social Criticism 27(4):21, 2001. https://doi.org/10.1177/019145370102700402

26 M. A. Muthhar, "The Deliberative Democracy of JURGEN HABERMAS in Dynamics of Indonesian politics Lg Tunas, Luminous Feminine: A Study on narrative in the Elfland Quartet by Peter S. Beagle"2(2) *Ushuluna Jurnal Ilmu Ushuluddin,* (2020). Available at, http://www.ushuluna.net/?p=68 (Last visited on 22 June 2025).

27 *Ibid*

28 P. Duvenage, "Habermas, the sphere of the society and that which lays beyond it" 31(1) *Communication* (2005). doi:10.1080/02500160508538008.

29 M. A. Muthhar, "The Deliberative Democracy of JURGEN HABERMAS in Dynamics of Indonesian politics Lg Tunas, Luminous Feminine: A Study on narrative in the Elfland Quartet by Peter S. Beagle"2(2*) Ushuluna Jurnal Ilmu Ushuluddin*(2020). Available at http://www.ushuluna.net/?p=68 (Last visited on 22 June 2025)

transparency of the deliberation model.[30] Additionally, the online world adds even more intricacies to the equation with different online spaces reframing the public realm and requiring a new level of accountability among its members in order to maintain standards and values of communication.[31] The proliferation of misinformation and the fragmentation of the discussion media sources are a serious challenge to the idea of a consensus-oriented public sphere, which requires tools that can help to establish validity claims without cutting off the accessibility.[32] This speaks to the importance of continuing the critical study of how digital changes affect the possibilities of rational-critical debate and the creation of informed public opinion, especially in regards to the necessity of promoting the ideal of open participation and the necessity of balancing it with the solution to the effects of harmful narratives.[33] These states of the media further challenge the coherency of a public sphere as the dominating radio and television broadcasts are in constant competition with more decentralized efforts at communication.[34]

Some other philosophers who also favoured freedom of speech and expression like Baruch Spinoza argued in Theological-Political Treatise (1670) that expression of one's ideas is necessary for peace and the

30 H. Sousa, M. Pinto, and E. C. E. Silva, "Digital sphere of public: flaws and problems" 23 *Comunicacao e Sociedade,* 9(2013). Available at https://doi.org/10.17231/comsoc.23(2013).1610 (Last Visited on 27 June 2025)

31 J. Cohen, A. Fung, "The Democratic task in the online public space" 30(1) Constellations 92(2023). Available at DOI:10.1111/1467-8675.12670 (Last Visited on 1 August 2025)

32 O'Mahony, "Habermas and the public sphere: Rethinking a major theoretical concept" 24(4*) European Journal of Social Theory* 485(2021). Available at https://doi.org/10.1177/1368431020983224 (Last visited 25 June 2025

33 R.Celikates, "5 Digitalization: Another Structural Transformation of the Public Sphere?" 2016(1) *Yearbook of Eastern and Western Philosophy* 39 (2016). See also S. Sevignani, Digital Transformations and the Ideological Creation of the Public Sphere: Hegemonic, Populist, or Popular Communication? 39(4) *Theory Culture & Society* 91 (2022). Available at https://doi.org/10.1177/02632764221103516

34 H. Jenkins, "Cultural Logic of Media Convergence" 7(1*) International Journal of Cultural Studies* 33 (2004)

security of the state. He believed that we should all be free to think, act, and speak as is our nature while obeying the laws that govern our actions and words.[35] Alexander Meiklejohn, on the other hand, an American philosopher, saw free speech as necessary for our self-governance as a democracy. He argued that free speech is more than a personal right, but that it is an essential collective necessity for democracy to function. We need to remember that as an informed citizen we need unlimited access to all factual information, to make a rational vote.[36]

4. Constitutional Guarantee and Freedom of Speech and Expression

Notably, the proponents of the Indian Constitution pursued this liberty of speech and expression very seriously, as they saw this aspect as a pillar of a democratic republic that emerged as an aftermath of colonialism.[37] This provision enshrined under the Constitution of India in art.19 has been the necessary condition for the healthy public opinion and vibrant democracy in India. This protection has wider constitutional protection of civil liberties whereby freedom of speech was part of development of man, intellectually, morally and spiritually being in every

35 B. De Spinoza, "*Theological-political treatise*" (Hackett Publishing, 2001).

36 Self-government Rationale Written by Patrick M. Garry, published on July 30, 2023 last updated on July 2, 2024.

37 G. Bhatia, "The Conservative Constitution: Freedom of Speech and the Constituent Assembly Debates" available at SSRN Electronic Journal. https://doi.org/10.2139/ssrn.2679215. The attempt was made way before the independence in 1895 under the Constitution of India Bill 1895 that every citizen is entitled to express their thoughts through writings or words, publish them but be held accountable for the abuse committed in exercising this right. Available at, https://www.constitutionofindia.net/historical-constitution/the-constitution-of-india-bill-unknown-1895/
Nehru reported 1928 a strong advocacy of bill of rights also in favour of freedom of speech and expression "the right of free expression of opinion, as well as the right to assemble peaceably and without arms, and to form associations or unions, is hereby guaranteed for purposes not opposed to public order or morality. See https://www.constitutionofindia.net/historical-constitution/nehru-report-motilal-nehru1928/

citizen.[38] The framers specifically Dr. B.R. Ambedkar believed the freedom of press to have been implicitly incorporated under freedom of speech and expression since it held that there was essentially no difference between the rights of the press and the individuals with no favor being granted to the former.[39] But such magnificent freedom of speech was not intended to be absolute, as the framers accepted that reasonable limits, in the name of national security, order, decency and morals were necessary.[40] It was a subtle balance of the rights and interests of individual persons against the good of the whole community, which is also typical of constitutional democracies where freedom of expression is regarded as an unquestionable but not limitless value.[41] This natural conflict between freedom and control has always influenced the juridical understanding of Article 19(a) and the series of amendments added subsequently to match these two different interests and prove that the evolution of constitutional juridic thought is ongoing.[42] This reflection resembled the ideas of the Enlightenment that proclaimed the direct correlation between the responsibility to improve knowledge and the right to speak as the public discourse could be regarded as a crucial way to unveil the injustice and

38 N. Mansergh, "Fundamental Rights in India" 32(2) *International Affairs* 253 (1956). Available at https://doi.org/10.2307/2625900

39 A. Lakshminath, S. Singh& K.S. Manikyam, "Media, Law and the Civil Society"55(2) *Indian Journal of Public Administration* 252 (2015). Available at https://doi.org/10.1177/0019556120090208

40 S. Ramesh, "Media and Internet Censorship in India: A Study of its History and Political-Economy".33(1) *Journal of International Technology and Information Managemen*t 1 (2024). Available at https://doi.org/10.58729/1941-6679.1600. At the time of adoption of the Constitution only four reasonable restrictions were enumerated in art. 19 (2) of the Constitution of India. But after one year passed three new reasonable restrictions were added to this provision that is Friendly relation with foreign states, Public order, Incitement to an offence by first amendment act 1951 and one another is sovereignty and integrity of nation by sixteenth amendment act, 1963.

41 A. Masferrer, "The Decline of Freedom of Expression and Social Vulnerability in Western Democracy" 36(4) *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 1443 (2023). Available at https://doi.org/10.1007/s11196-023-09990-1

42 CAA, 1951, CAA 1963.

avoid the tendencies of totalitarianism.[43] The framers also knew that a truly democratic society will require free flow of both information and ideas and that can only be realized when individuals feel free to express themselves and to access information.[44]

Nonetheless, as evident in the proceedings of the Constituent Assembly, there were important debates as to what degree and extent of such freedom can be had.[45] These dilemmas usually dealt with striking a balance between personal liberty and social stasis, forever proving a challenge to any democratic nation and India is no exception being as diverse as any other.[46] One of the sources of contention was with the insertion of reasonable restrictions which was heavily debated to clarify that though the state could apply limitations it was not to be in an arbitrary manner.[47] That unintended touch represented a practical outlook that unregulated freedom might result in anarchy hence requiring strictly stated limits to preserve peace and stability in societies, however, these restrictions had to be considered as proportionate and reasonable. This balance on the extent of the freedom of speech and expression and a limit to the freedom based on reasonable restrictions created a very strong model reaching the democratic necessity of providing the imperative freedom of expression together with protecting the state and the welfare of the people.[48]

The Constituent Assembly Debates indicate that the framers did not ignore various citizen-centric aspirations and instead recognized the rights

43 F. Comunello, F.Martire, L.Sabetta, & R.T. Serpe, "What People Leave Behind Marks, Traces, Footprints and their Relevance to Knowledge Society" (2022).

44 R. Post, "Participatory democracy and free speech" 97 *Va. L. Rev* 477 (2011).

45 V.N. Shukla, *"Constitution of India"*. (2017). http://ci.nii.ac.jp/ncid/BA24682882

46 R. Apalara, "Striking a Balance: Freedom of Expression and the Prohibition of Hate Speech and Offensive Remarks" (2017). Available at SSRN Electronic Journal. https://doi.org/10.2139/ssrn.3035410

47 V.N. Shukla, *"Constitution of India"*. (2017). http://ci.nii.ac.jp/ncid/BA24682882

48 S.A. Simmy, "Free Speech in Restricted Democracy in India",7 *Issue 2 Int'l JL Mgmt. & Human* 1844 (2024).

of citizens and incorporated those in the constitutional framework.[49] The foundation of Article 19(1)(a) reads: "All citizens shall have the right to freedom of speech and expression." Hence this right guarantees freedom of the press,[50] the right to criticise government,[51] the right to receive information,[52] and the right to impart information. The essence of the freedom of speech and expression is in its foundation to the principles of democracy. If citizens are not having free speech to advance ideas or hold leaders and government accountable, the leaders and government will lead to misuses of their powers. Expectedly, as it connects to the basis of a free democracy. Without it, the moral ability for citizens to hold the government accountable and stand against the misuse of power becomes mute. Free speech, in essence, makes way for political exchange, protects dissent, and allows for the free exchange of ideas which is important for the development of the society's culture and sense of intellect.

Even though it is very important, Article 19(1)(a) is not an unfettered right. It was acknowledged by the makers of the Indian Constitution that there can be some menace associated with unrestricted form of speech, particularly in a pluralistic and sensitive society like India, where language, religion, caste, and cultural identities intersect based on their condition and the complexities of those multiple identities. For that reason, Article 19(2) allows the State to enshrine reasonable restrictions for the exercise. These restrictions are the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, contempt of court, defamation, and

49 **O. Shani, "The People and the Making of India's Constitution",65(4) *The Historical Journal* 1102 (2004). Available at https://doi.org/10.1017/s0018246x21000856**

50 *Romesh Thapar* v. *State of Madras*, AIR 1950 SC 124.

51 *Javed Ahmed Hajam* v. *State of Maharashtra*, 2024 (4) SCC 156, The Constitution of India, under Article 19(1)(a), guarantees freedom of speech and expression. Under the said guarantee, every citizen has the right to offer criticism of the action of abrogation of Article 370 or, for that matter, every decision of the State. He has the right to say he is unhappy with any decision of the State," the court said.

52 *Kulwal* v. *Jaipur Municipal Corporation*, 1986 SC 122.

incitement to an offence. These grounds reflect a deliberate effort to strike a balance between individual liberty and the collective interests of society.

The term "reasonable restrictions" is a prominent part of the text of the Constitution. The Indian courts have interpreted the term to mean that any restriction must be rational, justifiable, and not arbitrary. In *State of Madras* v. *V.G. Row*,[53] The Supreme Court established the test of reasonableness in terms of the excessiveness of the restriction and its proportionality. The restrictions must also be consistent with the public interest and the principles of natural justice. Over the years, the courts have reiterated that the onus is on the State to prove that a restriction is reasonable, and that mere inconvenience of the fact that public unrest or opposition may result from the expression is not enough to limit free speech.[54] The courts have also remarked that restrictions must be tailored as narrowly as possible and not blanket, or blanket-style restrictions omit any possibility of free speech.[55]

While utilising the First Amendment to the U.S. Constitution as an example, where free speech is given an absolute right, the Indian model has adopted a more moderated approach, where restrictions are qualified. The U.S. Constitution prohibits the government from making any law that would "abridge the freedom of speech" - thus representing one of the most protected rights in American jurisprudence.[56] Ultimately, the framers of the Indian constitution decided not to adopt an absolutist type model.

5. Indian Supreme Court's Jurisprudence on Constitutional Morality:

The existence of constitutional morality as construed by the Indian Supreme Court is a guiding principle to the protection of the fundamental rights and basic principles enshrined under the Constitution of India, it goes beyond the words of the Constitution to support the spirit and value

53 AIR 1952 SC 196.
54 R. K. Singh, "Freedom of Speech and Expression and Reasonable Restrictions: An Analysis" 2 *Indian JL & Legal Rsch.*1(2021).
55 *Kedar Nath Singh* v. *State of Bihar*, AIR 1962 SC 955.
56 First amendment act to US Constitution, 1791.

of the Constitution. Such a concept requires that every governmental body must work within the framework of the constitution, and that all operations made by governmental agencies comply with the democratic and human rights principles put forth in the constitution.[57] It provides a form of supreme moral guide such that even when a law is enacted by legislative measures, it should not compromise fundamental provisions on liberty, equality, and fraternity as legislative foundations of the Indian republic.[58] Specifically, the judiciary uses constitutional morality to look into the actions of the legislative and executive grounds and verify that they do not contravene the fundamental principles and aspirations of the Preamble, and are therefore, a custodian of the constitutional conscience.[59] This legal ideology gives the Supreme Court all the authority to overrule an act of the legislature or an executive decision that may fall within the light of legislative authority but are felt to be in contravention of the larger constitutional spirit, even when a given fundamental right has not been expressly infringed.[60] This organic interpretation enables the Constitution not to stay stagnant and offers a way of being adaptable to modern issues, as societal norms and issues can evolve, so can the Constitution.[61] Among the first people to present constitutional morality was Dr. B.R. Ambedkar who saw it as a precondition to the successful operation of a democratic constitution that we ought to have a sense of public conscience rather than

57 **K. Dhar, "Judicial Review - A Brief Note" SSRN Electronic Journal. RELX Group (Netherlands) (2012). Available at https://doi.org/10.2139/ssrn.**2008907

58 Rohit.De, "A people's constitution: the everyday life of law in the Indian Republic." 1-312 (2018).

59 K. T. S, "The Indian Constitution: Navigating Challenges in the 21st Century". 6(3*) International Journal For Multidisciplinary Research* (2024). Available at https://doi.org /10.36948/ijfmr. 2024 .v06i03.21602 (Last Visited on 22 June 2025).

60 *Minerva Mills* v. *Union of India*

61 The great John Marshall, C.J. said that the Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly". Available at https://www.scconline.com /blog/post /2022/09/13/ originalism -v-living -constitutionalism-the-debate-goes-on/

a sense of following the law.[62] The Supreme Court has since expanded on this idea and taken account of how it is credited in preserving the democratic spirit and averting the oppression of the many by maintaining the spirit of the constitution. Such jurisprudential evolution is a manifestation of the changing awareness of the notion that the Constitution is not purely a legal document, but a testament to the aspirations and nation, to which its moral and ethical principles must be ascribed.[63] This judicial activism, especially by way of Public Interest Litigations has been instrumental in promoting human rights and protecting the interests, especially of marginalized people,[64] but has given rise to some controversies about whether it is a legitimate move in the context of democratic ideals such as representation and accountability.[65] Notwithstanding these controversies, the Supreme Court has insisted on using constitutional morality to enhance democratic checks and balances, as well as place greater emphasis on ensuring effective realisation of fundamental freedoms.[66] As an example, the Court has used this doctrine of constitutional morality to interpret the relationship between fundamental rights and directive principles, aiming at creating a harmonious construction that carries along with the conscience of the

62 According to Dr. B. R. Ambedkar, Constitutional morality means reference to substantive content of the Constitution. Government to be governed according to the moral boundaries prescribed by the Constitution. Bhongale, Dr. Jay Kumar, Dr. B. R. Ambedkar's Constitutional Morality (January 03, 2023). Available at SSRN: https://ssrn.com/abstract=4312052 or http://dx.doi.org/10.2139/ssrn.4312052

63 K. R. Aithal, "Judicial Activism — the Enforcement of Human Rights in India*" International Journal of Law and Social Sciences* 60 (2023). Available at https://doi.org/10.60143/ijls.v1.i1.2015.11 (Last Visited on 27 June 2025)

64 P. N. Bhagwati, "Judicial activism and public interest litigation." 23 *Colum. J. Transnat'l L.*561 (1984).

65 K. R. Aithal, "Judicial Activism — the Enforcement of Human Rights in India*" International Journal of Law and Social Sciences* 60 (2023). Available at https://doi.org/10.60143/ijls.v1.i1.2015.11 (Last Visited on 27 June 2025)

66 *Ibid*

Constitution.[67] This has enabled the court system to bridge the gaps in the legislatures and handle the new socio-economic issues to ensure a more equal and just community.[68] The fact that the Supreme Court refers to Dworkin's support of the differentiation between principles and rules is another indication that clarifies its methodology of interpretation, with constitutional principles as a representation of political morality providing the direction to the particular legal rules.[69] This difference gives room to the judiciary to have a flexible interpretation by holding to the underlying principles of the Constitution, even though certain rules of law might not directly answer new complexity in the society.[70] This school of thought highlights the fact that the Supreme Court upholds the Constitution to the conditions of the modern day, on the one hand, and does not alter its fundamental underpinnings of being democratic and a force that protects human rights, on the other.[71] Constitutional morality has very much come into effect in the cases relating to social justice and the right of the individual where the Court has tended to focus more on the sense of the Constitution as opposed to a strict reading of its articles and clauses. This wider perspective of interpretation has enabled the court to deal with

67 K. Pandey, "Fundamental Rights V. Directive Principles: Minerva Mills Revisited" (2011). Available at SSRN Electronic Journal. https://doi.org/10.2139/ssrn.1917290 (Last Visited on 24 July 2025)

68 S. Umashankar, "Judicial Activism and the Supreme Court of India", (2013). SSRN Electronic Journal. Available at https://doi.org/10.2139/ssrn.2339271 (Last Visited on 23 July 2025).

69 G. G. V. Santillán, "Ronald Dworkin's Legal Non-Positivism: Main Characteristics and its Confrontation with Legal Positivism of the Twentieth Century (H.L.A. Hart)" *Mexican Law Review* 107 (2022). Available at https://doi.org/10.22201/iij.24485306e.2022.2.16570

70 L. Pierdominici, "Constitutional Adjudication and the "Dimensions" of Judicial Activism: Comparative Legal and Institutional Heuristics" (2012). Available at SSRN Electronic Journal.https://papers.ssrn.com/sol3/Delivery.cfm? abstractid=2231754 (Last visited on 21 July 2025)

71 H.A. Solangi, "The Neo-Jurisprudence of PIL in Superior Courts of Pakistan: A Comparative Analysis of Pre and Post Lawyers' Movement Working of Superior Courts" 60(1) *Journal of Social Sciences and Humanities* 33 (2021). Available at https://doi.org/10.46568/jssh.v60i1.444 (Last Visited on 21 July 2025)

problems that the framers of the Constitution did not anticipate thus transforming it to be current and relevant in an ever-changing society. The underlying principles supporting this evolving interpretation can be considered as being proportional in nature, supporting the Court in a trade-off between competing interests and rights to reach a decision that has a constitutionally acceptable result, parallel to those that exist in other contemporary democracies.[72]

Moreover, the Court adopting constitutional morality can be seen as part of a larger global trend of the constitutional courts playing the role of safeguarding fundamental values and principles of democracy, being inclined to stretch the limits of conventional judicial review in order to respond to systematic governance malfunctions.[73] This devotion to the constitutional spirit also goes towards making sure that even attempts by the majority to enact their will within laws do not affect the basic rights of the minority and hence strengthening the democratic fibre of the nation. This doctrine has witnessed some landmark judgments, which have hugely defined Indian constitutional law and have emanated to a positivism-free form of interpretation of the Constitution, one that is more purposive and value based.[74] This broad interpretation accords with the

72 D. G. Réaume, "Limitations on Constitutional Rights: The Logic of Proportionality" (2009). Available at SSRN Electronic Journal. https://doi.org/10.2139/ssrn.1463853. *See also* D. Grimm, "The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany"13(1) *International Journal of Constitutional Law* 9 (2015). Available at https://doi.org/10.1093/icon/mov005 (Last Visited on 20 July 2025).

73 S. Gardbaum, "Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa" (2019). Available at SSRN Electronic Journal. https://papers.ssrn.com /sol3 / Delivery. cfm /SSRN _ ID3339534_ code 109222.pdf ?abstract id =3338013&mirid=1&type=2. *See also* C. Starck, "State duties of protection and fundamental rights"3(1) *Potchefstroom Electronic Law Journal/ Potchef stroomse Elektroniese Regs blad* 20 (2017). Available at https://doi.org/10.17159/1727 - 3781/2000/v3i1a2882 (Last Visited on 21 July 2025).

74 Sullivan, K. Edward. (1988). Law as an interpretive concept: A study of the legal philosophy of Ronald Dworkin.

realization that law shines because the nature of its existence creates law legitimacy as its content realizes humanistic aspirations and social ideals.[75] This interaction of the Court with both constitutional morality and constitutionalism-as-experience demonstrates a highly developed awareness of constitutionalism, that in order to effectively implement principles of constitutionalism, especially rights, there must be a continuing judicial devotion to justice and fairness, as is evidenced throughout the globe in terms of constitutional justice.[76]

As an example, the case of Navtej Singh Johar v. Union of India[77] is an illustration of the Supreme Court using constitutional morality to strike down criminalization of consensual same-sex behaviour, the focus on dignity of the individual and the liberation of the Constitution. On the same note, the Indian Young Lawyers Association v. Union of India[78] A case , popularly referred to as the Sabarimala temple entry case, the Court highlighted the value of equality and non-discrimination of women, and argued that even the long-held traditions could not be used to deny the values of the Constitution. These decisions represent the active approach of the Court in reshaping social expectations in view of constitutional morality so that the basic rights cease to be an abstract question but can be actually implemented by each citizen.

The Court jurisprudence, thus, translates constitutional morality as an abstract ideal into a practical means to social change, as a devotion to

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https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1607&context=dissertations

75 O. Ivanchenko, "LEGITIMACY OF LAW AS ITS JUSTIFICATION AND RECOGNITION"8(4) *Baltic Journal of Economic Studies* 77 (2022). Available at https://doi.org/10.30525/2256-0742/2022-8-4-77-83 (Last Visited on 17 June 2025)

76 M.Deschamps, M. St-Hilaire, & P.N. Gemson, "The Cross-Fertilization of Jurisprudence and the Principle of Proportionality: Process and Result from a Canadian Perspective" (2010). Available at SSRN Electronic Journal. https://doi.org/10.2139/ssrn.2327537 (Last Visited on 17 June 2025).

77 (2018) 1 SCC 791

78 (2019) 11 SCC 1.

liberties-based constitutional order.[79] Such a perspective is correlated with the premise that the constitution is a dynamic document, which evolves according to societal development, without losing its core values.[80] Such adherence guarantees that the Constitution will continue being an active pillar of making progress, as opposed to a fossil of the day of its writing.[81]

Although positively critiqued as progressive in its formulation, this judicial interpretation has been compared to other constitutional courts, including the South African Constitutional Court, which adopts a similar policy of transformative constitutionalism in an attempt to capture the wrongs of the past and implement socio-economic equality.[82] This comparative lens points to a commonly developed jurisprudential philosophy in which courts have an active role in shaping the norms of society in the name of constitutional ideals, and reaching deeper into the justice system than just legality.[83] This global trend is further characterized by cross-pollination of ideas of jurisprudence, especially those of proportionality and human dignity[84], with constitutional courts in one country benefiting by learning the experiences of other constitutional courts in protecting the fundamental rights.

79 P. C. Dash, "ROLE OF JUDICIARY FOR PROTECTION OF ENVIRONMENT IN INDIA" *International Journal of Multidisciplinary Research (IJMR)* 9 (2021). Available at https://doi.org/10.36713/6627 (Last visited on 25 July 2025).

80 G. Bhatia, "Equal Moral Membership: Naz Foundation and the Refashioning of Equality" (2017). Availbale at SSRN Electronic Journal. https://doi.org/10.2139/ssrn.2980862 (Last Visited on 17 August 2025)

81 Ornit Shani, "The People and the Making of India's Constitution", 65 The Historical Journal 1102 (2022)

82 Jackie Dugard, "Testing the transformative premise of the South African Constitutional Court: A comparison of High Courts, Supreme Court of Appeal and Constitutional Court socio-economic rights decisions, 1994–2015", 20 *Int'l J. Hum. Rts* 1132 (2016).

83 **S. van der. Berg, "A Capabilities Approach to the Adjudication of the Right to a Basic Education in South Africa" 18(4) *Journal of Human Development and Capabilities 497* (2017).**

84 K. Omidire, "Administrative Justice as Human Right: A Perspective from South Africa" 4(2*) International Journal of Law and Society* 128 (2021).

Such a mutually defining relationship between judicial innovation in the domestic constitutional setting and the sharing of law in international jurisprudence reinforce the universal ideals of human rights and democratic governance. Also, the interpretation of the Indian Supreme Court based on constitutional morality has enabled the Court to develop a robust jurisprudence on rights with the scope to include unenumerated rights essential to dignified lives in modern society.[85] Such an initiative highlights the importance of the Court as an institutional actor that plays a critical role in influencing the normative contours of India, especially when the lawmaking process should not keep pace with social change.

6. Conclusion and Suggestion

This paper on Freedom of Speech, Public Morality and Tolerance can give us a deep insight on how the rules of constitutionalism and constitutional jurisprudence help democratic societies strike a balance between personal rights and public morality and tolerance. Freedom of speech and expression is central to liberal democracies, since it forms a bulwark of individual free will, social development and the growth of democratic principles. This freedom is not absolute, reasonable restrictions can be placed to maintain law and order, decency, morality, and social harmony. The constitutional makers have solved the conflict between individuality and morality through restricting the article 19(2).

The judiciary, especially the Supreme Court of India has played a crucial role in impacting this balance between these two competing interests. The Supreme Court of India has interlinked the public morality and the fundamental rights by respecting pluralism, tolerance, and changing morality of the society. The concept of constitutional morality is a central idea of the Indian Jurisprudence which is aligned with dignity, equality and freedom instead of favouring traditional or majoritarian morality.

85 Particularly, the Supreme Court of India has enlarged the scope of Art.21 of the Constitution of India encompassing a variety of rights which are essential attributes of life with dignity. See *Maneka Gandhi* v. *Union of India (1978) AIR 597*, *Francis Coralie* v. *Union of India* AIR (1981) SC 746.

Constitutional morality becomes the philosophy of the Indian courts in maintaining the law and policies of the government should be in consonance with the ideals of democracy and fundamental values incorporated in the constitution. It has been decisive in respecting the rights of minorities and marginalized sections of society, and creating a social structure that values diverse opinions. This principle provides liberal interpretation of the law in line with the changing societal norms and human rights issues.

The courts in India should adopt a restraint approach when imposing restrictions on freedom of speech and expression on moral grounds. Judiciary should not become an instrument of conservative instead focus on protecting the democratic ideals of free expression. The legal framework should promote pluralism and promote dissenting voices.

Presumption Of Culpable Mental State and Section 15(1) of the POCSO Act: A Case Comment on Just Rights for Children Alliance & Anr v. Union of India & Others

Dr.P.R.L.Rajavenkatesan*
Snegapriya V S**

Abstract

The case of Just Right for Children Alliance & Anr v. Union of India & Ors has ended the longstanding public disquiet about child victimization perpetuated by child pornography with its significant ruling that 'mere' viewing, possession, or storage is an offence under Section 15 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act"). The judgment is lauded for its attempt to replace the term 'Child Pornography' with 'Child Sexual Exploitative and Abuse Material' (CSEAM) by imposing a bar on its judicial usage, which is an exceptional feat of social engineering. With which the exploitation and abuse involved in child pornography has been brought to light. While all these are perceived to be significant progress made in curbing crime against children, it has opened the discussion on the position of the accidental possessor of the contraband. In this regard, this paper aims to fulfil its objective of analysing the judgment in detail by understanding the legislative intent of Section 15 of the POCSO Act and the judicial interpretations of its clauses (1), (2), and (3). Through doctrinal analysis, this paper seeks to critically examine the rationale behind the presumption of culpable mental state under Section 30 of the POCSO Act and the application of the reverse burden of proof doctrine in the present case.

Keywords*: Abuse, Children, Perpetrators, Pornography and Videos.*

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* Professor of Law, VIT School of Law, Vellore Institute of Technology, Chennai- 600 127.

** Final Year LL.M., Student, School of Legal Studies, Cochin University of Science and Technology, Cochin.

I. Introduction

Children are menaced by perpetrators in various ways and for different means every single day in larger numbers than ever before. In this context, child pornography has turned out to be the most lucrative globalised illegal activity just next to drug trafficking.[1] The perpetrators operate from the demand side, treat vulnerable children as commodities, and commercialize them for profit.[2] The issue is of a nature that is not only confined to children being exploited and abused while making pornography videos, but it also extends to the future victimisation of children induced by such videos.[3] To address the severity of the problem, international and domestic laws have been enacted to ensure the 'Best Interest of the Child', devoid of discrimination.[4] In India, a catena of judicial pronouncements has reinforced the purpose and object of legislation dealing with this issue. One such decision is *Just Rights for Children Alliance & Anr v. Union of India & Others (Just Rights')*, where even 'mere' viewing, possession or storage of child pornography has been held to be an offence by interpreting Section 15 (1) of the Protection of Children from Sexual Offences Act of 2012 ("POCSO Act"). Nevertheless, the associated consequence of the same has been briefly addressed to the extent of leaving the distinction between accidental and intentional possession unattended.

II. Facts of the Case

On 29 January 2020, an FIR was registered against a 25-year-old man ("Respondent") at the All Women's Police Station, Ambattur for offences punishable under Section (s) 67B of the Information Technology Act, 2000 ("IT Act") and 14 (1) of the POCSO Act. The FIR was registered

1 Vasilis Dimoulas. et al, 'Child Pornography in Cloud Era' (Themis Competition, 2018) International Cooperation in Criminal Matters, Paris <https://portal.ejtn.eu/PageFiles/17290/WR%20TH-2018-01%20GR.pdf> accessed on 18 May 2025.

2 UNODC, *Global Report on Trafficking in Persons,* (United Nations publication, 2020), accessed on 30th May , 2025.

3 Richard Wortley. et al. 'Accessing child sexual abuse material: Pathways to offending and online behaviour' (2024) Child Abuse Neglect, 154. <https://doi.org/10.1016/j.chiabu.2024.106936> accessed 30th May 2025.

4 United Nations Convention on the Rights of the Child, 1989, Art. 3.

based on a 'Cyber Tipline Report' of the National Crime Records Bureau (NCRB) informing the Additional Deputy Commissioner of Police (Crime against Women and Children branch) that the Respondent was an 'active consumer' of pornography, and had allegedly downloaded pornographic material involving children in his mobile phone. The Computer Forensic Analysis ("CFA") report of the Respondent's mobile phone found the presence of more than a hundred pornographic videos, including two 'child pornographic' videos. In September 2023, the chargesheet was filed against the Respondent under Section (s) 67B of the IT Act, 14 (1) and 15(1) of the POCSO Act. Aggrieved by the alleged charges, the Respondent approached the High Court of Judicature at Madras ("High Court") for quashing the chargesheet and the criminal proceeding arising therefrom. Through an order dated 11 January 2024 ("Impugned Order"), the High Court ruled that "mere possession or storage" of 'child pornography' was not an offence under the POCSO Act and hence quashed the criminal proceedings pending before the Sessions Judge, Mahila Neethi Mandram ("Fast Track Court"), Thiruvallur District, Tamil Nadu. On 22 February 2024, an NGO named 'Just Rights for Children Alliance' ("Appellant") challenged the impugned order dated 11 January 2024 before the Supreme Court of India. The Appellant contended that the impugned order is normalizing child pornography as it has created an impression among the 'general public' that downloading and possessing child pornography is not an offence. Furthermore, increased demand for child pornography and people involving innocent children in pornography would be the unfortunate aftermath. There are issues as follows: Is it reasonable and fair to consider 'mere' viewing, possession, or storage of child sexual abuse material a punishable offense under the distinct interpretations of Section 15(1) of the POCSO Act? And whether the presumption of culpable mental state under Section 30 of the POCSO Act be extended to Section 15 of the POCSO Act, and whether it is permissible for the High Court to invoke such presumption while quashing a petition under Section 482 of Cr.P.C?

III. Critical Analysis of Just Rights for Children Alliance & Anr v. Union of India & Others

Is it reasonable and fair to consider 'mere' viewing, possession or storage of child sexual abuse material a punishable offence under the distinct interpretation of Section 15(1) of the POCSO Act? The distinct interpretation of Section 15(1) of the POCSO Act can be comprehended post-parsing the entire provision in detail. Section 15 enumerates and penalizes 3 different forms of storage and possession of Child Pornography under a catchall title, "*Punishment for storage of pornographic material involving child*," reads as follows,

"(*1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.*

(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."

The plain reading of Section 15 (1) provides that it penalizes the act of possession or storage of child pornographic material ("Child Sexual Exploitative and Abuse Material") coupled with an intentional choice not to delete or destroy, or report it to the competent authority. Section 15(2) criminalizes the act of storing the contraband to transmit, propagate,

display, or distribute. If the pornography material is stored for any commercial purpose, it falls within the purview of Section 15(3). In *Just Rights*, subsections (2) and (3) were not the subject of discussion, as the accused person had not shared those two videos he was found to be in possession of and did not store them for any commercial purposes. The distinction between the clauses (1) and (2) of Section 15 is that the former criminalizes the act of possession, whereas the latter criminalizes the act of transmission, propagation, display or distribution.[5] Section 15(1) requires intention to share or transmit, it penalizes the very act of possession of child pornography and employs presumption provided under Section 30. Nevertheless, it allows the accused to defend and prove his innocence if found to be in 'possession' of the Child Sexual Exploitative and Abuse Material ("CSEAM").[6] Ingredients of Section 15 (1) are as follows, Possession of child pornography ; Failure to delete, destroy or report and with an intention to share or transmit.

It is comprehensible that the legislative intention of Section 15(1) is not to penalize 'mere' viewing, possession, or storage of child pornography but to criminalize such acts fuelled by an intention to transmit or transfer such videos. As elucidated in *para 74* of the judgment, the amendment to Section 15 (came into force on 16 August 2019) by which Section 15(1) was added is to combat the sexual exploitation of children by exerting a more stringent law to punish the perpetrators. The intention to exploit is criminalized, but not mere possession. Per contra, in *Just Rights*, the Supreme Court of India has penalized even 'mere' viewing, possession, or storage of CSEAM under Section 15(1) of the POCSO Act. The rationale of the judgment is discernible from *Para 109* of the judgment, where the court has highlighted the modus operandi of the distribution of child pornography and how criminals are evading the provisions of the POCSO Act. The

5 Gauri Kashyap, '*Supreme Court's Landmark Judgment'* (Supreme Court Observer, 2024) <https://www.scobserver.in/journal/supreme-courts-landmark-pocso-judgement/#:~:text=Section%2015(1)%20penalizes%20the,or%20distribution%20of%20such%20material> accessed on June 1st, 2025.

6 *Ibid.*

concern has been placed on the leapfrogging trend of making money through sharing links instead of sharing the actual videos and downloads. By only forwarding links, the condition requisite for attracting Section 15 of the POCSO Act, i.e. storing such material on any device, is completely bypassed. It is the same with those who view such material, as links are used to access CSEAM, no actual download is involved. Thus, Section 15 of the POCSO Act, which necessitates the possession or storage of CSEAM as a precondition to criminalise the subsequent transfer or distribution, is not applicable.

The underlying reason behind the ruling is what makes the *Just Right* judgment a pressing necessity. The gravity of the issue justifies the court's decision. India reflected on the UNCRC mandate and enacted the POCSO Act. The legislative intent of the Act is to protect innocent children from being victimised. While the moral reprehensibility of 'mere' watching of CSEAM subsists, its social implications led to its criminalization. The free circulation of such materials will normalize crimes and psychologically persuade an individual to commit them. The recent news from Gujarat, which stunned the public with the report of a teen brother raped his 13-year-old sister after watching a porn video, is one of the hundreds and thousands of incidents that reveal the impact of pornography.[7] Consequently, the Hon'ble Supreme Court in *Just Rights* holding that storing or distributing contraband is inessential, even accessing CSEAM online amounts to "constructive possession" and hence falls within the purview of Section 15 of the POSCO Act, is crucial to stifle child exploitation.

However, one cannot overlook the other aspect of the judgment, which impinges on the rights of the accused. It is pertinent to note that, in this case, the CFA report of the Respondent's mobile phone indicates that he was an active consumer of pornography, from whose phone100+ videos were recovered, out of which 2 videos were CSEAM. The date of

7 Sudeep Lavania, 'Teen rapes 13-year-old sister, impregnates her in Gujarat's Surat' *India Today*. (4 October 2024) <https://www.indiatoday.in /india /story/gujarat-girl-pregnant-after-being-raped-by-teenage- brother-in-surat-2610935-2024-10-04> accessed 15th June, 2025.

creation (download) and the last modified date of CSEAM being the same date (14. 06. 2019) conveys that those files were never accessed or have not been accessed after that mentioned date. It is also to be noted that those files were WhatsApp zip files.[8] A zip file contains several documents; upon extraction, all files get downloaded automatically.[9] Convincingly, he might not have known those files existed in his phone. With that, a question arises: What is the position of an accidental recipient or unintentional downloader post *Just Rights* decision?

With *Just Rights* decision, even if one has not searched or browsed for child pornography, the files were downloaded without his or her knowledge (possibly through automatic downloads or malware), mere accidental possession is now enough to bring him or her within the purview of Section 15 (1) of the POCSO Act. An individual will get punished for no fault of his/her own in pursuance of this judgment. Hence, critics claim that while giving greater importance to curbing child exploitation and prioritising *the best interest of a child principle,* the court has glossed over the potential future consequences of such a decision.

In line with the foregoing analysis, placing reliance on the ratio of the following cases gains prominence,

- *P.G. Sam Infant Jones v. State of Tamil Nadu*[10] - In this case, the accused was a PhD scholar, against whom the criminal proceeding was initiated based on the tip-line report from NCMEC. After examining the facts, the court has held that the distinction between one-time consumers and those who transmit, propagate, display, or distribute in the digital domain needs to be made to apprehend the actual offender.

- *Manual Benny v. State of Kerala*[11] - In this case, the court observed from the presented facts that the CSEAM stored in the accused's mobile phone, downloaded from a messaging app 'Telegram', offers a great possibility for automatic or accidental download. And, to attract

8 Computer Forensic Analysis Report, *Just Rights for Children v. S Harish* (2024), Pg 8 of 199.
9 WhatsApp Help Centre (n.d.) *How to Configure auto-download*, accessed on 15th June, 2025.
10 *P.G. Sam Infant Jones v. State of Tamil Nadu*, 2021 SCC OnLine Mad 2241.
11 *Manual Benny v. State of Kerala*, 2022 KER 9730.

Section 67B, the pornographic material in question shall be voluntarily downloaded.

- *Shantheeshlal T v. State of Kerala*[12]- In this case, the court held that possession or storage of CSEAM is a prerequisite condition to attract Section 15(1) of the POCSO Act. Further, such material should be shown to have been shared or transmitted by the accused. Mere possession or storage of pornographic material by itself is not an offence under Section 15(1) unless it is shown that the accused person had indeed shared or transmitted such material. Hence, to constitute an offence under Section 15(1) of the POCSO Act, there must be an actual act of transmission or sharing.

The balanced approach was commonplace in the abovementioned cases, where the accused's position was determined by giving him/her a fair opportunity to defend, and justice was certainly rendered to victims by upholding the essence of the provision. There are other issues as follows: Whether the presumption of culpable mental state under Section 30 of the POCSO Act be extended to Section 15 of the POCSO Act, and whether it is permissible for the High Court to invoke such presumption while quashing a petition under Section 482 of Cr.P.C? To provide a nuanced analysis, the issue has been bifurcated as follows: Whether the presumption of culpable mental state under Section 30 of the POCSO Act be extended to Section 15 of the POCSO Act?

Section 30 of the POCSO Act reads as follows,

"(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

12 *Shantheeshlal T v. State of Kerala*, 2024 KER 35968.

Explanation. – In this section, 'culpable mental state' includes intention, motive, knowledge of a fact, and the belief in, or reason to believe, a fact."

The terms '*any offence'* followed by the expression "*requires a culpable mental state on the part of the accused*" in Section 30 (1) accentuate that the provision extends to Section 15 of the POCSO Act. The commission of an offence under Section 15 requires a culpable mental state, and as per this presumption, the *actus rea* satisfies the condition to assume the *mens rea*. This approach diverges from the general '*innocent until proven guilty*' principle. In pursuance of Section 30, the court *shall presume* that the accused person is guilty unless he proves his innocence beyond reasonable doubt. Such a presumption in a special legislation enacted under Article 15 (3) read with Article 39 (f) of the Indian Constitution is sensible, judicious and reasonable, as it leaves no space for an accused to escape by circumventing the Act.

Its importance can be comprehended by analysing the case of ***U.S. v. Vosburgh***[13] **(*The Vosburg*).** It was an Appeal before the United States Court of Appeals. The facts of the case were that the accused, Roderick Vosburgh ("Appellant"), challenged his conviction for the charges under 18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252(b)(2) for possession of CSEAM. This case exemplifies the technicalities coupled with ambiguities in law that may favour the accused if the legal framework is not sufficiently stringent. The complexity began with the fact that an internet message board named '*Ranchi'* existed, which was solely devoted to sharing and circulation of CSEAM, including infants engaging in sexual activities with adults. *Ranchi* was designed to provide access only through one of the three 'gateway' websites (revised every three months), and each consists of a webpage containing a direct link to the actual *Ranchi* platform.[14] The location of the *Ranchi* on the internet was untraceable, as updates were made every week. Therefore, it is very unlikely for an innocent internet user to land on *Ranchi* by mistake or through an unfortunate Google search, as "*Ranchi was moving frequently*

13 *U.S. v. Vosburgh*, 602 F.3d 512 (3d Cir. 2010)
14 Id. at 3.

and had cumbersome URLs".[15] Therefore, technical know-how is necessary to find the message board itself, followed by a complex process to access CSEAM. URLs posted in *Ranchi* started with the prefix "hxxp," rather than the customary "http," to make it difficult for search engines to detect the links.[16] It requires the user to copy and paste the URL, then change "hxxp" to "http" to access *Ranchi*. Even after downloading, to access the files, they must be decrypted first using a password. The entire crime was uncovered by an FBI Agent, who entered *Ranchi* and posted a download link for a fake CSEAM. The Appellant was arrested for the possession of child sexual explicit content, which happened after and based on his desperate attempts to download the fake content that the FBI Agent posted. Subsequently, several similar videos and pictures were recovered from his devices.

In light of *the Vosburg* facts, to curb similar crimes and prosecute such perpetrators, Sections 15 and 30 of the POCSO Act are crucial provisions, as the issue is no longer confined to the territory of a particular country but is a borderless organised crime. In the present context, CSEAM is not available in the public domain as intermediaries (e.g. Google) have taken all necessary steps to remove and report CSEAM to law enforcement authorities. Therefore, for a person receiving spam advertising CSEAM, a pop-up link appearing on unrelated websites or inadvertently landing on a CSEAM is next to impossible. Comprehensively, technical know-how is required to watch or download child pornographic material as it is not openly accessible; hence, the *actus reas* of downloading or watching child pornography is sufficient to show the intention of the person who is indulging in such an act. This backs the significance of the presumption under Section 30 of the POCSO Act. However, in the *Just Rights* case, a ticklish problem of reasonableness arises from the application of the presumption along with the inchoate crime doctrine in a case where the accused had contraband that had never been shared and might have been an accidental download. Whether the High Court should have invoked such a presumption under Section 482 of

15 Ibid.
16 Id. at 4.

Cr. P.C., while quashing the criminal proceeding? Section 482 of CRPC reads as follows, ***"482. Saving of inherent powers of the High Court.***

Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

This provision empowers the High Court to make any order necessary to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Explicably, the court is not duty bound to invoke the presumption clause under Section 30 of the POCSO Act at the stage of quashing petition, but, if it finds it is necessary to secure the ends of justice, it shall consider the application of the provision for presumption, where the case necessitates the establishment of the culpable mental state of the accused person. In this case, the High Court dealt with Section 14 of the POCSO Act and Section 67B of the IT Act, not Section 15; hence, the necessity for invoking Section 30 did not arise. However, the Supreme Court emphasised that where there is a statutory presumption regarding the existence of the culpable mental state, the High Court shall consider such provision without which the absence of such mental state shall not be determined, while quashing the petition.[17] Though it is provided under Section 30 that the presumption shall be considered by the special court, as the question before the HC was whether or not to allow the continuance of a criminal proceeding, it would be justifiable on the part of High Court to apply such presumption to secure the ends of justice as held in the case of *Rathis Babu Unnikrishnan v. The State (Govt. of NCT of Delhi)*.[18] Because if this statutory presumption is not applied, then the absence or presence of *mens rea* for a particular offence would be determined based on the general criminal jurisprudence, where the accused does not bear the burden of proof, which will destroy the very object of the legislation.[19] In the *Just Rights* case, it was the POCSO Act.

17 *R. Kalyani v. Janak C. Mehta & Ors, (2009)* 1 SCC 516.
18 *Rathis Babu Unnikrishnan v. The State (Govt. of NCT of Delhi),* 2022 INSC 480.
19 *Prakash Nath Khanna v. CIT,* (2004) 9 SCC 686.

IV. Conclusion

To conclude, child Pornography was expressly addressed for the first time at the international level in Article 34 of the United Nations Convention on the Rights of the Child,1989 (UNCRC) long before this phenomenon escalated dramatically. The domestic manifestation of the same is the Protection of Children from Sexual Offences Act, 2012. Though Section 292 of the IPC was applied to some extent, the Special Act introduced provisions for criminalization of Child Sexual Exploitative and Abuse Material' (CSEAM). Before the 2019 amendment, the provision was confined only to storage for commercial purposes, but with the insertion of Section 2 (1) (da), Section 15 (1), and (2), the scope of Section 15 was widened. The underlying reason for having a distinct provision for the reverse burden of proof under Section 30 of the POCSO Act is that storage or possession of CSEAM validates an individual's sexual interest in children, to groom and entice children, or to threaten victims or offenders for financial gains. Its free circulation with no legal restriction may induce others to access CSEAM to feed their curiosity, for sexual arousal, or for different purposes. In this context, criminalizing viewing, possession and storage of CSEAM is reasonable, but widening its scope to cover even 'mere' possession or storage is a quixotic endeavour in this digital world. If the term 'mere' is used, then it would leave no defence for an accused person to prove his innocence. Even the presumption of culpable mental state under Section 30 is rebuttable, but with the *Just Rights* judgment, no matter whether the possession is accidental or unintentional, the possessor would be prosecuted under the POCSO Act. As in the case of accidental downloads, the possessor who is unaware of the existence of the contraband would not destroy it, resulting in prolonged possession, which inherently attracts the attention of intermediaries. Consequently, such possessors become hapless victims, as now even mere possession or storage of CSEAM is a criminal offence punishable under Section 15 (1) of the POCSO Act, 2012.

The Socio-Economic Impact of Marital Rape and Legal Inaction: Unrecognized Harm

Dr. Purnima Gupta*
Ms. Smriti Sharma**

ABSTRACT

The topic explores the complex issue of marital rape by looking it from both legal and socio-economic perspective. Even though sexual assault is widely acknowledged as a serious crime, many nations, including India, still do not include in their legal systems, which results in a huge legal gap. This gap stems from the outdated notion that consent is impliedly granted upon marriage, rendering the concept of rape within marriage legally and socially invisible. The research intends to analyse this disparity, highlighting the necessity of legislative changes to acknowledge marital rape as a crime that infringes upon fundamental human rights. From a socio-economic viewpoint, the issue is compounded by patriarchal norms that normalize control over a wife's body as a husband's prerogative. These customs, rooted in deeply ingrained cultural values, perpetuate the silence around marital rape, discouraging victims from getting justice. The economic dependency of women on their husbands further exacerbates this issue, as many are financially incapacitated to take legal action or to break free from abusive marital dynamics. Beyond the lapses in the law, this paper examines the socioeconomic effects of marital rape. The paper will explore how legal recognition of marital rape could not only uphold justice but also pave the way for social reform, challenging patriarchal norms and promoting gender equality. The researchers urge immediate legislative action to address marital rape as a socioeconomic crime and a social reality in order to close the legal gap.

* Associate Professor, MAIMS, Rohini
** Research scholar, USLLS, GGSIPU, Dwarka

Keywords: *Marital Rape, history, theories, socio-economic considerations.*

I. Introduction

Marital rape, also known as spousal rape, refers to as a non-consensual sexual intercourse between married partners and here in this paper, it refers to non-consensual intercourse by a husband with his own wife. Unlike other forms of sexual assault, marital rape occurs within the context of a marriage, fuelling the traditional perceptions that marriage implies permanent consent to sexual activity by the wife. Marital rape is a significant issue with far-reaching implications on individual well-being, gender equality, and human rights. It affects individuals across diverse societies and cultures, revealing deep-rooted gender biases and societal norms that have historically silenced survivors and downplayed the gravity of sexual violence within marriage. Recognizing marital rape as a criminal offense challenges the idea that marriage grants an irrevocable right to sex, a notion that has long enabled coercive control and abuse under the guise of marital obligation. Marital rape not only violates an individual's autonomy over their body but also has profound mental, emotional, and physical consequences. Victims often suffer from trauma, depression, anxiety, and post-traumatic stress, which can disrupt family structures, relationships, and community cohesion. Furthermore, marital rape contributes to a culture of silence around sexual violence, as many survivors are deterred from reporting due to fear of stigma, retaliation, or lack of legal recourse. Recognition of marital rape by different legal systems signals that all individuals deserve respect and agency in intimate relationships. Therefore, the criminalization and acknowledgment of marital rape are crucial steps in ensuring personal dignity, advancing women's rights, and fostering healthier, more equitable societies.

The Researcher through their Research paper states that marital rape is a grave violation of human rights and must be addressed effectively within socio-legal frameworks. This kind of rape must be recognized as a

crime to dismantle patriarchal norms, and ensure equal protection under the law for all individuals, regardless of their marital status. This research paper advocates for creation of specific legislation for the protection against the violation of rights of the wife by the husband in a heterosexual marriage. Doctrinal Research has been attempted for the paper. Both primary and secondary sources, such as statutes, case laws and articles, have been used to gather data.

II. History Behind Marital Rape Exemption

The historical context of marital rape is deeply rooted in patriarchal beliefs that viewed marriage as a contract granting husbands ownership over their wives' bodies. For centuries, most societies operated on the assumption that by entering marriage, a woman provided unconditional, irrevocable consent to sexual relations with her husband. This notion was enshrined in common law. Throughout the history of most societies, it has been acceptable for men to force their wives to have sex against their will. The traditional definition of rape in most countries was 'sexual intercourse with a female not his wife without her consent'. This provided the husband with an exemption from prosecution for raping their wives known as "a license to rape". The foundation of this exemption can be traced back to statements made by Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale (1609–1676) in History of the Pleas of the Crown wrote that: 'the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract.[1] Also, Russell reiterated the same ideology of husband not committing crime against his own wife.[2] The marital rape exemption gained further support by the middle of the 18th century when Blackstone put forth the unities theory, which viewed the husband and wife as becoming one on marriage. In Blackstone's Commentary on the Laws of England (1765),

1 Hale, Matthew, 1 History of the Pleas of the Crown, p. 629. (1736, London Professional Books, 1972)

2 Tan Cheng Han, 'MARITAL RAPE – REMOVING THE HUSBAND'S LEGAL IMMUNITY' Malaya Law Review, Vol. 31, No. 1 (July 1989)

he wrote, “Husband and wife are legally one person. The legal existence of the wife is suspended during marriage, incorporated into that of the husband. If a wife is injured, she cannot take action without her husband’s concurrence.”[3] Historically, in much of the world, rape was seen as a crime or tort of theft of a man’s property (usually either a husband or father). In this case, property damage meant that the crime was not legally recognized as damage against the victim, but instead to her father or husband's property. Therefore, by definition a husband could not rape his wife.

Also, American and English law subscribed until the 20th century to the system of coverture, that is, a legal doctrine under which, upon marriage, a woman's legal rights were subsumed by those of her husband. The implication was that once unified by marriage, a spouse could no longer be charged with raping one’s spouse, any more than be charged with raping oneself. Many jurisdictions, including all fifty U.S. states, had criminalized marital rape by the 1990s. English common law also had a great impact on many legal systems of the world through colonialism.

Rape has been, until recent decades, understood as a crime against honour and reputation, not only in domestic legislation, but also in international law; for example, according to the Article 27 of the Fourth Geneva Convention, "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". It was not until the 1990s that the ICC statute recognized crimes of sexual violence as violent crimes against the person. "Not until the last half century was rape understood to be an offense against the woman, against her dignity, instead of against her family's or her husband's honour”.[4]

3 Sanskriti Singh, ‘Reality and Need for Criminalization of MARITAL RAPE: Does the right of HUSBAND overshadow that of WIFE?’ 06 October 2015, 20th International Academic Conference, Madrid, ISBN 978-80-87927-17-5, IISES

4 Sonia Devi, “MARITAL RAPE: THE BITTER TRUTH OF OUR SOCIETY” Journal of emerging Technologies and Innovative Research ,2022 JETIR December 2022, Volume 9, Issue 12

III. Theories On Marital Rape

Delving into the origin behind justification of the marital rape exemption, the following few theories have been illuminated:

i. Implied Consent Theory,
ii. Unities Theory,
iii. Property Theory, and
iv. Privacy and Reconciliation Theory.

i. Implied Consent Theory

As per this theory, and statements by Sir Mathew Hale, the husband cannot be guilty of rape committed by himself upon his lawful wife and also stated that by virtue of contract of marriage, the wife had given irrevocable consent for sexual relations to her husband.[5]

"Further support for what has been described as the 'right to rape' is found in various dicta in R v Clarence (1888) 22 QBD 23, a case which declared that a man who had sexual intercourse with his wife while he was suffering from venereal disease was not guilty of rape. While the case was clearly not directly on point, a majority of the 13 judges who sat on it appeared to accept Hale's theory of implied consent. English case law developed to the point where a husband could be prosecuted for any actual or grievous bodily harm accompanying the rape of his wife, but not for the act of non-consensual sexual intercourse itself."[6]

There was a demarcation between husband and wife wherein the wife was treated as an inferior to the husband. A wife's choice to not have sexual intercourse was deemed to be secondary to her husband's needs. This was based on irrevocable consent implied at the time of marriage to have intimate relations with her husband.

5 Mathew Hale, Historia Placitorum Coronæ: The History of the Pleas of the Crown (Lawbook Exchange, Ltd.; Reprint ed., 2016)

6 Lea Armstrong, Rape in Marriage: Farewell to the Fiction of Implied Consent, 35 Alternative L.J. 1992

ii. Unities Theory

The Unities Theory derived from the feudal doctrine of coverture, or unity of husband and wife[7]. Blackstone enumerated this doctrine in one of his Commentaries: "*By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated [into her husband].*" Although the doctrine posited that the husband and wife became one upon marriage, in reality "the one [was] the husband." Under this doctrine, the woman's identity merged with her husband after marriage and they were taken as part of one unit and since they were one, it's impossible for a man to rape himself. Therefore, the scope of marital rape extinguished.

iii. Property Theory

This theory puts forth the view that a woman is merely a property, upon birth, her father's then, upon marriage, becomes the husband's property. This notion was reflected in the rape law of England wherein the rape of woman was taken as a crime either against her father or her husband depending upon her marital status. Since a husband could not commit a crime against himself by taking what he already owned, "a husband was no more capable of raping his [own] wife than an owner was of stealing his own property." Sexual intercourse between a husband and a wife could never constitute rape, because the husband would merely be "making appropriate use of his property."[8]

iv. Privacy and Reconciliation Theory

During the Victorian era, 'privacy meant keeping people out of one's own business [and] the domestic fortress was privacy's stronghold.' Under the common law, a husband had legal and physical control over his wife, and the law protected a husband's right to exert such control without

7 Thomas Clancy, Equal Protection Considerations of the Spousal Sexual Assault Exclusion, 16 New ENG. L. Rev., 17 (1980).

8 Stacy-Ann Elvy, A Postcolonial Theory of Spousal Rape: The Carribean and Beyond, 22 MICH. J. GENDER & L. 89,105 (2015)

intrusion. A husband could subject his wife to corporal punishment; authorities would intrude on the sanctity of marriage only where a husband caused permanent physical injury to his wife.[9] This marital privacy finds support from the doctrine of coverture.[10] Under the privacy theory, failing to prosecute a husband for raping his wife prevented governmental intrusion, protected marital privacy, and promoted reconciliation between spouses. Upon marriage, "the curtain is drawn: the public stays out and the spouses stay in." If a husband were prosecuted for raping his wife, the public could review the intimate acts of a married couple, which would violate the couple's right to marital privacy. Under the reconciliation theory, one spouse should not be able to waive the right to marital privacy without the other spouse's consent. Spouses are incentivized to resolve their problems without outside interference, which facilitates mutual respect between the spouses. Under the reconciliation theory, the ability of married couples to reconcile would be greatly decreased if spouses were permitted to access the criminal justice system to resolve all of their marital disputes."[11]

The above-mentioned theories preserve the tenets of patriarchy. However, these theories cannot be strictly applied in India. Marriages in India are predominantly arranged by the parents and may often be forced upon the girl. Therefore, the consent given by the girl at the time of marriage may not be free. Further, child marriages are still a reality in India where the concept of consent doesn't exist. Hence, application of implied consent theory may fail under these circumstances.

Furthermore, there was no concept of divorce in India till the Hindu Marriage Act was enacted in 1955[12] providing for dissolution of marriage on various grounds such as adultery and cruelty. Additionally in 1976, by

9 ibid.

10 The legal identity of a woman merges with her husband upon marriage and they are treated as single, unified legal entities. The Doctrine Of Coverture Family Law Over 185 Years of Combined Experience Practicing available at: https://moshtaellaw.com /blog/ the-doctrine-of-coverture-family-law / (last visited on April 12, 2025).

11 Supra note 8.

12 The Hindu Marriage Act, 1955, No. 25

way of amendment, the legislature provided the husband and wife to divorce through mutual consent[13]. This signals that the law is providing a tool to legally end unacceptable marriages. Therefore, it cannot be asserted that marriage is of permanent nature in India because law provides for the culmination of dysfunctional marriages.

Lastly, the unities and the privacy theory may not resonate in Indian laws which do criminalize husbands for certain wrongful conduct. For instance, a husband can be punished in India for committing cruelty or domestic violence on the wife. In these cases, a wife is treated as a separate legal entity from the husband and the law does not shy away from punishing the husband by encroaching their marital privacy. Still, India continues to have the marital rape exemption clause. Initially, it was in the Indian Penal Code, 1860 which has now been replaced by Bharatiya Nyaya Sanhita, 2023.

IV. Overview Of The Legal Discourse

The Indian Penal Code defined the offence of rape under section 375 as a violent act committed against the will of the women[14]. Focusing on

13 Marriage Laws (Amendment) Act, 1976 (Act No. 25 of 1955)

14 S-375 Rape- A man is said to commit "rape" if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

First.Against her will.

Secondly.Without her consent.

Thirdly.With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

the exception 2 to the Section 375, it clearly stated that *"sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape*"[15]. Therefore, the husband would not be punishable for any forceful sexual intercourse with his own wife above the age of 15 years. And this exemption found support from the doctrines applicable in the Victorian era which led to its incorporation while drafting the Indian Penal Code in 1860. The only scenario where marital rape was criminalized was if the wife was below the age of 15 years and the law remained largely unchanged.

The introduction of Protection of Children from Sexual Offences Act (POCSO Act) in 2012 became problematic for the marital rape exemption as this act criminalized all kinds of sexual assaults with children below the age of 18 years. Under the penal code, the husband was not punishable if he were to have sexual relations with his wife above the age of 15 years but below 18 years. However, the same husband could have been held liable for penetrative sexual assault as per provisions of the POCSO Act. On that account, the provisions of the POCSO Act were in conflict with the exception in the Penal Code. Therefore, to harmonize the provisions

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Fifthly.With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly.With or without her consent, when she is under eighteen years of age.
Seventhly.When she is unable to communicate consent.
Explanation 1.For the purposes of this section, "vagina" shall also include labia majora.
Explanation 2.Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
Provided that a woman who does not physically resist the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
Exception 1.A medical procedure or intervention shall not constitute rape.
Exception 2.Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape

15 Ibid.

of both the Indian Penal Code and the POCSO Act, the Supreme Court read down the exception 2 of Section 375 in Independent Thought vs Union of India[16]. Consequently, the exception was modified to criminalize marital rape by the husband on his own wife below the age of 18 years.

It is clear from the above that the original penal code of 1860 did not provide any remedy under the rape law to the married women above the age of 15 years. However, in 2013, post-nirbhaya case, Criminal Law Amendment Act introduced new provisions to enhance the protections given to women, especially married women under section 376B[17]. This section penalized the husband for having sexual intercourse without the consent of his wife, if the wife was living separately- under a decree or otherwise. This meant that the India criminal law provided for partial protection through the exemption and this provision.

Further, any suggestion to create a specific offence to criminalise marital rape has been rejected by Parliamentary Ministry on account of already existing provisions including Section 498A of the Indian Penal Code, the Protection of Women from Domestic Violence Act, 2005 (PWDVA, 2005), and various other personal laws dealing with marriage and divorce.[18] Regarding the alternate remedies, section 498A[19] criminalizes subjecting a woman to cruelty by her own husband or his relatives. However, section 498A is not necessarily applied even in clear cases of marital rape. In Bomma Ilaiah case,[20] The High Court set aside the charge of cruelty under section 498A despite clear medical evidence

16 AIR 2017 SUPREME COURT 4904

17 S.375B, Indian PenaL Code, 1860- Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

18 Sabhapandit, S. (2023, August 2). Criminalising marital rape in India. The India Forum. https://www.theindiaforum.in/law/criminalising-marital-rape-india

19 Section 498A-Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

20 Bomma Ilaiah V. The State Of Andhra Pradesh 2003(1)ALD(CRI)965

that the wife had injuries in her vagina due to forceful insertion of a stick and fingers by her own husband.

Apart from section 498A, PWDVA Act provides for civil remedies in case of marital rape. First and foremost, section 3[21] defines what

21 Section 3- Definition of domestic violence.—For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—
(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;
or (b) 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;
or (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b);
or (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person. Explanation I.—For the purposes of this section,—
(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;
(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;
(iii) "verbal and emotional abuse" includes— (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested;
(iv) "economic abuse" includes— (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

constitutes domestic violence, it enumerates the situations of abuse which also includes sexual abuse. It is any abusing, humiliating or degrading conduct of the husband which is sexual in nature that is violative of the dignity of a woman. Secondly, the remedies under the Act includes counselling [22]; right of the aggrieved to reside in the shared household even without any title[23], seeking protection orders[24] or residence orders[25]. The aggrieved wife can also seek monetary reliefs[26] and compensation orders[27] in such cases. The major problem in case of a wife seeking relief under PWDVA is that it is a mere civil remedies law providing no punishment for such a heinous act by the husband. Therefore, the problem that remains is that there is no law which directly protects victims of marital rape.

The lack of protection has been carry-forwarded to Bharatiya Nyaya Sanhita, 2023. As per the Sanhita[28], a man cannot be prosecuted for having sexual intercourse with his wife provided she is above the age of 18 years. In addition, the offence of cruelty defined under section 86[29] has been made punishable under Section 85 of the BNS. The parliament has failed to provide specific relief for the protection of victims of marital rape despite having the opportunity to incorporate marital rape as a specific offence in BNS.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

22 Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005), s. 14.

23 Id., s 17.

24 Id., s 18.

25 Id., s 19.

26 Id., s 20.

27 Id., s 22.

28 Section 63, Exception 2

29 For the purposes of section 85, "cruelty" means: any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

In T. Sareetha v. T. Venkata Subbaih[30] case, it was held that rights and duties in a marriage, is like a creation and dissolution and not the term of private contract between two individuals. The right to privacy is not lost by the marital Association. Hence there is no punishment for marital rape and the remedy lies with her. Not only is the Indian Constitution a safeguard against all the wrongs for the Indian citizens, but it also clearly demarcates what's right from what's wrong. Along with rights, it also crowns upon its citizens the responsibility that goes hand in hand with it. Each citizen has a responsibility toward Article 21: Right to Life and Right to Live with Human Dignity The Right to Life is an all-encompassing right. Every time an issue on human rights violation crops up, the Right to Life comes to play an integral role in that scenario.

Once this right is violated, the victim can approach the Court to seek Constitutional remedies against the violation under Article 32 of the Indian constitution the State and its fellow citizens. In a landmark case, Chairman, Railway Board & Others v Chandrima Das & Others,[31] a foreign woman, Smt. Hanuffa Khatoon was raped in the Yatri Nivas by four men belonging to the Railway Department and thus later raped again by a member of the Railway department where she was gagged and abused. Hearing her hue and cry, the people from the rented flat had rescued her and she was given Rs10 Lacs as compensation from the Court. The Supreme Court in this regard pointed out that rape is not only a crime against the victim individual but it is also a crime against the society at large. Rape disturbs the entire society as well as the victim equally.

V. Societal Impact

Marriage is a pillar of humanity and plays a crucial role in the development of both women and men in society.[32] There are various national and international legislations, which aim at protecting women; however, in a marital relationship, rape is yet not considered as a serious

30 AIR 1983 AP 356
31 AIR 2000 SC 988
32 Kalyani Abhyankar4 and Anushka Datta, 'Marital Rape: Legal Status and Development' Volume 5, Issue 1, 2022

offence. Marital rape is one such concept, which is difficult to understand and comprehend by society in general. In India, as in different traditional cultures, women have been and still are treated in a number of inhumane ways.[33] Marital rape has profound social repercussions in India. Victims of marital rape suffer depression, severe mental distress, psychological trauma, including anxiety, depression, and post-traumatic stress disorder (PTSD), gynaecological problems and other severe health issues which disrupts family dynamics and affects their ability to maintain relationships or care for children and also impact their lives in a negative manner. It perpetuates gender inequality and reinforces patriarchal norms, where women are often seen as subordinate within marriage. Survivors face immense stigma, leading to underreporting and silence, which further normalizes the issue. This silence impacts not just the survivors but also their families, creating cycles of trauma and reinforcing harmful societal attitudes. This trauma is compounded by the cycle of domestic violence that often accompanies marital rape, creating an environment of fear and helplessness within the household. Children exposed to such violence are deeply affected, experiencing emotional distress and behavioural issues, and may grow up normalizing abusive relationships. Additionally, survivors frequently lose their sense of autonomy, feeling powerless to assert their rights or make independent decisions within their own homes. The lack of legal recognition in our society further exacerbates the problem, as it denies survivors justice and sends a message that their suffering is not valid. Socially, this contributes to a culture where women's autonomy and consent are undervalued, affecting broader conversations about gender rights and equality. Marital rape profoundly affects the private sphere of the home. Outside the home, the societal impact of marital rape is equally significant. This silence perpetuates harmful societal norms that devalue women's autonomy and consent. On a broader scale, the physical and psychological effects of marital rape contribute to public health concerns, including reproductive health issues

33 Saurabh Mishra & Sarvesh Singh, ' Marital Rape — Myth, Reality and Need for Criminalization, (2003) PL WebJour 12

and mental health disorders, placing additional strain on healthcare systems.

VI. Economic Considerations Vis-À-Vis Marital Rape

Financial dependence is one of the biggest barriers for survivors. Many women, especially in traditional households, rely on their husbands for financial security as they are dependent on their spouses.[34] This dependence makes it difficult for them to leave abusive relationships, as they may lack the resources to support themselves and their children. Without financial independence, survivors often endure marital rape in silence, fearing homelessness or destitution. Economic constraints also play a significant role in the issue of marital rape in India, affecting survivors ability to seek justice, escape abusive marriages, and rebuild their lives. Employment challenges also contribute to economic constraints. Survivors who experience prolonged abuse may suffer from psychological trauma, affecting their ability to work or seek employment. Additionally, societal stigma can make it harder for them to find jobs, as many workplaces still hold conservative views on marriage and gender roles. Women who do manage to leave abusive marriages often struggle to secure stable employment, further limiting their options for financial independence. Legal costs and lack of access to justice further exacerbate economic constraints. Seeking legal recourse for domestic violence or divorce can be expensive, requiring legal fees, court costs, and time away from work. Since marital rape is not criminalized in India, survivors must rely on alternative legal provisions, such as domestic violence laws, which may not provide adequate protection or compensation. The financial burden of legal proceedings discourages many survivors from pursuing justice.

34 Abu Zafar M. Shahriar and Quamrul Alam, 'Violence against women, innate preferences and financial inclusion'Volume 87, October 2024, Pacific Basin Finance Journal

Another angle could be the economic disempowerment of women. Women do not have the ability to pursue education or sustain employment. The resulting absenteeism, job loss, or reduced productivity creates a cycle of economic dependency, limiting their financial autonomy. Furthermore, the lack of legal recognition in many jurisdictions perpetuates this vulnerability, leaving women with little recourse or support, thereby reinforcing their economic marginalization. The resulting absenteeism, job loss, or reduced productivity following marital rape creates a vicious cycle of economic dependency that severely limits a woman's financial autonomy. Frequent absences or inability to meet job expectations may lead to disciplinary actions or termination, further isolating the survivor economically. In cases where the woman is forced to remain in the abusive environment due to lack of financial means, the abuse continues unchallenged, reinforcing her dependence on the perpetrator. This economic dependency not only traps the woman in a cycle of violence but also prevents her from accessing opportunities for upward mobility, self-sufficiency, and empowerment. In the long term, this contributes to the feminization of poverty and has broader socio-economic implications for communities and national productivity.

VII. Conclusion

Marital rape must be criminalized as it should not be a right of a husband to force or threaten his wife to enter into any kind of sexual activity. Despite, the fact that marital rape is a heinous act of the husband, it is still not treated as a crime in 32 countries.[35] Proponents of not criminalizing marital rape often present arguments grounded in cultural, social, and familial contexts, these arguments are based on the assumption that a wife is the exclusive property of her husband.

Delving into the history of common law, multiple theories justifying marital rape exists which cannot be made applicable absolutely in India. The exclusion of marital rape from Indian criminal legislation perpetuates gender-based discrimination and reflects a disregard for the individual

35 News 18, August 26, 2021, 16:40 IST

rights of women, ultimately fall short in addressing the fundamental principles of equality, dignity, and autonomy. The law has intervened in the marital privacy to criminalize a husband if he commits cruelty or bigamy which shatters the tenets of marriage. Similarly, the legislature should make an effort to criminalize the husband who commits non-consensual sexual acts on his wife. Women who experience marital rape often face long-term consequences, such as deteriorating mental health, diminished productivity, and hindered economic independence.

The persistence of marital rape as a legally unrecognized offence in India underscores a critical disjunction between statutory law and the lived realities of countless women. This research has sought to illuminate the multifaceted nature of marital rape—not merely as a private or moral issue, but as a complex socio-economic offence rooted in entrenched patriarchal norms and gendered power imbalances. The legal immunity afforded to marital rape under prevailing laws reflects a historically constructed presumption of implied consent within marriage, thereby negating the autonomy and bodily integrity of women.

From a socio-economic perspective, the normalization of male dominance, coupled with women's financial dependence and social subordination, significantly impedes their ability to seek redress. The silencing of victims is not solely a consequence of legal omission, but also a result of cultural conditioning and economic vulnerability, which together perpetuate systemic gender injustice.

The findings of this study reinforce the urgent need for comprehensive legislative reform that unequivocally criminalizes marital rape and acknowledges the necessity of consent within all conjugal relations. However, legal recognition alone is insufficient. It must be accompanied by broader socio-educational interventions aimed at dismantling patriarchal attitudes and promoting gender-sensitive jurisprudence.

In conclusion, the recognition of marital rape as both a legal and socio-economic offence is imperative to uphold constitutional guarantees of equality, dignity, and personal liberty. Bridging this legal gap is not

merely a matter of criminal law reform, but a decisive step toward fostering a more just, equitable, and rights-based social order. Addressing these economic constraints requires systemic changes, including financial empowerment programs, employment opportunities, legal reforms, and stronger social support systems.

The Constitutionalization of Environmental Justice in the Indian Legal System

Dr. Ramandeep Singh Sidhu*

Abstract

The intersectionality of human rights and environmental protection is a contentious issue, with conflicts extending beyond mere environmental conservation to encompass complex dynamics between state sovereignty and individual rights. The environment serves as a fundamental support system, rendering a healthy life impossible without a clean and thriving ecosystem. Consequently, the interdependence between human rights and environmental protection is a critical consideration that cannot be overlooked. Environmental justice seeks to promote and protect the environmental rights of these marginalized groups, mitigating the adverse consequences of environmental degradation and promoting a more equitable distribution of environmental costs and benefits. Environmental justice is social justice that includes allocation of natural resources, political limits of exploitation of natural resources by the state and the corporations. This paper primarily focuses on the constitutionalization of environmental justice in the Indian legal system through judicial activism.

Keywords: *Constitutionalization of Environmental Justice, Human Rights, Religious environmentalism, and Judicial Activism.*

I. Introduction

The intersection of human rights and environmental protection is a contentious and multifaceted issue, often giving rise to conflicts that transcend mere environmental conservation. These conflicts frequently involve a complex interplay between the competing interests of the state, on one hand, and the rights and interests of individuals and communities,

* Assistant Professor & Principal at Bathinda College of Law and also Working as Visiting Faculty at Department of Law Central University of Punjab

on the other.[1] Environmental rights include such as a clean and healthy environment including clean water, air etc. The second aspect relating to human rights and environmental justice, is social justice that includes, the allocation of natural resources, political limits of exploitation of natural resources by the state and the corporations.[2] The rights related to environment are part of environmentalism which principally focus on the human right to healthy environment[3] as a non-legally binding right. It reaffirms obligations to protect, respect and promote human rights, especially of vulnerable communities from the violation of environmental degradation. Environmental justice movement is part of the social movement originating from the social justice movement focusing on civil rights protection, but later shifting its focus on environmental issues, giving rise to the new concept of environmental justice. The concept of environmental justice originated in the United States in the 1970s, and recently it has become a global issue as globalization and environment are inextricably linked with one another.

This paper argues what environmental justice is and how the Indian judicial system has contributed to constitutionalize the concept of environmental justice in the Indian legal system? Indian constitution incorporates fundamental rights in Part III which are legally enforceable, and part IV comprises socio-economic rights which are not enforceable by law, but serves as guiding principles for the government when enacting law. Although there is no explicit mention of environmental rights in part III but article 21[4] has been expanded including the right to a healthy environment, and Part IV in its Article 48A contains environmental protection and also under Fundamental duties Article 51 A(g) in Part IV - A of the Constitution. Part I of the article provides an overview of the research article discussing the significance of environmental rights and

1 Lyuba Zarsky, *Human Rights and the Environment: Conflict and Norms in A Globalizing World* 1 (Earthscan Publisher, 2002).
2 *Ibid*.
3 UNGA, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022). Available at: https://digitallibrary.un.org /record /3983329? ln=en
4 The Constitution of India, Art. 21.

conflict between state and human beings. Part II of the paper defines the concept of environmental justice and illustrates the features of environmental justice. Part III of the paper provides an insight into the religious aspect of environmentalism in India and how religion has been striving to protect nature as nature religion and whether it is religious environmentalism or not? Part IV of the Paper provides a small insight into key laws related to environmental protection and environmental rights. Part V critically analyses how the higher judiciary has been striving to protect environmental rights through social justice mechanisms. Part VI concludes on the basis of preceding parts.

II. Environmental Justice: Concept, Framework and Principles

The environmental justice movement originated in the United States in 1978 as a response to environmental racism. Environmental racism is "any policy, practice or directive that differentially affects or disadvantages (whether intentionally or unintentionally) individuals, groups or communities based on race or colour." Benjamin Chavis, former head of the United Church of Christ's Commission on Racial Justice defines environmental racism as "*Environmental racism is racial discrimination in environmental policy-making and enforcement of regulations and laws, the deliberate targeting of communities of colour for toxic waste facilities, the official sanctioning of the presence of life threatening poisons and pollutants for communities of colour, and the history of excluding people of colour from leadership of the environmental movement.*"[5] Environmental racism is a form of discrimination that is expressly or impliedly directed towards environmentally vulnerable communities such as, poor people, black communities, as in the United States, Indigenous peoples and others. This form of discrimination gave birth to environmental justice, which originated from the social justice movement. Most of the countries have begun to address environmental harms or problems through social justice mechanisms. Later

5 Chavis, B. F., Jr., *R. D. Bullard, Unequal Protection: Environmental Justice and Communities of Colour* XII (San Francisco, CA: Sierra Club Books, 1994).

environmental laws and policies were enacted, and globalization of environmental issues paved the way for the concept of environmental justice.

Bullard defines environmental justice as a principle that "all people and communities are entitled to equal protection of environmental and public health laws and regulations."[6] David Miller defines it as "*the fair treatment and meaningful involvement of all people regardless of race, colour, sex, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies.*"[7] Here, environmental justice primarily deals both with substantive and procedural aspects. In particular, the principle of fair treatment requires no segment of society to be forced or disempowered. Through policies or procedural mechanisms, they should be made to bear a disproportionate share of negative human health or environmental impact. Such results may result from pollution or consequences which are caused by industrial, municipal or commercial operations at any level, from the highest State executive to local levels.[8]

The environmental justice movement began in the 1970s in the United States, as studies revealed widespread environmental inequalities within the State. Later, in 1983, the U.S. The General Accounting office conducted a study based on previous research, finding that African American Communities in the southern United States faced disproportionate environmental discrimination, especially regarding the high number of waste sites located in these areas. The history of environmental justice can be traced back to the civil rights movement in the 1960s. In 1968, Dr. Martin Luther King Jr. spoke in Tennessee about

6 R D Bullard and Benjamin Chavis (Eds), *Confronting Environmental Racism: Voices from The Grassroots* 15 (South End Press, 1993).

7 Daniel A. Bell and Avner de-Shalit (eds.), *Forms of Justice: Critical Perspectives on David Miller's Political Philosophy*, (Rowman & Littlefield, 2003).

8 R D Bullard, "Environmental Justice in 21st Century", University of Wisconsin, Centre For Environmental Research, 1-22, available at: https://uwosh.edu/sirt/wp-content/uploads/sites/86/2017/08/Bullard_Environmental-Justice-in-the-21st-Century.pdf.

the interconnectedness of environmental, economic and social justice highlighting the struggles of striking black garbage workers who were fighting for equal pay and better working conditions.[9] The landmark dispute over garbage arose in Houston in 1978, becoming a significant moment in the environmental justice movement. African Americans in the areas protested the construction of a sanitary landfill out of suburban, middle-income neighbourhood. In response, the Northeast Community Action group was formed and a lawsuit was subsequently filed. *Bean vs. Southwestern Waste Management Inc*. was the first lawsuit filed in 1979, against the waste facility under the civil rights movement. Subsequently, courts began receiving a steady stream of lawsuits challenging environmentally racist policies, particularly the construction of waste management sites in the African American communities, which significantly posed health hazards due to inadequate waste disposal.[10] This trend persisted, as evident in 2007 report, *Toxic Wastes and Race at Twenty, 1987–2007: Grassroots Struggles to Dismantle Environmental Racism Report* (2007) which concluded that socio-economic disparities are very much prevalent in waste facilities construction sites, and these are deliberately constructed near poor societies.[11]

Two Summits were held in the United States to protest racially environmental policies and waste facilities sites. Summit I was held on 27 September 1991 where delegates adopted "17 principles of environmental justice" for the development of organizing, networking and guidance for the government and non-government organizations. These principles were also circulated after translation in the 1992 Rio De Janeiro Earth Summit.[12] The Second National People of Colour Environment Leadership Summit II took place in Washington, D.C., from 23-26 October 2002, attended by 1400 participants, far exceeding the 500

9 Glenn S Johnson, *Environmental Justice in the New Millenium: Global Perspectives on Race, Ethnicity and Human Rights* 17 (Palgrave Macmillan, 2009).

10 *Id*. at 18

11 *Ibid*.

12 United Nations Conference on Environment and Sustainable Development, the Earth Summit 3-14 June 1992.

attendees. It was built on the basis of Summit I, expanding the concept of environmental and economic justice, and exploring its relationship with globalization.[13]

Environmental Justice Framework: environmental justice entails the principle of fair treatment and inclusion of people in the environmental decision making to realize their right to a healthy environment. Environmental justice seeks to eliminate injustice and inequality by devising tools and strategies to bring equal treatment to all the communities. There are certain features which the environmental justice framework must include. *First*: the environmental justice framework should adhere to the principle of protection of all individuals from hazardous environmental issues. To accomplish this a 'public health model of protection' must be adopted. This proactive approach enables the protection of people from environmental degradation before they suffer serious health issues or illness.[14] Bullard signifies that environmental justice frameworks shifts the burden of proof to violators who discriminate or violate the equality principle, predominantly against the marginalized groups such as, poor, people of colour and others. The environmental justice framework allows disparate impact and statistical weight or an "effect" test, as opposed to "intent," to infer discrimination and also redresses disproportionate impact through "targeted" action and resources. In general, "this strategy targets resources where environmental and health problems are the most severe (as determined by some ranking scheme but not limited to risk assessment)."[15] There are certain principles that need to be followed while the environmental justice framework is developed. These principles are based on *Seventeen Principles* adopted by the People of Colour Environmental Leadership Summit, which also serves as the theoretical basis of the framework. The principles are as follows: sacredness of mother earth and its harmonization with other

13 The Second National People of Colour Environment Leadership Summit II, 2002, available at: http://www.sric.org/voices/2003/v4n1/.
14 *Supra* note 6 at 203-204.
15 *Ibid.*

species,[16] reflecting the doctrine of ecocentrism that human beings are not at the centre of the universe.[17] Public policy must be developed with mutual respect and understanding of all communities to provide equal treatment with inclusiveness,[18] ethical and balanced use of natural resources,[19] protection of clean and healthy environment, social, economic, political and environmental self-determination,[20] right to participate in decision-making, right to livelihood, right to receive compensation for environmental injustice, to oppose the establishment of industries which are destructive of the environment and principles of inter-generational which provide that sustainable use of natural resources and environment for the present and future generations. These principles must be incorporated as an essential facet of framework or policy so that environmental justice can be achieved in true sense. This can only be achieved by constitutionalizing environmental justice from a human rights perspective. In India environmental justice has been entailed through fundamental rights perspective which is discussed in part IV of the Paper.

III. Historical development of Environmental Justice in India: A Religious Aspect

Religion has played a very significant role in protecting the environment and preserving nature. Evolution of environmental protection and environmental justice in India is as old as religion. Dharma was considered the law in India. India is a land of diverse religions, primarily Hinduism, Islam, Sikhism, Christianity, Buddhism and Jainism. Religious environmentalism has emerged to protect the environment, nature and their inherent worth. Tomalin has distinguished between two religious approaches to nature: "Nature Religion" and "Religious environmentalism". The former refers to "traditional religious worship of

16 *Supra* note 13.
17 Linda Hajjar Leib, *Human Rights and The Environment* 29 (Martinus Nijhoff Publishers, 2011).
18 Supra note 13, Principle 2.
19 *Ibid.*
20 *Id*., Principle 5.

some elements of nature from the association of specific natural elements with the Gods and Goddesses, rather than ethical concern for environmental protection."[21] Religious environmentalism is a recent contemporary environmental trend that evolved as a reaction against the exploitation of nature and environment on a large scale that leads to global environmental issues. Religious environmentalism owes its origin to non-western religious and cultural traditions that tie the religious environmental activism in deeper spiritual foundations. Tomalin notes that in India, various trees have been worshiped, which is part of nature religion. Although scientific reasons behind these worship practices are significantly not elaborated by the religious priests, science has explored those.

Hinduism is deeply rooted in nature religion. According to Hindu scriptures, all creatures have an equal right to existence. Unlike Christianity, Hinduism does not consider humans as central to the universe. Instead, Hindu scriptures advise humans to live in peace and harmony with nature.[22] The Hindu religion considers trees and nature as sacred, which has been referred to as 'nature religion' by Tomalin. However, this concept has nothing to do with environmental ethics. Buddhism is a religion which is rooted in non-violence and love. The principle of simplicity, which emphasizes sustainability dictates that humans should not exploit nature and must refrain from harming or killing animals. The Theory of Karma and the Theory of Cause and Effects are two major Buddhist principles that caution against harming the environment, warning that such actions will inevitably lead to destruction and crisis.[23] Jainism is also founded on the principle of non-violence which commands individuals to refrain from harming others or themselves. Jains emphasize achieving environmental harmony through

21 Emma Tomalin, "The Limitations of Religious Environmentalism for India,"6 (1) *Worldviews: Global Religions, Culture, And Ecology, 16* (2002).

22 *Ibid*.

23 Universal Responsibility and the Environment available at: https://www.dalailama.com/messages/environment/universal-responsibility

spiritualism, which can be attained by adhering to three fundamental precepts: right conduct, right faith, and right knowledge.[24] Islamic jurisprudence also contains references to environmental protection. Islam ordains that divine rules, which include principles of environmental stewardship, must be followed. The Holy Quran declares that everything is created from water.[25]

Sikhism, being the most recent religion in origin, is also uniquely secular, and has deep veneration for nature. Sikhism was founded by the First Sikh Guru, Guru Nanak Dev Ji. Sri Guru Granth Sahib is considered the living Guru for the sikh community. Sri Guru Granth Sahib has charted the way for religious environmentalism as well. The imagery of the Gurbani guides humankind, and is often interpreted by "environmentally minded Sikhs" as an obligation for the listener to respect and protect nature. The imagery of nature as parent, nurse and Guru suggests a sense of interconnectedness and even intimacy with the natural world. One of the most cited passages of Guru Nanak dev ji: "Balhari Kudrati Vassia'.

Religious Environmentalism, as emphasized in the Guru Granth Sahib, highlights the significance of environmental protection as an integral aspect of life that cannot be ignored. Susan E Prill has aptly termed Sikhism as a "greening" religion.[26]

Religious environmentalism explores the relationship between religion and ecology, and how it is related to environmentalist social movements? This concept encompasses three different movements: i). "Environmental actions of religious leaders and communities" ii). "Political environmentalism bolstered by religious resources", or, iii). "The environmental movement interpreted as a religious movement".[27] It requires a collective response from all world religious leaders to address environmental issues. Gottlieb defines 'religious environmentalism' as a

24 David L. Gosling, *Religion and Ecology in India and Southeast Asia* 16-29 (Routledge Publishers, 2001)

25 *Supra* note 24.

26 Susan E. Prill, "Sikhi and Sustainability: Sikh Approaches to Environmental Advocacy", 11 *Sikh Formations*, 223-242(2015).

27 Roger S Gottleib, *Greener Faith: Religious Environmentalism and Our Planet's Future* 210 (Oxford University Press, 2006).

"*diverse, vibrant, global movement*" of ideas and activism that "*roots the general environmental message in a spiritual framework*".[28] Nevertheless, thinkers do not consider this phenomenon as the emergence of environmentalism per se, but rather as an integral part of nature-based spirituality, which holds significance in the context of religious environmentalism in modern times, particularly in addressing global environmental issues.

Environmental Laws related to Environmental Rights: An Overview from Environmental Justice Perspective

India has enacted various laws relating to environmental protection and to protect rights of its citizens. India has enacted various environmental laws, some of which date back to the British era, while others were introduced after independence. This includes laws enacted to fulfil obligations under international treaties and Article 253[29] of the Indian Constitution. Some notable acts include:

The Indian Forest Act, 1927[30]: is an act enacted during the British India era. The preamble states, "the act consolidates the law concerning forests and transit of forest produce and duty leviable on the timber and forest produce.". **The Prevention of Cruelty Act, 1960** has been enacted to protect animals from harm caused by humans. The Act defines various categories of animals, including domestic, captive, and others. **The Water (Prevention and Control of Pollution) Act, 1974**[31] The Act was further amended in 1988. It protects water from pollution and various judgments have considered water as a fundamental right. Air (Prevention and Control of Pollution) Act, 1981[32], the Environment (Protection) Act, 1986 provides definition of environment and other terms. It is the most significant Act as it includes all kinds of pollution and environment. **The National Forest Policy 1988**[33] is another milestone in the forest rights of

28 *Id. at* 215.
29 The Constitution of India, art. 253.
30 Act No. 16 of 1927
31 Act No. 6 of 1974.
32 Act No. 14 of 1981.
33 Resolution No.13/52/F, 1988.

tribal people. This policy was enacted with two primary objectives: ecological stability and social justice. It strengthens conservation measures and signifies the symbiotic relationship between tribal, poor people and the environment. The Wildlife (protection) Amendment Act, 2002, protects wild animals, plants, and birds, which is essential for maintaining a fair ecological balance and ensuring the enjoyment of environmental rights. The Biological Diversity Act, 2002, in its preamble aims to conserve biological diversity, sustainable use of its elements, equitable sharing of benefits of resources knowledge and other ancillary matters. The Act has been amended in 2023 and made more state friendly. The Right to Information Act, 2005,[34] plays a pivotal role in seeking environmental information. The Scheduled Tribes (Recognition of Forest Rights) Bill, 2005,[35] introduced in the Lok Sabha on 13 December 2005. It was passed by Lok Sabha as well as Rajya Sabha, but the assent of the president is yet to be obtained. This bill seeks to recognize forest rights such as forest dwelling of Scheduled Tribes who are occupying the land before 25, October 1980. Its primary objective is to protect the livelihood needs of the tribal people and trying to protect their allied rights including cultural and religious rights associated with their natural environment.

The above-mentioned list of Acts is not exhaustive, rather indicative of laws enacted to fulfil its international obligations. These laws have been interpreted to recognize the environmental rights under Article 21 of the Constitution. The Constitutionalization of environmental justice is discussed in the following part.

IV. Environmental Justice as Fundamental Rights component Through Judicial Activism

The Constitution of India enshrines fundamental rights and fundamental duties. The conservation, protection and preservation of these rights is significant, and the constitution contains a number of provisions related to the environment. Hohfeld analysis reveals a jural

34 Act No. 22 of 2005.

35 Available at: https://prsindia.org/billtrack/the-scheduled-tribes-and-other-traditional-forest-dwellers-recognition-of-forest-rights-bill-2005.

relation between rights and duties, "If you have a right then, you have corresponding duty as well. Right and duty are essential elements of law. They correlated to each other in such a way that one cannot be conceived without the other."[36] Therefore, environmental protection will be analysed as a duty of the state as well of citizens, and fundamental rights as well from the environmental justice framework. Part III of the Constitution enshrines fundamental rights and part VI comprises directive principles of state policy. These two parts are complementary to each other. Part VIA enumerates the fundamental duties of the citizens.

A. Environmental Protection as Duty of State

Under international law, the state bears a responsibility to protect the environment from pollution and other hazards. Interdependence of ecological and political systems demands that the state is obliged to preserve the human environment, and this is incorporated in international environmental treaties as well.[37] According to Jan Schneder , state responsibility for the protection and preservation of the environment has three broad subgoals: "prevention of environmental deprivations, deterrence of impending environmental harm, and reparation or compensation for environmental injury which nevertheless results."[38] These goals are very essential for realizing environmental justice. Principle 21 of the Stockholm Declaration provides that, "*states have the sovereign right to exploit natural resources according to their environmental policies but they need to ensure that exploitation shall not damage or cause any harm beyond its jurisdiction*."[39] Principle 22 further states that cooperation for environmental liability for pollution and compensation to victims within jurisdiction or beyond jurisdiction should be implemented. The Policies should be enacted in a way to ensure

36 W N Hohfeld, "*Some Fundamental Legal Conceptions As Applied in Judicial Reasoning"*, *23 Yale Law Journal* 21-59 (1913).

37 Jan Schneider, *World Public Order of The Environment* 141 (University of Toronto Press, 1979).

38 *Id* at 142.

39 Declaration on the Human Environment, Stockholm 16 June 1972, U.N. General Assembly Resolutions 2994/XXVII, 2995/VIII and 2996/XXII.

peoples' right to healthy and clean environment, and states must bear in mind this is utmost responsibility, and protecting environment and natural resources is the most significant principle of environmental rights.[40] The *Corfu channel case* and the *Trial Smelter case* are significant milestones in development of environmental law and transboundary harm, and state responsibility. Constitutionalizing the environmental responsibility in the form of duty has been incorporated under the Constitution of India, and various laws have been enacted to prevent the environmental pollution, thereby fulfilling international obligations. The constitutional provisions concerning state duty are discussed in the following paragraphs.

Part IV of the Constitution comprises directive principles of state policy, in the form of active obligations of the state when they enact laws and policies. Article 37 limits the scope of Directive Principles, stating these are not enforceable by any court, whereas fundamental rights under part III are enforceable by court of law.[41] If any direction is not followed by the state, it cannot be enforced through judicial proceedings. Nonetheless, these directives are fundamental in the governance of the state. Dr Ambedkar signifying the importance of Directive Principles stated, "*though directive principles are not legally enforceable but cannot be said these are legally non-binding in nature. While enacting laws, directive principles cannot be ignored, these need to give consideration to law related to any socio-economic policy*."[42] Article 48-A provides, "the state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country".[43] Other constitutional provisions that deal with environmental protection as a duty of state, albeit indirectly, are articles 39(e), 42 and 47, having significant relation with environmental problems. These provisions impose a duty on the state to secure the health and improve the environment and protect it. Article 49 imposes a duty on the state to prevent the environmental pollution that may damage the monuments, places and objects of national importance.

40 *Supra* note 37 at 145.
41 The Constitution of India, Art. 37.
42 Constituent Assembly Debate, Vol. VII. P. 41.
43 The Constitution of India.

[44] Article 51(c) directs the state to "foster respect for international law and treaty obligations" which imposes a duty on the state to oblige the international environmental treaties signed by India. Justice Krishna Iyer stating in *Ratlam Municipality vs Vardhichand*[45] What drives common people to public interest litigation? Where the Directive principles incorporated in the statutory forms in dos and don'ts the court will not sit as a silent spectator.

Environmental Protection as Citizens' Obligation

Article 51A was inserted by the Constitution (Forty-Second Amendment) Act, 1976. This article contains certain duties that must be fulfilled by the citizens of the State. Article 51 A(g) states "it shall be the duty of every citizen of India- to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."[46] Since this article imposes duty upon the citizens, there is a need to enact the law for the same. States have been considered as potent tools for implementing the duty of citizens. In *L.K Koolwal vs. State of Rajasthan*[47] it was opined that, "since Article 51A(g) imposes an ordinary duty on the citizens, while conferring to them right to safe and healthy environment, which is duty of the state to protect the environment and citizens have right to move to court for the enforcement of their rights against the state and its instrumentalities or agencies." Supreme court in *M. C Mehta vs Union of India (Ganga Pollution case)*[48] held that environmental protection and preservation is a joint responsibility of state and citizens.

B. Environment as a Fundamental Right Constitutionalized through Judicial Activism

The principle of environmental justice has not been incorporated in the Indian Constitution explicitly but the provisions of constitution

44 *M C Mehta vs Union of India*, AIR 1987 SC 1086 (Taj Case).
45 AIR 1980 SC 1622.
46 The Constitution of India, Art. 51 A (g).
47 AIR 1988 Raj 2.
48 AIR 1988 SC 1115.

especially articles 14, 15, 19 and 21 of the constitution along with directive principles and fundamental duties have been interpreted in such a way to incorporate the right to a healthy and clean environment as a fundamental right. Right to environment has both substantive and procedural aspects which are essential to realize environmental justice. Judiciary through judicial activism has broadened the scope of article 21 for both substantive and procedural environmental justice.

So far as substantive aspect is concerned article 21 of the constitution speaks about right to life and personal liberty[49] The right to life is most significant to enjoy other rights. considering the United States supreme court judgment on life *Munn vs Illinois*[50] "life is not mere animal existence; it is more than including all limbs and faculties which are essential to live a dignified life." It is reaffirmed in *Francis Coralie vs Union Territory of Delhi*[51] and stated "any act which damages or harms or interferes with the use of any limb or faculty of a person, either permanently or even temporarily would be within the ambit of article 21 of the constitution."

Further the apex court stated that "*right to live with human dignity and all that goes along with it such as basic necessities of life like shelter, food, clothing, nutrition, education and so on forms part of the same right*". Therefore, the right to life has an indivisible linkage with the environment. The emergence of the right to environment can be traced back *to Bhandua Mukti Morcha vs. Union of India*[52] judgment where the apex court though not recognized the right to environment as a right explicitly but stated workers have the right to decent life. Clean potent drinking water is essential for healthy workers and "vast open mountain dug-up without a thought as to environment is used by men and women and children as one huge open latrine' to direct the government to ensure

49 Art. 21- Protection of life and personal liberty: it provides both substantive and procedural aspects of right to life which is essential for environmental justice.
50 94 U.S. 113 (1876).
51 AIR 1981 SC 746.
52 AIR 1984 SC 802.

the provision of 'conservancy facilities in the shape of latrines and urinals."[53] The court referred to various direct principles, such as articles 39 (e), 41 and 42 of the constitution. In *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of Uttar Pradesh and Ors*[54] came through public interest litigation, though the case was not related to environment as such but the court referred to the right to environment considering "every citizen has a right to the enjoyment of quality of life and living as enumerated in article 21. If anything endangers the life or derogates or violates article 21 will be illegal and sheer violation of article 21. The very first case which explicitly involved the environmental issues was *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[55] The apex court sought to protect the environment and opined that people have a right to live in an environment which is least ecologically disturbed and without any harm to them and their cattle, agricultural land and love to their water, land and environment." The healthy environment and ecological balance are the foremost aspects of healthy life.

The court considered the environmental rights aspect in detail from substantive as well procedural part in *T. Damodhar Rao and Ors v. The Special Officer, Municipal Corporation of Hyderabad and Ors*[56] The Andhra Pradesh High court decided matters related to environmental rights from article 21 of the constitution. Apart from that court considered the procedural aspect of environmental justice such as right to ownership of natural resources and also invoked international environmental instruments such as Stockholm declaration of human environment stating that ecosystem should be protected keep in mind sustainable development as basis for present and future generations. The court signified that pollution is threat to life and its prevention is mandatory and court invoked the environmental Protection Act, 1986.

53 *Id.* para 34.
54 AIR 1990 SC 2060.
55 AIR 1985 SC 652.
56 AIR 1987 AP 171.

Environmental ties with the right to livelihood were considered in *Olga Tellies vs. Bombay Municipal Corporation*[57], the government issued a notice to remove all slums from pavements. The government action was challenged by the fact that poor people do not have that much money to afford a house, and their huts and shops on the pavement are the source of their livelihood. In *Subhash Kumar v. State of Bihar,*[58]The court held that the right to life includes the right to enjoyment of pollution-free water and air. In *A. P. Pollution Control Board v. Prof. M. V. Nayudu (Retd) and Ors,*[59]The court began its judgment by quoting from Harvard Environmental law review: "all the living organisms are interlinked is the fundamental perception of ecology and nothing can exist alone. The world system is like a web, if one thing will be harmed then it will vibrate the entire ecology. If something wrong happens to one thing then others will have to bear the ramifications too. Our actions cannot be considered as individual; these are collective, it echoes in the entire ecosystem."[60] Further in *MC Mehta vs. Kamal Nath and Ors*[61] the court emphasised on the procedural aspects of environmental justice. The court discussed the doctrine of public trust and ownership of public over natural resources, polluter pays principle. These doctrines are most essential to implement the right to a healthy environment and a person who damages the environment, will have to pay for its damage.

In 1987 the supreme court in *M.C Mehta vs Union of India*[62] *(Oleum Gas Case),* propounded the doctrine of absolute liability against strict liability in environmental matters. The liability is absolute and non-derogable- – "for disasters arising from the storage of or use of hazardous materials from their factories." In *Vellore Citizens welfare Forum vs*

57 AIR 1986 SC 180.
58 (2000) 6 SCC 213.
59 Decided by Supreme Court on 27 January 1999. Available at: https://indiankanoon.org/doc/764031/.
60 A.Fritsch, "Environmental Ethics: Choices for Concerned Citizens", 12 *Harvard Law Rev*. 313 (1980).
61 (1997) 1 SCC 388.
62 AIR 1987 SC 1086.

Union of India[63] The Vellore Citizens forum filed a public interest Litigation under article 32, against the pollution caused by non-treated effluents discharged by the tanneries in Tamil Nadu, and invoked the Water Prevention and Control of Pollution Act, 1974. The court opined that "traditional concepts of development and ecology are opposed to each other and cannot be accepted today. The court stated that now it is time to invoke the concept of sustainable development as first appeared in the Stockholm Declaration in 1972, later the 1987 World Commission on Environment and Development submitted its report known as the Common Future." Eradication of poverty, inter-generational equity, Environmental Protection, the precautionary principles, polluter pays principle and salient features of sustainable development and without sustainable development environmental justice is impossible to be achieved. The court considering the duty stated that we need to interpret the environmental rights from Article 21 of the Constitution along with articles 47, 48-A and 51A (g) of the Constitution. The court observed "The Constitutional and statutory provision protect a persons' right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment."[64]

In Thervoy Gramam Munnetra Nalal Vs. Union of India,[65] Justice R Bhanumati opined that the development of the industrial park was hazardous to the village communities, depleting the water sources and destroying the forests and grazing lands of the village community. The petition for the development of the industrial park was dismissed on the grounds stated above. The court observed that "especially after the Maneka Gandhi judgment, the expanded interpretation of Article 21 has made environmental justice a significant aspect of the right to life, enabling individuals to enjoy a quality of life as contemplated by Article 21." Considering articles 47, 48-A ,and 51A(g) of the Constitution fall under the Directive principles of state policy and inferred from the concept

63 (1996) 5 SCC 647.
64 *Id*.
65 Decided by Madras High Court on 16 September 2009. Available at: https://indiankanoon.org/doc/283403/

of sustainable development, have become law of the land. The court also opined that "green benches" as established under the Direction of Supreme Court Guidelines which are essential for the development of environmental justice as a constitutional facet." In *Selvakumar vs Union of India & Ors,*[66] The issue was related to damage to the water body due to illegal construction of roads by the National Highway Authority of India. The court observed that the water bodies need to be preserved and highways cannot be undermined. The roads and transport play a significant role in the transformation of the country, pollution free environment is an essential aspect of the under art. 21 of the Constitution.

T.N. Godavarman Thirumulpad vs. Union of India[67] The case was related to forest and sanctuaries. In this case the court dealt with anthropocentric and ecocentrism approaches that need to be recognized which are essential to achieve environmental justice. The court observed that "principles such as sustainable development, polluter pays and precautionary measures are based on anthropocentric principles. Anthropocentrism is human interest oriented and other non-humans are just instrumental to human beings. In other words, it can be said that humans have prominence over the other non-humans. Ecocentrism is a nature-oriented approach to the environment where humans and non-humans have equal value and all are intrinsic part of nature. Human interest is not given automatic prominence over the other non-humans. It obliges human beings to give respect to all beings of nature."[68] In *WWF vs Union of India,*[69] settled the guidelines for the recognition and establishment of national parks, sanctuaries. The court said that prior approval of the supreme court is required. In *Citizens for Green Doon vs Union of India*[70] Justice DY Chandrachud said that rights are

66 Madras High Court Decided on 9 November 2010, available at: https://indiankanoon.org/doc/1719182/ .

67 Decided by Supreme Court on 13 February 2012. Available at: https://indiankanoon.org/doc/187293069/.

68 *Id*. Para 14

69 Decided by Supreme Court of India on 15 April 2013.

70 Supreme Court of India, on 14 December 2021. Available at: https://indiankanoon.org/doc/161682615/ .

interdependent and enjoyment of one is not possible without the other. The court considered environmental justice and environmental equity for environmental protection and marginalized societies and said that environmental harm badly impacts the socially and economically marginalized communities. The court observed, "environmental justice is a trifecta of distributive justice, procedural and social justice."

In *Kehar Singh vs State of Haryana*[71] The NGT decided the case where section 14 of the National Green Tribunal Act, 2010 was invoked. The court considering the section 2 (m) of the NGT Act 'substantial question relating to the environment' includes "where is direct violation of any statutory violation by a person which affects the public at large or community, where the gravity of damage to the environment or property, or damages the public health." The tribunal states that international environmental treaties and national legislation must go hand in hand. The objects and reasons of the scheduled Acts would have to be read as an integral part of the object, reason and purposes of enacting the NGT Act."[72]

In *Orissa Mining Corporation Ltd. Vs Ministry of Environment & Forest Rights & Ors,*[73] The issues were related to the Environment protection Act, 1986, the Forest Rights Act, 2006. The community rights were the main issues dealt by the court. The court considered individual and community cultural and religious rights of tribal and indigenous peoples invoking articles 25 and 26 of the Constitution. Forest dwellers have certain traditions that are part of their cultural life and those are closely associated with the environment. Those rights are not merely confined to cultural aspects, rather the livelihood and way of life of the traditional forest dwellers as defined under section 2 (o) of the Forest Conservation Act, and these rights are essential to realize the right to life, personal liberty and human dignity of these tribes. Referring to *Samatha*

71 National Green Tribunal decided on 12 September 2013 available at https://indiankanoon.org/doc/88347937/.
72 *Id*. para 24.
73 AIR 2013 SC 2508.

vs Arunachal Pradesh[74] "all relevant clauses in the Sixth Schedule and the Regulations should be harmoniously and widely be read as to elongate the Constitutional objectives and dignity of person to the Scheduled Tribes and ensure distributive justice as an integral scheme thereof. The Court noticed that agriculture is the only source of livelihood for the Scheduled Tribes apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living. Consequently, tribes have great emotional attachments to their lands." In *Jaya Thakur vs State of Madhya Pradesh*[75]The NGT addressed issues related to illegal residential and commercial construction, encroachment of solid waste materials, and discharge of sewage and polluted water into Sagar Lake, situated in the city of Sagar, Madhya Pradesh, which severely impacted the local ecology. Article ... not only protects human rights but also imposes an obligation to preserve the environment and protect endangered species from extinction. The court applied the doctrine of public trust to protect the natural resources and the right to the environment. Referring to the *Fomento Resorts Judgment*[76]stated *"*The public trust doctrine is a tool for exerting long- established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations*."*

In *Dr Vijay Kumar vs State of U.P.,*[77] The tribunal took suo moto action on the letter sent by Dr Vijay Kumar against Sandeep Paper mills established in Noida and having ill effect on the health of residents in

74 (1997) 8 SCC 191.
75 The National Green Tribunal decided on 5 April 2022. Available at: https://indiankanoon.org/doc/52778788/
76 AIR 2009 SC 694.
77 National Green Tribunal decided on 1 November 2023, available at: https://indiankanoon.org/doc/125275086/

nearby areas due to chemicals released by the factory. The court also invoked the international principles of environmental law, such as precautionary principles, environmental justice and environmental equity and environmental jurisprudence in India. These principles, now, have become part of the Indian legal system especially in implementing the international environmental obligations.

In *MP High Court Bar Association vs Union of India*[78] The issue before the apex court was, whether the sections 14 and 22 of the NGT Act oust the jurisdiction of High Court under articles 226/227 of the Constitution? whether these sections are ultra vires to the constitution? As far as judicial review is concerned, it is part of basic structure doctrine, and constitutional objects related to the environment are more important than statutory jurisdiction conferred under the Act. The court after observing international and national environmental protection obligations, to achieve the environmental justice the court has reviewed jurisdiction, and provisions of the NGT Act do not oust the jurisdiction of constitutional courts at all. The court stated that section 3 of the NGT act is intra vires to the constitution, but section 22 is not. Hence, Sections 14 and 22 of the NGT Act are unconstitutional to the extent that they oust the jurisdiction of constitutional courts. Recently, Supreme Court in *M K Ranjitsinh & Ors vs. Union of India*[79], considered a writ petition regarding Great Indian Bustard (GIB) and Lesser Florican, species which are on the verge of extinction. In 2018, the International Union for Conservation of Nature, classified GIB as a 'critically endangered species.' While considering the petition, the court considered that extinction of species is also caused by climate change. India is a signatory to the United Nations Framework Convention on Climate Change, 1994, and its additional protocols. Climate change is not only a threat to the survival of nature but also to human existence. The court broadened the scope of right to a healthy environment under article 21, and stated that people have the right

78 Supreme Court decided on 18 May 2022 available at: https://indiankanoon.org/doc/19326425/

79 Delivered by the Supreme Court of India on 21 March 2024. Can be accessed at: https://indiankanoon.org/doc/121903673/

to a healthy environment free from the adverse effects of climate change. The concept of environmental justice includes climate justice as well. The court invoking the Paris Agreement, 2015, stated it has recognized the wide ambit of human rights, and effect of climate change. The court directed the Union of India to take steps, as suggested in the judgment, to implement renewable energy measures and curb climate change effects within the broader spectrum of human rights and environmental justice.

The Indian judiciary is first to recognize the right to a clean and healthy environment. Through judicial activism, various high courts and Supreme Court have expanded the ambit of article 21 of the Constitution to include environmental rights as fundamental rights. Judicial activism has been playing a significant role in constitutionalizing environmental rights and achieving environmental justice. The rule of environmental justice cannot be realized without giving effect to fundamental rights. Social, economic and political justice must be recognized while dealing with environmental rights because majority of the time marginalized groups are the most deprived from environmental rights.

V. Conclusion

The Constitution of India contains both positive and negative rights. Fundamental Rights are available in the form of negative rights that impose obligation on the state to not to interfere with the rights of citizens, whereas part IV contains Directive Principles of State Policy in the form of positive rights, as directive for states to consider while enacting laws. Judiciary through Judicial activism has been playing a pivotal role in realizing environmental rights by invoking international treaties. Various laws have been enacted to implement environmental rights effectively. However, the violation of these rights disproportionately impacts vulnerable communities, such as scheduled castes, Dalit people, tribal communities, and children. The scope of Article 21 of the Constitution has undergone significant expansion since its commencement, with various rights being added to its realm. The right to a clean and healthy environment has also been added as a fundamental right through judicial

endeavours. Attainment of environmental justice necessitates a multifaceted interpretation that encompasses both substantive and procedural dimensions, incorporating principles such as the polluter pays principle, sustainable development, and the public trust doctrine, among others.

Exploring The Intersection Of Good Governance And Cyber Bullying: Strategies For Effective Prevention And Response

Saeeba Mushtaq Bhat*
Dr. Syed Asima Refayi**

Abstract

This study investigates the crucial relationship between good governance and the rising threat of cyber bullying in the digital era. Cyber bullying has become a major societal concern as online platforms have a greater influence on social interactions. It frequently causes victims to suffer from significant psychological, emotional, and even physical harm. India lacks a comprehensive legal framework to address cyber bullying, despite its increasing prevalence; instead, it relies on the Information Technology Act of 2000 and Bharatiya Nyaya Sanhita,2023. This paper makes the case that a governance model based on the values of openness, responsibility, inclusivity, responsiveness, and the rule of law is necessary for the effective mitigation of cyber bullying. It demonstrates how effective governance may offer comprehensive and long-lasting solutions when combined with technological, legal, educational, and community-based strategies. The creation of clear laws, international collaboration via agreements like the Budapest Convention, specialised training for law enforcement, reliable reporting systems, AI-powered content moderation, and national awareness campaigns are important tactics. It is also underlined that fostering a culture of empathy and digital responsibility requires the participation of NGOs, schools, parents, and guardians. The study illustrates how integrated governance systems can improve protection for vulnerable users and foster a safer, more equitable digital environment by drawing on international best practices and Indian legislative precedents. The study concludes by highlighting the need for adaptive governance and multi-stakeholder collaboration to address the

* *Ph.D Research Scholar, Department of Law, University of Kashmir*
** *Senior Assistant Professor, Department of Law, University of Kashmir.*

changing nature of cyber bullying in a quickly expanding technological context.

Keywords: *Governance, Good Governance, Cyber Bullying, Types, Causes, Effects, Legislative Framework.*

Introduction:

The idea of governance, which includes the procedures for making decisions and carrying them out, is as old as human civilization. Good governance, which has developed with human civilization, aims to create guidelines and laws for peaceful coexistence by enforcing the law and reaching consensus in decision-making. The concepts of good governance are essential in today's digital world while tackling modern problems like cyber bullying. The term *"cyber bullying,"* coined by Canadian educator *Bill Belsey*, refers to deliberate, hostile behaviours carried out through internet means directed towards those who are weak and unable to defend themselves. Cyber bullying victims frequently endure extreme psychological and emotional suffering, which can have detrimental effects like depression, social anxiety, and even suicidal thoughts.

Even though cyber bullying is becoming more common, India does not yet have any laws that address it completely. Although the Indian Penal Code, 1860(now the Bharatiya Nyaya Sanhita, 2023), and certain provisions of the Information Technology Act, 2000, offer some coverage, stronger legal frameworks are still required. In this situation, in order to combat cyber bullying, clear legal frameworks, international cooperation, law enforcement training, easily available reporting systems, and public awareness campaigns are all necessary components of effective governance. Furthermore, the engagement of non-governmental organisations and the proactive involvement of parents and guardians are crucial in establishing a nurturing atmosphere to counteract cyber bullying.

In order to establish a safer digital environment, this paper examines the complex relationship between good governance and the mitigation of cyber bullying, highlighting the necessity for all-encompassing measures

that include technological, pedagogical, and legal solutions in addition to community engagement.

1. Governance:

The concept of "governance" is not new. It is as old as human civilization. Simply put "governance" means: the process of decision-making and the process by which decisions are implemented (or not implemented). Governance can be used in several contexts such as corporate governance, international governance, national governance and local governance. Since governance is the process of decision making and the process by which decisions are implemented, an analysis of governance focuses on the formal and informal actors involved in decision-making and implementing the decisions made and the formal and informal structures that have been set in place to arrive at and implement the decision.[1]

Governance can be broadly defined to encompass the following:

✓ It is politically circumscribed.

✓ It is multi-dimensional and the indicators selected in each dimension may change over time.

✓ It is a process by which the governments realise the goals set for themselves, effectively and efficiently within the time specified.

✓ It takes into account the common good and development of the society as a whole without generating gross inequities and without violence and corruption.[2]

2. Good Governance:

The concept of Good Governance was primarily implemented since Human civilization commenced in the Anachronistic period where man to man was to cross the rational period and it goes for the common purpose of living mutually. The common cause brought them together to set some rules through policy with the consensus for making decisions and strictly

1 What is Good Governance? Available at: https://www.unescap.org /sites/default /files /good-governance. pdf Accessed on 18-07-24.

2 K. Srinivasana and M.S. Selvan, Governance and Development in India: A Review of Studies and Suggestions for Further Research. Available at: https://www.mids.ac.in/assets/doc/WP_219.pdf Accessed on 22-07-24.

passed laws for the implementation of rules for harmonious life. The term Good Governance has been well obtainable in terms of Democratic values for achieving global targets for Human development, which is at the top priority by providing designed systematic facilitation.[3] In the 1992 report entitled "Governance and Development", the World Bank set out its definition of good governance. This term is defined as "the manner in which power is exercised in the management of a country's economic and social resources for development".[4]

Good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.[5]

➢ **Key Principles Of Good Governance**

2.1.1 Participation:

Participation in the concept of good governance. Here is an opportunity for everyone to voice their opinions through institutions or representations. In addition, everyone, without exception, has the right to freedom of association and expression.

3 Abdul Rahim, Governance and Good Governance-A Conceptual Perspective. Available at: file:///C:/Users/HOME/Downloads/Governancegoodgovernanace.pdf Accessed on 19-07-24.

4 The World Bank group on governance. Available at : https://byjus.com/free-ias-prep/the-world-bank-group-on-governance/#:~:text=This%20term%20is%20defined%20as,the%20projects%20it%20helps%20finance. Accessed on 19-07-24.

5 Governance, Available at: https://leap.unep.org/en/knowledge/glossary/governance Accessed on 20-07-24.

2.1.2 Rule Of Law:

To implement good governance, the legal framework in the country must be enforced impartially, especially concerning human rights law.[6]

2.1.3 Consensus Oriented:

Encouragement participation across an organisation is a great first step, but it's not always enough. Managers should make an effort to acknowledge all opinions offered- our second principle for good governance. It's easy for us to be uncomfortable with a diversity of perspectives, or perceive them as a point of conflict. However, when an organisation genuinely values their employee's input, a culture where differences become constructive intrinsically follows. When a diverse board reaches a consensus, it is likely to better serve the broader interests of stakeholders.

2.1.4 Accountability:

Accountability generally refers to the responsibility of an organisation to provide an explanation for its actions. However, clear accountability in an organisation encourages clean and quick decision-making. Establishing clear lines of command ensures issues are escalated to the right people in an appropriate manner. Good governance is evident when individuals know exactly what they are responsible and accountable for.[7]

2.1.5 Equity and Inclusiveness:

Good governance assures an equitable society. People should have opportunities to improve or maintain their well-being.

2.1.6 Effectiveness and Efficiency:

Processes and institutions should be able to produce results that meet the needs of their community. Resources of the community should be used effectively for the maximum output.

2.1.7 Transparency:

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6 Good Governance: Definition and characteristics. Available at: https://uclg-aspac.org/good-governance-definition-and-characteristics/ Accessed on : 20-07-24.

7 8 principles of good governance. Available at: https://pmo365.com/blog/8-principles-for-good-governance Accessed on 26-07-24.

Information should be accessible to the public and should be understandable and monitored. It also means free media and access to information.

2.1.8 Responsiveness:

Institutions and processes should serve all stakeholders in a reasonable period of time. [8]

3. Cyber Bullying:

The term "cyber bullying" was first defined by a Canadian educator named Bill Belsey.[9] The most frequently used definition of cyber bullying is '*an aggressive, intentional act or behaviour that is carried out by a group or an individual, using electronic forms of contact, repeatedly and overtime against a victim who cannot easily defend themselves.*'[10]

Cyber bullying means the bullying which is done through digital devices such as mobiles, computers/laptops or tablets via instant messaging, SMS, online social media platforms or any online groups where people can share and exchange messages.[11]

The most common places where cyber bullying occurs are: Social Media, such as Facebook, Instagram, Snapchat, and Tik Tok, Text messaging and messaging apps on mobile or tablet devices, Instant messaging, direct messaging, and online chatting over the internet, online forums, chat rooms, and message boards, such as Reddit, Email, online gaming communities.[12] Not only social media and digital social platforms

8 Good governance. Available at: https://www.drishtiias.com/to-the-points/paper4/good-governance-2 Accessed on 18-07-24.

9 Overview of the concept of cyber bullying in India. Available at: https://blog.ipleaders.in/overview-of-concept-of-cyber-bullying-in-india/ Accessed on 24-07-24.

10 Grover, et al, Cyberbullying: A Narrative Review. Available at: https://journals.lww.com/mhhb/fulltext/2023/28010/cyberbullying__a_narrative_review.3.aspx Accessed on 24-07-24.

11 Swati Shalini: What are Cyber Bullying or Anti-Bullying Laws in India. Available at: https://www.myadvo.in/blog/must-read-what-is-cyber-bullying-or-anti-bullying-laws-in-india/ Accessed on 25-07-24.

12 What Is Cyberbullying? Available at: https://www.stopbullying.gov/cyberbullying/what-is-it Accessed on 26-07-24.

but any online medium that allows the sharing of information can become a platform for such bullying.[13]

Examples of cyber bullying can include harassing, threatening, or embarrassing someone else using an online platform,[14] spreading lies about or posting embarrassing photos or videos of someone on social media; sending hurtful, abusive, or threatening messages, images or videos via messaging platforms; impersonating someone and sending mean messages to others on their behalf or through fake accounts;[15] humiliating/embarrassing content posted online about the victim of online bullying, hacking of accounts, posting vulgar messages, threatening the victim to commit an act of violence, stalking, child pornography or threats of child pornography.[16]

Cyber bullied victims generally manifest psychological problems such as depression, loneliness, low self-esteem, school phobias and social anxiety. Moreover, research findings have shown that cyber bullying causes emotional and physiological damage to defenseless victims as well as psychosocial difficulties including behavior problems, depression, and

13 Kabeer Kalwani, Cyber Bullying: A form of Digital Defamation. Available at :https://lawlex.org/lex-pedia/cyber-bullying-a-form-of-digital-defamation/21126 Accessed on 19-07-24.

14 52 Alarming Cyberbullying Statistics and Facts for 2023 Available at: https://www.pandasecurity.com/en/mediacenter/family-safety/cyberbullying-statistics/ Accessed on 18-07-24.

15 Right To Be Forgotten: A Remedy To Cyberbullying. Available at: https://lexlife.in/2022/03/06/right-to-be-forgotten-a-remedy-to-cyberbullying/ Accessed on 29-07-24.

16 Prerna, Look Into Cyber Bullying in the Digital Age. Available at:https://www.legalserviceindia.com/legal/article-11528-a-look-into-cyber-bullying-in-the-digital-age.html Accessed on 27-07-24.

low commitment to academics.[17] As a result of severe cyber bullying many also commit suicide.[18]

According to a survey, 'Global Youth Online Behaviour Survey' conducted by Microsoft in 25 countries 2012, it was found that India was in the third (3rd) position of cyber bullying.[19]Young people who fall victim to cyber bullying are up to twice as likely to self-harm and/or attempt suicide than those who have not been victims.[20]

4. Types of Cyber Bullying:

With time, cyber bullying has evolved to take many forms. Here are some common types of cyber bullying:

- *Flaming:* Using h urtful language in emails, text messages, or chat rooms against an individual
- *Harassment:* Sending hurtful, hateful, and/or threatening messages
- *Cyber stalking:* Following an individual online and sending emails or messages to scare, harm, or intimidate him[21]
- *Exclusion:* Deliberately excluding an individual from a group and posting malicious comments/messages about her

17 Yehuda Peled , Cyberbullying and its influence on academic, social, and emotional development of undergraduate students. Available at:https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6434491/ Accessed on 18-07-24.

18 Tandon Akshita, Cyber Bullying. Available at: https://www.legalserviceindia.com/legal/article-9227-cyber-bullying.html Accessed on 23-07-24.

19 Rumani Saikia Phukan, India Ranks Third in Cyberbullying: What Needs to Be Done. Available at: https://www.mapsofindia.com/my-india/social-issues/india-ranks-third-in-cyber-bullying-what-needs-to-be-done Accessed on 18-07-24.

20 Links Between Cyberbullying, Self-Harm And Suicide Discovered In New study. Available at:https://www.cybersmile.org/news/links-between-cyberbullying-self-harm-and-suicide-discovered-in-new-study Accessed on 23-07-24.

21 Cyberbullying: Laws and Policies in India. Available at: https://www.parentcircle.com/cyberbullying-laws-and-policies-in-india/article Accessed on 22-07-24

- *Impersonation/masquerading*: Using a fake identity to damage an individual's reputation, and publicly sharing real or false information about him
- *Trolling:* Intentionally hurting an individual by posting insulting or inflammatory comments
- *Fraping:* Using an individual's social networking accounts to post inappropriate content to ruin her reputation.[22]

5. Legislative Framework For Cyber Bullying In India:

Although the rate of cyber bullying is increasing day by day in India, there lies no direct provisions dealing with the same. There are some sections of the Information Technology Act, 2000 and IPC (Indian Penal Code) 1860 which deal with the punishment related to cyber bullying, as have been discussed hereunder: Section 66 A of the Information Technology Act, 2000; Section 66 C of the Information Technology Act, 2000; Sec 66 D of the Information Technology Act, 2000; Sec 66 E of the Information Technology Act, 2000; Section 67 of the Information Technology Act, 2000; Section 67 A of the Information Technology Act, 2000; Sec 67 B of the Information Technology Act, 2000; Section 354 C of the Indian Penal Code, 1860[23]; Section 354 D of the Indian Penal Code[24], 1860; Section 499 of the Indian Penal Code, 1860[25]; Section 507 of the Indian Penal Code[26], 1860; Section 509 of the Indian Penal Code[27], 1860.[28]

6. Causes Of Cyber Bullying:

- The primary cause of cyber bullying is when a person who commits the offence is completely unknown , in which a person who is bullying can easily target anyone over the internet by hiding his/her original identity.

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22 Ibid
23 Now Section 77 of Bharatiya Nyaya Sanhita (BNS) 2023.
24 Now Section 78 of Bharatiya Nyaya Sanhita (BNS) 2023.
25 Now Section 356 of Bharatiya Nyaya Sanhita (BNS) 2023.
26 Now Section 351 of Bharatiya Nyaya Sanhita (BNS) 2023
27 Now Section 79 of Bharatiya Nyaya Sanhita, (BNS) 2023
28 Overview of the concept of cyber bullying in India. Available at: https://blog.ipleaders.in/overview-of-concept-of-cyber-bullying-in-india/ Accessed on 18-07-24.

- There are various other factors which are responsible for a person to become a cyber bully such as Personality traits are responsible for cyber bullying behavior or anti social behavior.
- Another primary cause is online shyness or hampering , in which a person bullies others with the motives of causing harm, domination, or taking revenge, or just for fun[29]
- Other causes are moral disentanglement as the findings imply that, regardless of the contemporaneous victimization status, moral disengagement has an equal impact on bullying perpetration for those who are most engaged.
- The next one is egotism which means individuals consider social status and authority dominant over their human relations.
- The last is aggression, which refers to overcoming negativities and failures by force, triggering them to do cyber bullying for satisfaction[30]

7. Effects Of Cyberbullying:

Cyber bullying may affect an individual's life in various ways. It may harm him emotionally, mentally. A 2019 Swedish study indicates that youths involved in cyber bullying, either as the target or the perpetrator, had a higher risk of symptoms of depression and anxiety. They also had lower levels of general well-being.

A person starts eluding from reality, from social media or other online platforms. He may feel it difficult to engage in social activities and have a social life. He may have a low opinion of himself. Cyber bullying usually increases fear and anxiety in the mind of a person. Destructive thoughts, mood swings, not showing emotions, not trusting anyone, aggressiveness and short-tempered nature are some of the symptoms of a victim. He sees no hope in the near future. There are many chances that a victim may commit suicide. There is a lot of mental agony and pain. He

29 Shikha Bhatnagar, Cyber Bullying: A brief Analysis. Available at: https://www.legalserviceindia.com/legal/article-10150-cyber-bullying-a-brief-analysis.html Accessed on 29-07-24

30 Ibid

remains mentally disturbed and many times starts hiding things. Fear of losing reputation and respect changes his behaviour towards his family members are the common symptoms.[31]

8. National Cyber Crime Reporting Portal:

The National Cyber Crime Reporting (NCCR) portal is an initiative by the Government of India that provides a platform for victims, especially women and children, to lodge online complaints related to cyber crimes. This portal enables individuals to report incidents of cyber bullying, harassment, fraud, and other digital offenses. Once a complaint is filed through the NCCR portal, prompt action is taken by collaborating with local law enforcement agencies to ensure timely resolution and appropriate investigation of the reported cases. This initiative aims to provide a user-friendly and efficient system for reporting cyber crimes, contributing to a safer digital environment for all individuals in India.[32]

9. Cyber Bullying Case Laws In India:

Following are some of the popular cyber bullying case laws in India known to everybody.

➢ **Shreya Singhal V. Union Of India (2015)** Although this landmark decision was not particularly about cyber bullying, it did result in the repeal of Section 66A of the Information Technology Act, which was frequently used to restrict free speech online. The provision was declared unlawful by the Supreme Court because it went against the freedom of speech and expression.

➢ **Rini Johar V. State Of MP (2018)** In this instance, the victim of online harassment and character assassination was ordered by the Madhya Pradesh High Court to receive compensation from the cyber bully. The

31 Overview of the concept of cyber bullying in India. Available at: https://blog.ipleaders.in/overview-of-concept-of-cyber-bullying-in-india/ Accessed on 22-07-24.

32 Krishnan Ravishankar, et al, Promoting Online Safety: The Government's Role in Combating Cyber Harassment and Cybercrime Through Social Media Platforms. Available at: file:///C:/Users/HOME/Downloads/IGIGlobal.pdf Accessed on 18-07-24.

ruling emphasized the need to secure people from abuse and defamation online.[33]

➢ **Neha Rastogi V. State Of Delhi (2019)** The Delhi High Court upheld the man's conviction in this case after he was discovered guilty of cyber bullying and harassing his wife both online and off. The court stressed the need to shield people involved in marital disputes from internet abuse and harassment.

➢ **Nikita Singh V. State Of MP (2018)** The conviction of a man who made a false Facebook profile in the victim's name and uploaded defamatory material was upheld by the Madhya Pradesh High Court. The seriousness of internet abuse and defamation was acknowledged by the court.

➢ **Arjun Pandit Rao Khotkar V. Khotkar Sujata Sanjay (2019)** The Bombay High Court fined those involved in this case for posting defamatory comments online and ordered the removal of that content from social media platforms.[34]

10. Role Of Good Governance In Addressing Cyberbullying:

10.1 Legal Frame Works

10.1.1 Rules and Laws:

A strong legal framework is essential for dealing with cyber bullying. Legislation that is effective must define cyber bullying precisely, penalise offenders, and offer victims' compensation. To keep up with the rapid improvements in technology and the changing nature of online behaviour, these regulations need to be flexible.

For example, to combat cyber bullying, the US has passed a number of state-level laws. The "Megan Meier Cyber bullying Prevention Act," which sought to make cyber bullying illegal, was one noteworthy legislative attempt. Despite

33 Cyberbullying laws in India. Available at: https://www.bytecode.in/cyberbullying-laws-in-india/ Accessed on 30-07-24

34 Ibid

difficulties and lack of federal enactment, it initiated significant conversations around the necessity of cyber bullying laws.

The "Budapest Convention on Cybercrime[35]" of the Council of Europe is a vital piece of legislation that promotes global collaboration in the fight against cybercrime, particularly cyber bullying. By creating uniform guidelines and encouraging collaboration among participating nations, the agreement contributes to addressing the transnational aspect of cyber bullying.

10.1.2 Global Collaboration:

International cooperation is necessary to address cyber bullying since it is a global problem that cuts across national boundaries. To provide uniform legal definitions, exchange best practices, and make it easier for laws against cyber bullying to be enforced across international borders, nations must work together.

One example of an international attempt to counter cyber bullying through collaboration is the Budapest Convention on Cybercrime. The convention guarantees an integrated strategy for combating cyber bullying and other cybercrimes by coordinating national laws and encouraging international cooperation.

10.2 Mechanisms Of Enforcement

Law Enforcement Training Law enforcement personnel must receive specialised training in order to implement cyber bullying laws in an effective manner. Officers need to be prepared to handle cases involving

35 The Convention on Cybercrime, also known as the Budapest Convention on Cybercrime or the Budapest Convention, is the first international treaty seeking to address Internet and computer crime (cybercrime) by harmonizing national laws, improving investigative techniques, and increasing cooperation among nations. It was drawn up by the Council of Europe in Strasbourg, France, with the active participation of the Council of Europe's observer states Canada, Japan, the Philippines, South Africa and the United States.

cyber bullying, comprehend digital evidence, and offer victims the help they need.

To improve law enforcement organisations' ability to deal with cyber bullying, organisations such as INTERPOL[36] and the European Union Agency for Law Enforcement Training (CEPOL)[37] provide training programmes. These courses address a range of topics related to cybercrime investigation, such as victim support and digital forensics.

***10.2.1 Systems for Reporting and Reaction*:**

Creating easily accessible and efficient reporting systems is essential to combating cyber bullying. It should be easy for victims to report occurrences, and these reports should be processed quickly and efficiently.

Reporting procedures have been put in place in some countries, such as the United Kingdom, to enable people to report cases of cyber bullying to social media sites or local authorities. To address critical circumstances, quick reaction teams can be established to offer prompt assistance and stop additional damage.

10.3 Initiatives For Education

10.3.1 School Programmes:

An important factor in stopping cyber bullying is education. By teaching kids about the dangers and repercussions of cyber bullying, school curriculum can encourage appropriate online conduct. Bullying in schools has been successfully decreased by initiatives like the Olweus Bullying Prevention Programme[38], which has cyber bullying

36 The International Criminal Police Organization – INTERPOL, commonly known as Interpol, is an international organization that facilitates worldwide police cooperation and crime control. It is the world's largest international police organization

37 CEPOL, officially the European Union Agency for Law Enforcement Training, is an agency of the European Union dedicated to training law enforcement officials. The institution was founded in 2000 and adopted its current legal mandate on 1 July 2016. It is based in Budapest,

38 The Olweus Program (pronounced Ol-VAY-us) is a comprehensive approach that includes schoolwide, classroom, individual, and community

components. These initiatives teach parents, educators, and students how to spot, stop, and deal with cyber bullying.

10.3.2 Campaigns for Public Awareness:

Public awareness efforts around the country are necessary to educate the general public about cyber bullying, its effects, and preventative measures. These initiatives can make use of a range of media channels to connect with a wide range of people and advance an online community that values empathy and decency.

The "Safer Internet Day[39]" initiative by the European Commission is a shining example of a public awareness programme that works. The annual programme encourages responsible and safer use of mobile devices and the internet, particularly among kids and teenagers.

10.4 Technological Fixes

10.4.1 Platform Safety Features:

Cyber bullying is something that can be prevented and addressed in large part by using social media sites and other internet services. To safeguard users, these platforms must incorporate strong safety measures including parental controls, content filters, and reporting systems.

For instance, Facebook has created a number of anti-bullying features that let users report and ban bullies, silence offensive chats, and get help. With the use of these tools, consumers may take charge of their online experiences and ask for assistance when necessary.

10.4.2 Artificial Intelligence and Machine Learning:

Technologies related to artificial intelligence (AI) and machine learning present viable ways to identify and address cyber bullying in real

components. The program is focused on long-term change that creates a safe and positive school climate.

39 The 2024 edition of Safer Internet Day took place on Tuesday, 6 February 2024. This special celebration, which takes place in February of each year, aims to raise awareness of a safer and better internet for all, and especially for children and young people.

time. These tools have the ability to evaluate content found online, spot hazardous activity, and take action before it gets out of control.

Google's Perspective API is a cutting-edge tool that lessens online harassment by identifying harmful comments through machine learning. Online platforms can prevent cyber bullying and establish safer digital spaces by including these tools.

10.5 Participation of the Community

10.5.1 Organisations that are not governed (NGOs):

Non-governmental organisations (NGOs) are essential in providing resources for education, lobbying for stricter laws, and assisting victims of cyber bullying. NGOs can provide specialised services and raise awareness to close the gap between government initiatives and community needs.

In the US, groups such as "StopBullying.gov" offer a wealth of information to help parents, teachers, and young people recognise and avoid cyber bullying. These NGOs provide lobbying campaigns, educational resources, and support systems in an attempt to change policy.

10.5.2 Engagement of Parents and Guardians:

It is crucial to involve parents and guardians in initiatives to avoid cyber bullying. It is important for parents to have the skills and information necessary to shield their kids from cyber bullying and teach them appropriate internet conduct.

Workshops and seminars can be arranged by community centres and schools to inform parents about the warning signs of cyber bullying, efficient communication techniques, and accessible options for assistance. In the home, empowered parents can make a big difference in stopping and dealing with cyber bullying.

Conclusion

In summary, governance is an ancient idea that is fundamental to human civilization and refers to the systems, procedures, and establishments that are used to make and carry out decisions. To promote development and improve societal well-being, good governance is defined by participation, the rule of law, consensus-building, accountability, transparency, responsiveness, equity, inclusivity, effectiveness, and efficiency. The widespread problem of cyber bullying, made worse by the emergence of digital platforms, requires strong regulatory structures to lessen its effects. A multidimensional strategy is needed for effective governance in the fight against cyber bullying, encompassing legal frameworks, international cooperation, law enforcement training, easily available reporting mechanisms, educational programmes, technology advancements, and community involvement.

Robust legislative frameworks, including the Indian Information Technology Act and the Budapest Convention on Cybercrime, offer crucial assistance in combating cyber bullying. Consistent enforcement and cross-border sharing of best practices are guaranteed by international collaboration. Law enforcement organisations need specific training in order to successfully address cases of cyber bullying. Reporting platforms that are easily accessible, such as India's National Cyber Crime Reporting Portal, enable prompt victim assistance and intervention.

Promoting an online culture of respect and empathy requires both public awareness campaigns and educational programmes in schools. Technological solutions provide proactive ways to identify and stop cyber bullying, such as AI-driven tools and platform safety features. Community involvement fills the gap between government efforts and grassroots action by offering complete assistance and tools to combat cyber bullying, especially through NGOs and parental engagement.

Through the integration of these many components, good governance may minimise the negative impacts of cyber bullying and foster a more inclusive, healthy online community while also establishing a safer digital environment. By means of consistent adjustment and cooperative endeavours, communities can proficiently tackle the dynamic obstacles

presented by cyber bullying, guaranteeing the safeguarding and welfare of every person in the digital era.

Empirical Assessment of Geographical Indication (GI) Awareness and Implementation: A Case Study of Saffron Growers in Kashmir

Saima Ahad Kumar*

Abstract

Geographical Indications (GIs) are a key component of intellectual property rights that link products with their geographical origin, conferring authenticity, reputation, and economic value. This empirical study evaluates the awareness, participation, and perceptions of saffron cultivators in Kashmir regarding the GI regime. Drawing on primary data from 384 respondents, the research explores their economic profiles, marketing channels, knowledge of IP laws, registration processes, and institutional support systems. The findings reveal a striking lack of awareness about the GI Act and its associated benefits, despite a strong belief in the authenticity and uniqueness of the regions saffron. The paper concludes with actionable recommendations, including the need for localized policy interventions, awareness drives, streamlined registration processes, and stronger enforcement to ensure that the benefits of GI registration are fully realized by the cultivators themselves.

Keywords: *Geographical Indications, Kashmir Saffron, Intellectual Property, GI Awareness, GI Act 1999, Agriculture, Marketing Channels, Policy Reform, IP Law, GI Registration*

1. Introduction

In an increasingly globalized and competitive marketplace, "Geographical Indications (GIs)" have emerged as powerful tools for protecting region-specific products and supporting rural economies. Rooted in the concept of collective intellectual property, GIs recognize the intrinsic link between product quality and geography, drawing on the widely accepted notion of terroir—the interaction of environmental and

* Guest Faculty at School of Law, University of Kashmir, 190006 (can be contacted at saimaahad33680@gmail.com)

human factors in shaping product identity. They not only promote cultural heritage and traditional knowledge but also aim to provide equitable market access and income enhancement for marginalized producers.

This paper is grounded in the broader theoretical framework of Geographical Indications and Rural Development, which situates GIs at the intersection of intellectual property law, institutional economics, and inclusive innovation theory. According to this perspective, the success of a GI regime depends not only on legal registration but also on the active participation of local producers, the presence of supportive institutions, and the fair distribution of benefits.

India, as a signatory to the TRIPS Agreement, enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999, to safeguard products tied to specific regions, such as Darjeeling tea, Basmati rice, and Kashmir saffron. Kashmir saffron, known globally for its superior aroma, color, and medicinal value, received GI status in 2020. However, the practical realization of its potential hinges on awareness, participation, and benefit-sharing among local cultivators.

This study seeks to empirically assess the level of awareness, institutional gaps, and socio-economic realities of saffron cultivators in Kashmir, particularly through the lens of GI theory. By doing so, it provides insights into how legal tools like GIs can function as instruments of local empowerment, cultural preservation, and economic resilience, or conversely, how their benefits may remain symbolic in the absence of supportive infrastructure and inclusive governance.

2. Universe and Sampling

This study was carried out in the Kashmir Division of the Union Territory of Jammu and Kashmir. For the selection of districts and tehsils, the researcher employed a multi-stage purposive sampling method—a form of non-probability sampling—targeting locations rich in relevant information. Pulwama district, located in South Kashmir, was deliberately chosen as it is the sole region in the valley where the world-famous Kashmiri saffron is cultivated. The research focused specifically on the district's 9,721 registered saffron farmers.

Within Pulwama, Pampore tehsil was selected because more than 90% of its land is devoted to saffron cultivation. From this tehsil, four villages—Khrew, Lethpora, Dussu, and Koil—were identified, as they represent the primary saffron-producing belt, contributing nearly 78% of the total saffron-growing area in the Kashmir Valley. These villages are celebrated for their exceptional climatic and soil conditions, which are highly conducive to saffron cultivation.

2.1. Sample Size

To determine the appropriate sample size, the researcher applied Taro Yamane's formula, which indicated that the sample should consist of more than 384 respondents.

3. Research Methodology

A structured survey instrument was developed to collect data from 384 saffron cultivators in Kashmir. The questionnaire covered diverse areas such as source of income, marketing channels, awareness of GI and IP laws, perception of GI authenticity, registration status, and opinions on policy reforms. The responses were tabulated and analyzed using descriptive statistics and percentage distribution. The study aims to capture ground realities and provide evidence-based insights for policymakers and stakeholders.

4. Data Analysis and Interpretation

4.1. Income Sources and Economic Diversification

Responses	Number of respondents	%age
Agricultural	108	28
Horticultural	0	0
Both agricultural and horticultural	36	9.33
Any other	240	62.66
Total	**384**	**100**

The data reveals that only 28% of respondents rely solely on agriculture, and none exclusively on horticulture. 62.66% are engaged in other non-farm activities. This shift away from traditional occupations

reflects increasing economic diversification, driven by instability in agricultural returns, climate unpredictability, and limited institutional support. Although agriculture remains integral to the region, it is no longer the dominant livelihood source.

4.2. Marketing of Agricultural Produce

Responses	Number of respondents	%age
Through direct correspondence	62	16
Through an individual middleman/intermediary	281	73.33
Through a government agency	10	2.66
Any other	31	8
Total	**384**	**100**

Marketing remains largely dependent on intermediaries. A significant 73.33% of respondents use middlemen for product sales, whereas only 16% rely on direct marketing. The minimal role of government agencies (2.66%) and a growing reliance on informal digital platforms (8%) point to systemic inefficiencies in public procurement and support systems. This reliance on intermediaries reduces producers' profit margins and bargaining power.

4.3. Power Asymmetry in the Transaction Chain

Responses	Number of respondents	%age
Grower/Producer	44	11.33
Middleman/Intermediaries	225	58.66
Trader	74	19.33
Everyone occupies an equally advantageous position	41	10.66
Total	**384**	**100**

When asked who holds the most advantageous position in the value chain, 58.66% of respondents pointed to intermediaries, followed by traders (19.33%). Only 11.33% identified themselves (the growers) as holding any significant advantage. This stark imbalance highlights the

vulnerability of cultivators in the absence of organized marketing or producer cooperatives.

5. Perceptions about Product Identity and GI Potential

5.1. Factors Defining Product Uniqueness

Responses	Number of respondents	%age
Natural factors (Soil, Climate, Temperature, etc.)	276	72
Traditional methods of production	21	5.33
Reputation	10	2.66
Specific qualities	77	20
Total	**384**	**100**

An overwhelming 72% attribute the uniqueness of Kashmir saffron to natural factors such as soil, climate, and altitude—emphasizing its strong geographical link. Specific qualities (20%) and traditional methods (5.33%) were cited less frequently. This affirms saffron's suitability for GI protection based on "terroir," a concept widely accepted in GI theory.

5.2. Awareness of IP Legislations

Responses	Number of respondents	%age
Trademarks Act, 1999	13	3.33
Copyright Act, 1957	31	8
Geographical Indication of Goods (Registration and Protection) Act, 1999	31	8
Patent Act, 1970	0	0
All of the above	75	19.66
None of the above	234	61
Total	**384**	**100**

The survey reveals that 61% of respondents are unaware of any IP legislation. Awareness about the GI Act is particularly low (only 8%). A mere 19.66% knew about all four major IP laws, while the Patent Act registered zero awareness. This underlines a significant gap in IP education among rural producers.

5.3. Awareness of Geographical Indications

Responses	Number of respondents	%age
Yes	136	35.33
No	248	64.66
Total	**384**	**100**

Despite GI status being granted to Kashmir saffron in 2020, 64.66% of cultivators have never heard of GIs, while a smaller proportion (35.33%) has. Therefore, the survey results highlight a significant gap in awareness about Geographical Indications among the respondents.

5.4. Awareness about Authorized Users

Responses	Number of respondents	%age
Yes	41	10.66
No	343	89.33
Total	**384**	**100**

5.5. Registration as Authorized Users

Responses	Number of respondents	%age
Yes	0	0
No	384	100
Total	**384**	**100**

The results from the tables 4.4 and 4.5 shows that 89.33% are unaware of the concept of authorized users. Shockingly, none of the 384 respondents are registered as authorized users. This critical failure severely undermines the practical impact of GI protection in the region.

6. Institutional Gaps and Stakeholder Perceptions

6.1. Relationship with the Agriculture Department

Responses	Number of respondents	%age
Yes	113	29.33
No	271	70.66
Total	**384**	**100**

Only 29.33% of cultivators are registered with the Agriculture Department, raising concerns about the accessibility and functionality of state support mechanisms. While a significant majority (70.66%) is not registered. This low registration rate indicates several potential issues:

a) Lack of awareness about the registration process or its benefits.

b) Barriers to registration (e.g., complicated procedures, high costs, or time constraints).

c) Perceived lack of value in registration.

d) Possible distrust or skepticism towards government departments.

Responses	Number of respondents	%age
Strongly agree	22	5.66
Agree	198	51.66
Neither agree nor disagree	154	40
Disagree	10	2.33
Strongly disagree	0	0
Total	**384**	**100**

6.2. Local Quality Inspection

There is strong agreement (57.32%) that local inspection mechanisms for saffron are weak or non-existent. The fact that 40% neither agreed nor disagreed reflects either limited knowledge or skepticism regarding existing systems.

7. Policy Opinions and Reform Perspectives

7.1. Reforming GI Registration

Responses	Number of respondents	%age
Strongly agree	0	0
Agree	31	8
Neither agree nor disagree	322	84
Disagree	31	8
Strongly disagree	0	0
Total	**384**	**100**

The results on GI registration procedures reveal significant ambiguity: 84% neither agreed nor disagreed about its complexity. This neutrality reflects poor engagement and understanding, necessitating capacity-building initiatives and procedural simplification.

7.2. Separate GI Policy for Jammu and Kashmir

Responses	Number of respondents	%age
Strongly agree	237	61.66
Agree	137	35.66
Neither agree nor disagree	10	2.66
Disagree	0	0
Strongly disagree	0	0
Total	**384**	**100**

The data in table 20 shows overwhelming support for a separate GI policy for Jammu and Kashmir. 97.32% of respondents either strongly agree (61.66%) or agree (35.66%) with the proposition. This near-unanimous support suggests that stakeholders see significant potential benefits in having a dedicated GI policy for the region.

Responses	Number of respondents	%age
Strongly agree	67	17.33
Agree	297	77.33
Neither agree nor disagree	20	5.33
Disagree	0	0
Strongly disagree	0	0
Total	**384**	**100**

7.3. Collaborative Efforts for GI Promotion

Nearly 95% of respondents support increased collaboration between communities, stakeholders, and institutions for enhancing GI awareness and engagement. This suggests that collective efforts are seen as essential to bridge information gaps and foster ownership among producers.

8. Key Findings

a. Limited Awareness of Collective GI Rights and IP Laws among Growers

A substantial 61% of saffron cultivators surveyed were unaware of any form of intellectual property legislation, with only 8% familiar with the Geographical Indications Act. Despite Kashmir saffron receiving GI recognition in 2020, 64.66% of farmers had never heard of the GI concept, and none were registered as authorized users, revealing a fundamental disconnect between the law and those it is meant to empower.

b. Institutional Gaps Undermine Inclusive GI Implementation

Only 29.33% of the cultivators were registered with the Agriculture Department, and a significant portion expressed dissatisfaction with its outreach and support. Weak local inspection systems and the absence of decentralized facilitation mechanisms have limited the effectiveness of the GI regime as a development tool.

c. Recognition of Terroir but Weak Legal Enforcement

The majority of growers (72%) credited the uniqueness of Kashmir saffron to natural and geographical factors—such as soil, climate, and altitude—validating the product's strong territorial linkage. However,

77.33% of respondents believed the penalties under the GI Act were inadequate, and 80.99% felt current legal protections did not effectively deter unauthorized use, highlighting weak enforcement and lack of deterrence.

d. Market Chains Favor Intermediaries, Disempowering Producers

The saffron market is largely dominated by middlemen, with 73.33% of cultivators selling through intermediaries, and only 16% engaging in direct sales. Just 11.33% of respondents felt they held a favorable position in the value chain, whereas 58.66% identified intermediaries as the most advantaged, revealing deep power asymmetries.

e. Ambiguity and Inaccessibility in GI Registration Process

While procedural complexity was not directly cited by most respondents, 84% neither agreed nor disagreed when asked about GI registration reforms, indicating a lack of engagement or understanding of the process—likely due to poor access to legal aid and information. This passive uncertainty points to exclusionary institutional design.

f. Strong Support for Regional Policy and Collaborative Governance

An overwhelming 97.32% of respondents supported the idea of a separate GI policy for Jammu and Kashmir, reflecting the need for context-specific governance that recognizes the region's unique agro-climatic and socio-political context. Additionally, nearly 95% advocated for collaborative efforts among producers, government bodies, and civil society to enhance awareness and participatory governance in the GI ecosystem.

9. Policy Suggestions

1. Localized GI Awareness and Capacity Building Programs

Launch multilingual, grassroots-level awareness campaigns through local radio, community leaders, NGOs, and digital platforms to educate growers on their collective rights under the GI regime, particularly the concept of "authorized user registration". Training workshops should focus on the benefits, procedures, and obligations under the GI Act, making the information accessible even to small and marginal farmers.

2. Establish Decentralized GI Facilitation and Support Centers

Set up village- or tehsil-level GI Facilitation Centers with legal, administrative, and technical assistance to guide cultivators through registration and post-registration compliance. These centers should function as one-stop platforms for education, certification, branding support, and quality inspection coordination.

3. Strengthen Producer Cooperatives and Collective Marketing Platforms

Promote saffron grower cooperatives or Farmer Producer Organizations (FPOs) with a dedicated GI division to facilitate joint branding, marketing, and export registration. This will reduce dependency on intermediaries, empower growers economically, and reinforce the collective ownership model central to GI theory.

4. Legal and Regulatory Strengthening of GI Enforcement

Amend the GI Act to define stricter penalties and faster legal mechanisms against unauthorized use and misbranding. A fast-track dispute redressal mechanism at the district level should be created, supported by trained enforcement officials and judiciary familiar with GI jurisprudence.

5. Institutionalize Local Quality Control Systems

Develop participatory quality control systems with village-based inspection committees involving growers, agricultural scientists, and civil society actors. These bodies should be tasked with monitoring compliance with product specifications and authenticating origin-based characteristics in line with terroir.

6. Design a Region-Specific GI Policy for Jammu and Kashmir

Draft a GI policy framework tailored to the unique agro-ecological, cultural, and socio-political landscape of Jammu and Kashmir. This policy should clarify institutional responsibilities, define inspection procedures, promote community ownership, and streamline access to national and international GI registration.

7. Enable Global Market Integration through Export Facilitation

Collaborate with Indian embassies, trade bodies, and international IP organizations to support saffron growers in registering and promoting

their GI products in foreign markets. Participation in global GI fairs and bilateral agreements should be encouraged to elevate Kashmir saffron's visibility and protect its identity abroad.

8. Create Inclusive Multi-Stakeholder GI Governance Platforms

Establish formal forums that bring together saffron cultivators, government officials, research institutions, NGOs, and legal experts to deliberate on GI-related challenges and reforms. These platforms should ensure participatory decision-making and enable adaptive governance of the GI ecosystem.

10. Conclusion

This study reveals a critical paradox at the heart of GI governance in Jammu and Kashmir: while Kashmir saffron enjoys global recognition for its unparalleled quality, color, and aroma—firmly rooted in its "terroir"—the very cultivators who sustain this legacy remain marginalized from the legal and institutional mechanisms meant to protect it.

The Geographical Indications framework, as theorized in the context of rural development, is designed not merely as a legal instrument but as a tool for economic empowerment, cultural preservation, and inclusive market access. Yet, the evidence shows that the absence of awareness, institutional access, and organized representation among growers has rendered GI protection largely ineffective at the grassroots level.

Producers remain disempowered in market chains, unaware of their collective rights, and excluded from registration and enforcement systems. Institutional gaps—manifested in weak outreach, inadequate legal protection, and lack of local inspection systems—further prevent GI from translating into tangible livelihood benefits.

To transform GI from a symbolic recognition into a sustainable development tool, Jammu and Kashmir urgently needs localized policies, participatory governance, and institutional reforms that bridge the gap between law and reality. Empowering cultivators through education, cooperatives, and direct engagement with GI systems can reclaim Kashmir saffron as not only a product of pride but also of prosperity.

Recasting the Union: A Doctrinal Analysis of Judicial Precedents and the Centralization of Indian Federalism

Gazala Farooq Peer*

Abstract

This paper critically examines the role of federalism as a foundational component of the Indian Constitution, positing that its normative purpose is rooted in the preservation of pluralism, autonomy, and democratic engagement within a heterogeneous society. The paper delves into the complexities of Indian federalism—characterized by its asymmetry and unique nature—arguing that federalism has been entrenched as a non-amendable constitutional tenet through judicial interpretation. The analysis scrutinizes the evolution of relevant jurisprudence, particularly in the context of recent centralizing tendencies of the state. The paper concludes by reflecting if the normative federal framework continues to be part of the constitutional architecture.

Keywords: *Federalism, Constitutional Design, Centralization, Basic structure doctrine*

1. Introduction

India's federalism may be studied through a varied body of academic writings, judicial decisions, and current debates, all of which illustrate the intricate and changing nature of the federal structure in India. The framework that was outlined in the Constitution of India reflects a distinct federal agreement which harmonized central power with the independence of states.[1] K.C. Wheare notably defined this framework as "quasi-federal," highlighting its significant centralizing characteristics.[2]

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* Gazala Farooq Peer holds a doctorate in Interdisciplinary Studies in Law and Governance from the Centre for the Study of Law and Governance, JNU, New Delhi.

1 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 120 (Oxford Univ. Press 1966).

2 K.C. Wheare, *Federal Government* (4th ed., Oxford Univ. Press 1963).

The concept of "cooperative federalism," was also introduced imagining a governance framework where a robust Centre collaborates with the states, promoting a more inclusive and participatory federal system.[3] Sharma, while evaluating the Indian federal design, writes that federalism, as a governance model, is particularly suited to heterogeneous societies, enabling the accommodation of regional, linguistic, religious, and ethnic differences within a single constitutional framework[4]. KC Wheare and Austin argue that the Indian model, operational since 1950, diverges from the classical notion of coordinate federalism and has instead been characterized as quasi-federal or centralized federalism.[5] Most of the scholars, in line with MP Jain, uphold that the design was informed by pragmatic considerations of nation-building and socio-political cohesion.[6]

Moreover, as Tillin describes, Indian federalism is asymmetrical too, which crystallized as a defining attribute of India's constitutional design, wherein different states are accorded differentiated degrees of autonomy.[7] Provisions such as Article 370, formerly applicable to Jammu and Kashmir, and Article 371, applicable to several North-Eastern states, have been cited as institutional acknowledgements of India's socio-cultural diversity. Tillin explores further that India's federal architecture was conceived as a centralized federation, designed to harmonize unity and diversity through mechanisms such as constitutional asymmetry, regional autonomy, and linguistic accommodation.[8]

Rao argues that although the term *federation* is absent from the Constitution, Article 1 defines India as a "Union of States," signaling the framers' intent to foreground national unity. At the same time the constitutional design permits a division of powers between the Union and the States (Articles 245–263).[9] The Seventh Schedule establishes a

3 Austin,supra note 2,at 123-25.
4 Mool Raj Sharma, Contextual Dynamics of Federalism in India, 11 Stud. Indian Pol. 238 (2023).
5 Wheare, supra note 3; Austin, supra note 2 at 120.
6 M.P. Jain, *Indian Constitutional Law* (7th ed., LexisNexis 2018).
7 Louis Tillin, United in Diversity? Asymmetry in Indian Federalism, *Publius* (2006).
8 *Id.*
9 B. Shiva Rao, *The Framing of India's Constitution: A Study* (Indian Inst. of Pub. Admin. 1967).

tripartite distribution of legislative competence between the Union List, State List, and Concurrent List. Nevertheless, the residuary powers (Article 248), emergency provisions (Articles 352–360), and Parliament's authority to reorganize state boundaries (Article 3) — structurally privilege the Centre and are vested with the union. The original design of Indian federalism sought to institutionalize diversity through measures such as: special provisions for the erstwhile state of Jammu and Kashmir, Northeast and official language policies supporting both Hindi and regional languages to name a few.

Patnaik argues that the most distinctive feature of India's federalism is asymmetrical federalism, wherein certain states enjoy differentiated constitutional status. Article 370 (prior to its abrogation in 2019) accorded far reaching autonomy to Jammu and Kashmir. Article 371(A–G) grants varying degrees of autonomy to states such as Nagaland, Mizoram, and Sikkim. Additionally, Article 244 and the Sixth Schedule establish Autonomous District Councils in parts of Northeast India, safeguarding tribal self-governance.[10]

Comparative scholarship has consistently highlighted the *sui generis* character of Indian federalism, noting its resistance to conventional classificatory frameworks.[11] Within this body of literature, Indian federalism is frequently conceptualized not as a fixed institutional arrangement, but as a dynamic and adaptive mechanism for state formation, accommodation of diversity, and the integration of distinct ethnic and regional identities into the constitutional order.[12]

The judiciary has also significantly impacted the interpretative boundaries of Indian federalism.[13] Despite the text not explicitly characterizing India as a federation, the Supreme Court of India has played a decisive role in articulating federalism as a basic feature of the

10 J.K. Patnaik, The Governor's Discretionary Powers in the Sixth Schedule Areas of Northeast India, 63 Indian J. Pub. Admin. 243 (2017).

11 Sujit Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford Univ. Press 2008) and Louis Tillin, *Remapping India: New States and Their Political Origins* (Hurst 2013).

12 R.L. Watts, *Comparing Federal Systems* (2d ed., McGill-Queen's Univ. Press 1999).

13 Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* 152–57 (Harvard Univ. Press 2020).

Constitution. Article 1 describes India as a "Union of States," emphasizing indissolubility and unity over contractual federalism.[14] Yet, over time, the Court has elevated federalism from a textual and structural principle, placing substantive limits on parliamentary sovereignty.

The foundation of this trajectory lies in *Kesavananda Bharati v. State of Kerala*[15] where a thirteen-judge bench established that Parliament's amending power under Article 368 is subject to implied constitutional limitations. While the case is remembered for judicial innovation of the "basic structure doctrine," the Court also observed that federalism constitutes one such inviolable feature. This recognition marked the beginning of federalism's entrenchment in constitutional jurisprudence.

The principle was further elaborated in *S.R. Bommai v. Union of India*[16], a landmark decision on Centre–State relations and the misuse of Article 356 (President's Rule). The Court, underscored that federalism, though adapted to India's unique context, forms part of the Constitution's basic structure[17]. While striking down arbitrary dismissals of State governments, the Court strengthened the position of States within the Union. More importantly, the Court clarified that while India is not federal polity in the "traditional sense," its quasi-federalism embodies principles of democracy and pluralism, both of which are unamendable.

Subsequent rulings have reinforced and refined this position. In *Kuldip Nayar v. Union of India*[18], concerning the method of electing Rajya Sabha members, the Court reiterated India's "quasi-federal" nature of polity but stopped a step short of striking down parliamentary changes. However, in *State of West Bengal v. Union of India*[19], even before Kesavananda Bharti, the Court had hinted at the supremacy of the Union, rejecting the notion that States possessed sovereignty. This tension between federalism as a value and the supremacy of the Union as a structural feature continues to define Indian federal jurisprudence.

14 Austin, supra note 2, at 120
15 *(1973) 4 SCC 225,*
16 *(1994) 3 SCC 1*
17 *Id*.
18 *(2006) 7 SCC 1*
19 *(1963) AIR SC 1241*

More recently, cases such as *Government of NCT of Delhi v. Union of India*[20] and its 2023 follow-up[21] The Court has reaffirmed federalism's vitality in the context of cooperative governance. The Court held that the principles of federalism and representative government require meaningful distribution of powers between the Union and States, thereby constraining central dominance. These decisions extend the logic of *Kesavananda Bharti* and *SR Bommai* into contemporary intergovernmental disputes.

Thus, the Court's jurisprudence reveals a layered approach: while affirming the Union's supremacy, it has also constitutionalized federalism as part of the "basic structure," insulating it from legislative erosion. This duality reflects the Indian model of "quasi-federalism with a unitary bias" Tillin, argues that in this manner judicial innovation preserves the balance between unity and diversity. She further argues that federalism, as judicially construed, is not merely an organizational principle but a substantive guarantee of plural democracy and constitutionalism[22].

2. Laying the foundations of Indian Federalism

Adeney notes, former colonies rarely escape the structural imprint of imperial governance. The institutional legacies of British rule decisively influenced the Constituent Assembly's deliberations[23]. Adeney argues that under British colonial rule, the initial framework of political organization in the Indian subcontinent was predicated on interactions among autonomous provinces[24]. This arrangement was subsequently modified to centralize authority, aligning with imperial priorities rather than democratic decentralization[25]. Adeney states that such a framework served the British imperial interests more effectively than a democratically structured center would have. The British approach to

20 (2018) 8 S.C.C. 501 (India).
21 W.P. (C) No. 496 of 2016 (India May 11, 2023).
22 Louis Tillin, Indian Federalism, in *The Oxford Handbook of the Indian Constitution* 536 (S. Choudhry, M. Khosla & P.B. Mehta eds., Oxford Univ. Press 2019).
23 Katharine Adeney, *Federalism and Ethnic Conflict Regulation in India and Pakistan* (Palgrave Macmillan 2007).
24 *Id*.
25 S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford Univ. Press 2002).

federal and consociationalism arrangements was inconsistent, varying across provinces to suit divergent political objectives[26]. As Rai observes, democratic processes were often delayed through measures such as withholding the application of rights to Princely States[27].

The *Government of India Act, 1919,* marked the first formal attempt to introduce a constitutional federal framework, albeit in a rudimentary form. While it decentralized certain administrative functions and codified the division of powers between the Centre and provinces, effective power remained concentrated in the hands of centrally appointed governors[28]. Furthermore, colonial strategies such as separate electorates on the basis of religion and the co-option of princely states' entrenched divisions complicated the post-independence unification process.

Between 1916 and 1946, debates between the Indian National Congress (INC) and the Indian Muslim League (IML) centered on the desirability of separate electorates and the risk of partitioning the subcontinent along religious lines[29]. The INC endorsed unity among diverse communities and the IML initially viewed a united India—with power-sharing between religious communities in religiously defined provinces—as a safeguard for minority interests[30]. By the late 1930s, however, divergent political objectives made consensus on federal design elusive[31].

In the 1940s, federal proposals such as the *Rajagopalachari Plan*, the *Sapru Committee Report*, and the *Cabinet Mission Plan* sought to accommodate territorial ethnicities within a three-tier federal system inspired by the Austro-Hungarian model.[32] This arrangement envisaged provincial groupings with varying degrees of linkage to the center, which

26 Adeney, supra note 24.
27 Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (Princeton Univ. Press 2004).
28 Adeney, supra note 24.
29 Harihar Bhattacharyya, Federalism in Asia: India, Pakistan and Malaysia, 33 Int'l J. Pub. Admin. 733 (2010).
30 Sugata Bose & Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy* (Routledge 1998).
31 Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge Univ. Press 1995).
32 Radha Kumar, *Divide and Fall? Bosnia in the Annals of Partition* (Verso 2005).

would retain jurisdiction only over communications, currency, foreign affairs, and defence. The INC's historical acceptance of religious and linguistic reorganization—seen in its support for Sind's separation in 1928 and post-independence linguistic statehood in 1956—was grounded in the principle of respecting "the wishes of the people".[3334]

It is striking that the formative years of Indian federalism were shaped by the intersection of colonial administrative legacies, nationalist aspirations, and elite visions of unity and diversity.[35] While the Constitution institutionalized mechanisms for accommodating pluralism, the centralizing tendencies embedded in its design reflected the blend of strategies of nation-building and the legacy of political inheritance from the colonial state.[36]

The withdrawal of the Muslim League following Partition narrowed the ideological spectrum within the Assembly, fostering a more majoritarian vision of the Indian state.[3738] Jalal argues that the INC's constitutional preferences were shaped by the anticipated religious composition of the future state.[39] Austin contends that, in the absence of partition, India might have emerged as a loose federation with a minimal centre and broad residuary powers.[40]

However, the debates over accommodating marginalized and peripheral communities including Adivasis and the peoples of the Northeast, revealed tensions between symbolic recognition and substantive autonomy.[41] Leaders such as Jaipal Singh Munda resisted purely legalistic labels for Adivasi identity, seeking explicit recognition as original inhabitants—a demand

33 M.N. Char, *Political History of Jammu & Kashmir* (Metropolitan 1983).
34 *Nehru Report: Report of the All Parties Conference* (Gov't of India Press 1928).
35 Adeney, supra note 24 at 45–50.
36 Austin, supra note 2.
37 Kumar,supra note, 33.
38 G. Shani, *How India Became Democratic: Citizenship and the Making of the Universal Franchise* (Cambridge Univ. Press 2010).
39 Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (Cambridge Univ. Press 1994).
40 Austin, supra note 2, at 120–25.
41 Adeney, supra note 24,at 45–50; Austin, supra note 2, at 120–25 .

the Assembly rejected.[42] In the Northeast, constitutional provisions such as the Sixth Schedule were crafted to integrate regions that had contemplated independent statehood. However, as Sarmah argues, these measures failed to instill a sense of Indian nationalism, perpetuating an "othering" of the region and reinforcing colonial-era distinctions between plains and hill communities. [43] Although federal principles were embedded in the Constitution—division of powers, dual polity, single citizenship, independent judiciary—the Assembly avoided using the term *federalism* in its traditional sense. [4445] Ambedkar clarified that India's federation was not formed by an agreement among sovereign units and thus conferred no right of secession.[46]

3. Contemporary Developments and Tensions

Indian federalism, which is rooted in its constitutional principles but displays notable asymmetry, is at a crucial crossroads today.[47] Originally envisioned as a "Union of States," India's federal structure was intended to represent national unity in the wake of colonial rule, with the Union positioned centrally while treating states as both subordinate and sovereign entities.[48] However, modern challenges have surfaced, leading to persistent friction between central authority and state independence.

Recent developments around fiscal centralization, territorial reconfiguration, and recasting federalism as a pragmatic doctrine, discussions regarding the delimitation process, intensify worry

42 Constituent Assembly Debates, vol. VII, 5th ed. 330–32 (Lok Sabha Secretariat 2003); Rao, supra note 9, at 212–14.

43 B. Sarmah, The Politics of Autonomy: A Case Study of Bodoland, in *Ethnic Movements in North-East India* 15 (A. Baruah ed., Regency 2016).

44 A. Majeed, Federalism in India: A Historical Perspective in *Federalism and Decentralization in India for Better Governance* 21 (R. Balveer ed., Shipra 2005).

45 Jain, supra note 6.

46 S. Everett, Ambedkar's Federalism: The Theory and Practice of Indian Federalism, in *Judges and the Judicial Power: Essays in Honour of Justice Krishna Iyer* 73 (R. Dhavan, R. Sudarshan & S. Khurshid eds., Tripathi 1997).

47 Tillin, supra note 22, at 536 in (S. Choudhry, M. Khosla & P.B. Mehta eds., Oxford Univ. Press 2019).

48 Balveer Arora, *India's Federal System and Democratic Politics*, in *Varieties of Federal Governance: Major Contemporary Models* 190 (R. Saxena ed., Cambridge Univ. Press 2010).

concerning the possible political sidelining of state autonomy and authority. Aiyar & Tillin have commented on such centralizing trends in India's federalism, threatening cooperative federalism and creating a coercive relationship between the centre and the states, illustrating a multifaceted challenge to India's federalism.[49]

In *Government of NCT of Delhi v. Union of India*[50]The Supreme Court reaffirmed the authority of elected state governments over state matters, advancing principles of deliberative governance. The court, while deliberating federalism, states that "Pragmatic federalism and collaborative federalism will fall to the ground if… the Union has overriding executive powers…"

In *Union of India v. Mohit Minerals*[51], the Supreme Court held that "the recommendations of the GST Council are not binding on the Union and States". The court further added that GST runs on cooperation and not command, and the states retain concurrent legislative space even within the GST's policy of harmonized tax.

In the *State of Tamil Nadu v. Governor of Tamil Nadu*[52]The Supreme Court admonished the office of the governor that by indefinitely delaying bills reserved for aid and advice, the governor cannot pocket veto the bill, which amounts to disregarding and disrespecting the state legislature.

In Re: Article 370 / Mohammad Akbar Lone v. Union of India[53] while upholding the reading down of Article 370 of the Constitution of India the Court held that "Article 370 was a feature of asymmetric federalism and not sovereignty." The court set a clear stance that while asymmetry is a feature of the constitution of India, but is also reversible.

In *State of Kerala v. Union of India*[54]The Court, in its interim order, emphasized cooperative/pragmatic federalism and held that state autonomy must be balanced against macroeconomic integrity in the larger

49 Yamini Aiyar & Louise Tillin, *Centralization and Cooperative Federalism in India* 210–12, in *The Oxford Handbook of the Indian Constitution* (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., Oxford Univ. Press 2016).
50 (2018) 8 S.C.C. 501 (India).
51 *Union of India v. Mohit Minerals Pvt. Ltd.*, (2022) 10 S.C.C. ___ (India).
52 W.P. (C) No. ___ of 2025 (India Apr. 1, 2025).
53 W.P. (C) No. 1099 of 2019 (India Dec. 11, 2023).
54 (2024) 1 SCC 253 (India)

interest of the national economy. The Court further held that if a state is indebted to the Union, then the consent to extra borrowing from the Union is mandatory, and the Union, under Article 293(4), can impose conditions too. The Union, when granting consent, can impose conditions under Article 293(4). Therefore, the state's autonomy to borrow is not absolute but conditional upon the financial obligations of the Union.

It can be deduced from the constituent assembly debates, the adopted constitutional design, and the jurisprudence from *Keshenanda Bharti* and *S R Bommai* that federalism was entrenched as a non-derogable principle. The doctrine of basic structure devised by the court created a comprehensive system of checks and balances where any action of the union would face heightened scrutiny. From the most recent jurisprudence emerging from the Supreme Court, the court emphasized cooperative and pragmatic federalism, where the union supremacy exists, but the centre-state relations were recast as dialogic. The court further emphasized that the centre cannot dissolve constitutionally allotted spheres, especially in day-to-day affairs of the state.

However, a parallel jurisprudence that is emerging from the Supreme Court of India raises questions about the future of federalism in India. The *Article 370* case is one of the major cases that recast federalism in India in a mold that leads to centralization and turning the checks and balances, created over the decades, on its head. Despite holding that asymmetry is embedded in the constitutional design the Court affirmed a trajectory towards integration. Similarly, in *Kerala's Article 293* case, the court calibrated State fiscal autonomy against the National macro economy, shaping the centre-state fiscal federalism for years to come.

In the past, the Supreme Court has played an important role in resolving federal disputes by sticking to the highest standards of scrutiny. The Court has put to use mechanisms of checks and balances available to it in order to play its role as the guardian of the Constitution and restraining itself largely from indulging in judicial overreach. However, there have always been instances where the court has drifted from an adjudicatory role to policy-making. In *Mohit Minerals,* by declaring that the GST council recommendations are non-binding, the Court recalibrated the institutional relationship. Scholars argue that such declarations from

the Court amount to judicial law-making. The reframing of cooperative federalism deviates from the political compact and constitutional design envisaged by the constitution makers. Similarly, in *NCT of Delhi*, the Court moved beyond resolving an interpretive dispute over "services" and, in fact, outlined an operational philosophy that is now the guiding principle for administrative allocation of powers. In the case of the *Article 370* judgment, the Court ventured into historical reasoning to justify a radical federal reconfiguration that was performed by the executive. While doing so, the court abdicated the long-held high standards of checks and balances to scrutinize a central action that aimed at flattening state autonomy and reconfiguring the state itself. In the *Kerala Article 293* case, the Court without deciding on the merits kept the case within its continuing jurisdiction, which effectively amounts to macroeconomic policy-making.

4. Conclusion

State reorganization of 1956, devising basic structure doctrine and regionalizing of Indian politics, suggested that pluralism and asymmetry were deepening in India in line with the democratic promise that the constitution of India offered[55]. However, the recent developments and eventual court response underscore what Stephen argues that India's federalism is not demos-constraining but demos-enabling, allowing the majority to alter the terms of state autonomy-fiscal, territorial, and administrative[56].

Khosla examines the historical development of democratic and constitutional ideas in India during India's independence. He deliberates on the choices that the Indian constitution makers had to make in the face of challenges that the country faced and the extraordinary diversity of the Indian nation[57]. Khosla emphasizes the significant role that the Indian constitution and courts played in opposing any threat to democracy over the decades. One of the pillars upon which Indian democracy rests is

55 Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 Annals Am. Acad. Pol. & Soc. Sci. 37 (2001).

56 Alfred Stepan, Federalism and Democracy: Beyond the U.S. Model, 10 J. Democracy 19 (1999).

57 Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard Univ. Press 2020).

federalism. In spite of the centralizing tendencies, the foundational aspirations of the Indian federalism were more nuanced[58]. The constituent assembly refused to draw state boundaries on the basis of linguistic identity; nevertheless, in 1956, linguistic states were formed throughout India. Changes like these have contributed to the complex nature of Indian federalism[59].

The emerging jurisprudence highlights the distinct and precarious nature of Indian federalism. Devising doctrines like pragmatic federalism, entering the macroeconomy policy-making sphere, and upholding the extraordinary authority of the executive to unilaterally reorganize or abolish the state underscores the fragility and vulnerability of Indian federalism. The recent judgments and orders from the highest court have laid bare the weaknesses of Indian federalism. Khosla (2020) argues that because the executive was never as strong as today and courts never so weak, the situation exposes the weaknesses of India's institutions[60]. Therefore, the robustness of Indian federalism depends not only on constitutional structure but also on evolving political practices.

Tillin argues that the emerging trend not only dismantles the normative design of the Indian constitution but also reveals the precarious foundation of India's compromise with asymmetry and diversity[61]. What is at stake is therefore the normative question of whether India's federal order has the ability to accommodate diversity of people and thought. Ambedkar envisaged that the Indian polity is "both federal and unitary" depending on the needs of the time[62]. The test for the future of India's federalism is to what use the duality of the Indian constitution will be put to. Federalism theorists contend that genuine federalism provides "partial but permanent autonomy rights" to specific sub-units, a notion that becomes increasingly significant in comprehending India's federal dynamics[63].

58 *Id.*
59 *Id.*
60 *Id.*
61 Tillin, supra note 23, at 536 in (S. Choudhry, M. Khosla & P.B. Mehta eds., Oxford Univ. Press 2019).
62 B.R. Ambedkar, Constituent Assembly Debates, vol. VII, 5th ed. 234–36 (Lok Sabha Secretariat 2003).
63 Rubin,supra note 56 , at 574.

Safeguarding Human Dignity: The Indian Judiciary's Commitment to Eradicating Custodial Torture

Mr Kaisar Iqbal Mir*
Dr Rehana Shawl**

Abstract

This research paper explores the critical role of the Indian judiciary in the fight against custodial torture, emphasizing its commitment to uphold human dignity. Despite constitutional guarantees and international conventions, custodial torture remains a pervasive issue in India, undermining the justice system and eroding public trust. Through an analysis of landmark judgments and judicial pronouncements, this study highlights the judiciary's proactive stance in addressing human rights violations within the custodial environment. By examining case studies, legal frameworks, and the challenges faced in implementing effective safeguards, the paper elucidates how the judiciary has emerged as a vital bastion against state-sponsored violence. The research adopts a doctrinal legal research methodology, analyzing judicial decisions, constitutional provisions and other statutory frameworks to evaluate the Indian judiciary's role in addressing custodial torture.

Keywords: *Custodial Torture, Human Dignity, Judiciary, Human Rights.*

Introduction

"If you want to defend torture, well then go ahead. But please spare me any sermons about the law ever again."

Chris Hayes

Torture has been defined under different international treaties and instruments to which India is a party. Even though torture has been banned under these treaties and instruments, but the fact of matter is that the international treaties do not automatically become part of municipal law, unless they are incorporated in the domestic law by way of a legislative act. In this regard power has been exclusively vested in the Union

* Research Scholar, Faculty of Law, Jamia Millia Islamia, New Delhi, 110025
** Assistant Professor, School of Legal Studies, Central University of Kashmir.

Parliament to implement International Treaties.[1] No doubt the is no express prohibition against torture and other inhuman and degrading treatment within the Indian Constitution, but the Supreme Court has interpreted such prohibition to be implicit in the Constitution by relying on combination of Articles 14 and 21.[2] In *Mullin v Union Territory of Delhi*[3], the Supreme Court declared: "Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21,unless it is in accordance with procedure prescribed by law, but no law which authorizes and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21."

Section 24 of the Indian Evidence Act and Section 164 of the Code of Criminal Procedure provide protections against obtaining confessions through torture. However, these provisions do not explicitly ban the use of torture as a method for gathering evidence. Furthermore, the statutes regulating police authority include guidelines against the excessive use of force, but they lack explicit prohibitions against the use of torture

As such there is no exclusive definition of torture under the Indian legal system. Even the Supreme Court has not defined the term torture in its decisions, but has held as to what amounts to torture.[4]

There are no explicit provisions within the Indian Constitution that regulate the incorporation and status of international law in the Indian

1 Article 253 provides that: "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Entry 14 of the Union List of the Seventh Schedule empowers Parliament to legislate in relation to "entering into treaties and agreement and implementing of treaties and agreement with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

2 *Kharak Singh v State of U.P*. AIR 1963 SC 1295.

3 AIR 1981 SC 746.

4 A. S. Anand JJ. in D. K. Basu v. State of West Bengal, supra, para.10: "*Torture has not been defined in the Constitution or in other penal laws. Torture of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of human civilisation."*

legal system. However, Articles 51 (c) provides, "The State shall endeavor to foster respect for international law and treaty obligations in the dealings of organised people with another." In alignment with this provision, a rule of customary international law is binding in India provided it is not inconsistent with Indian law. "The comity of Nations require that Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, Municipal Law must prevail in case of conflict."[5] Generally in the event of clash between the municipal law and international law, it is the national law that has to be respected. But the courts in India especially the Supreme Court has consistently interpreted statutes in such a manner as to make them compatible with the international law.[6]

The Supreme Court of India in India in its various judgments has expressed that the rules of international law and municipal law should be interpreted harmoniously so as to expand the horizon of human rights jurisprudence in India.[7] The Supreme Court has even gone a step further

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5 *Gramophone Co. of India Ltd v. Birendra Bahadur Pandey*, AIR 1984 SC 667, at 671:

6 *S.C. Vosjala & Others v. State of Rajasthan & Others*, 1997 (6) SCC 241: "(it is) now an accepted rule of judicial construction that regard must be had to international conventions and norms of construing domestic law when there is no inconsistency between them and there is a void in domestic law;" *Apparel Export Promotion vs. A.K. Chopra* 1999 (1) SCC 759: "In cases involving violation of human rights, the courts must ever remain alive to the international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field.

7 *Vishaka v. State of Rajasthan,* (1997) 6 SCC 241, at 251 for cases, here gender equality and guarantees against sexual harassment, in which there is no domestic law: "(a) any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object

by repeatedly holding, "when interpreting the fundamental rights provisions of the Constitution, that those provisions of the International Covenant on Civil and Political Rights, which elucidate and effectuate the fundamental rights guaranteed by the Constitution can be relied upon by courts as facets of those fundamental rights and are, therefore, enforceable."[8]

Results and Discussion

The Supreme Court of India has taken significant steps to enhance the constitutional framework that guarantees rights and remedies for prisoners. This marks the dawn of a new era in the recognition of prisoner rights. In multiple rulings, the Court has affirmed that prisoners are entitled to be treated with dignity and humanity, establishing the fundamental principle that human rights apply to inmates as well. No entity, including the State, is permitted to violate these rights.

Judicial Initiatives on a Persons' Rights from the Pre-Detention Period till his Release

- **Fair and Speedy Investigation**

Article 21 of the Indian Constitution explicitly provides that the Criminal Justice System must in all its facets ensure a free, just and reasonable procedure. A set of well-established rules has been provided under the Code of Criminal Procedure, 1973 to ensure speedy trail of an accused in this regard, so as to comply with Article 21 of the Constitution. But this speedy trial completely rests upon the fair and speedy investigation of the

of the constitutional guarantee. This is implicit from Art.51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Art.253 with Entry 14 of List 1 of the Schedule.

8 *People's Union of Civil Liberties v. Union of India & others*, supra, affirming jurisprudence of Supreme Court in earlier cases concerning Article 9 (5) ICCPR that provides for a right to compensation for victims of unlawful arrest or detention. Remarkably, the Supreme Court has found Article 9 (5) ICCPR to be enforceable in India even though India has not adopted any legislation to this effect but had even entered a specific reservation to Article 9 (5) ICCPR when ratifying the Convention in 1979, stating that the Indian legal system did not recognise a right to compensation for victims of unlawful arrest or detention. See also the case of Prem Shaker Shukla v. Delhi Administration, AIR 1980SC 1535

case by the police, and it is often in this pursuit to create evidence that the authorities employ third degree methods of torture. That's why it is said that most often the rights are being trampled by those who are there to protect them.

In *Gauri Shanker Sharma v State of UP*,[9] three members of police force were charged for custodial death in the course of investigation. It was revealed that the deceased was taken into custody without recording arrest in the general diary on the actual day of arrest. This way the injuries given in the course of investigation were shown to have been incurred in the pre-arrest period. Ahmedi, J. observed, "the offence was of a serious nature aggravated by the fact that it was committed by a person, who was supposed to protect the citizens and not to misuse his uniform and authority to brutally assault them or else this would be a stride in the direction of Police Raj. It must be curbed with a heavy hand; the punishment be such that it would deter others from indulging in such behaviour. Though investigation and prosecution are the functions of two distinct wings of Criminal Justice Administration, but often the investigating agency develops a commonality of interest with the prosecution and at times, resorts to foul and underhand means to forge evidence to somehow secure conviction."

In *Dilawar Hussain v State*[10], the case relates to outbreak of communal violence in Gujarat, in which 8 members of one community were allegedly killed by a mob belonging to another community. Keeping in mind the sentiments of the population, strong punitive action was resorted to by arresting 2000 members of the mob. R.M. Sahai, J. observed, "Still sadden was the manner in which the machinery of the law moved from accusation in the charge sheet that accused were part of unlawful assembly of 1500-2000. The number came down to 150 to 200 in evidence and the charge was framed against 63 under Terrorist and Disruptive Activities (Prevention) Act, 1985 and various offences including Section 302 of Indian Penal Code. Even out of 63, 56 were acquitted either because there was no evidence or if there was evidence against some, it was not sufficient to warrant their conviction. What an affront to fundamental rights and human dignity. Liberty and freedom of these persons were in

9 AIR 1980 SC 709.
10 1991 SCC (Cri) 163.

chains for more than a year, for no reason – one even died in confinement."

In *Kishore Chand v State of Himachal Pradesh*[11] K. Ramaswamy, J. highlighted the over zeal of investigation agencies and its dangers for the liberty of the individual and observed that, "it is necessary to state that from the facts and circumstances of the case it would appear that the investigating officer has taken the appellant, a peon, the driver and the cleaner for a ride and trampled upon their fundamental personal liberty and lugged them in the capital offence punishable under Section 302 Indian Penal Code by fabricating evidence against the innocent. Undoubtedly, heinous crimes are committed under great secrecy and investigation of the crime is difficult and tedious task. At the same time the liberty of a citizen is precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law." In this case the Court advised to take extreme caution while admitting any evidence that comes from tainted sources, being aware of the investigating agencies undue interest in cooking up evidence.

In *Shivappa v State*[12], Dr. A.S. Anand, J. outrightly rejected to admit in evidence a confession under Section 164 of Code of Criminal Procedure, as the facts in the case displayed a real possibility of police influence over the accused and absence of any assurance about the voluntariness of the confession. The Supreme Court asserted, "the duty of the investigation officer is not merely to bolster up a prosecution case with such evidence that may enable the Court to record a conviction but also to bring out the real unvarnished truth."

The Supreme Court in *State of Andhra Pradesh v P.V. Pavithran*[13], held "there is no denying the fact that a lethargic and lackadaisical manner of investigation over a prolonged period makes an accused in a criminal proceeding to die every moment and he remains always under extreme emotional and mental stress and strain and the remains always under a fear psychosis. Therefore, it is imperative that if the investigation of a criminal

11 1991 SCC (Cri) 172..

12 AIR 1995 SC 980.

13 AIR 1990 SC 1266, see also *Shyam Babu v State of U.P.*, (2012) 6 ALJ 10, *Mohd. Hussain @ Julfikar Ali v State (Govt. of N.C.T.) Delhi*, 2013 (80) ACC 910 (SC).

proceeding staggers on with a tardy pace due to the indolence or inefficiency of the investigating agency causing unreasonable and substantial delay results in grave prejudice. Personal liberty will step in and resort to the drastic remedy of quashing further proceedings in such investigation."

- **Arrest and Detention**

The right to life and personal liberty is the most basic of all fundamental rights and cover wide variety of rights within its ambit. However, these rights are often at stake at the hands of police who enjoy fairly extensive powers of arrest and detention under the Code of Criminal Procedure, 1973. The necessary concomitant of extensive powers is that they are quite of abused by those who enjoy them, and police certainly is not an exception. And the result is that the police often abuse this power and invade upon the personal liberty of individuals. The police officer while resorting to his powers in relation to arrest must be satisfied as to the genuineness of allegation of commission of offence. Such satisfaction must be arrived at after taking all reasonable grounds into consideration and not based on mechanical application of mind.[14]

Article 21 of the Constitution has given vital rights to an individual. The Supreme Court observed, "It may be pointed that our Constitution is a unique document. It is not a mere pedantic legal text but it embodies certain human values, cherished principles and spiritual norms and recognises and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty all-powerful machine of the State but places him at the centre of the Constitutional scheme and focuses on the fullest development of his personality. But all these provisions enacted for the purpose of ensuring the dignity of the individual and providing for his material, moral and spiritual development would be meaningless and ineffectual, unless there is rule of law to invest them with life and forces."[15]

14 Dr. Deepa Singh, Human Rights and Police Predicament 217(2002).
15 *A.K. Roy v Union of India*, AIR1982 SC 1325.

In *Joginder Kumar v State of U.P.*[16] strongly opposing the practice of carrying out indiscriminate arrests, Supreme Court said, "an arrest cannot be made simply because it is lawful for the police officer to do so." This unusual case involved the arrest of an active practicing lawyer, who still remains to be the primary agency that can challenge the abuse of power of arrest. In this case the concerned lawyer was called to police station for an enquiry on 7 January 1994. On not receiving any satisfactory account of his whereabouts the family members of the detained lawyer filed a petition before the Supreme Court on 11 January 1994. In compliance with the notice of the lawyer was produced on 14 January 1994 before the Supreme Court.[17] Rejecting the police version that Joginder Kumar was co-operating with them out of his own choice, the Court said, "the law of arrest is one of the balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties of the single individual and those of individuals collectively". The Supreme Court further said, "existence of power of arrest is one thing, the justification for the exercise of it is quite another. The police officer must be able to justify the arrest."[18]

- **Harassment and Ill Treatment**

Holding that protection of prisoner within his rights is a part of Article 32, in case of *Sunil Batra*[19] , Justice Krishna Iyer, observed that "even prisoners under death sentence have human rights which are not negotiable and even the dangerous prisoner has basic liberties that cannot be bartered away", while nullifying the practice of putting bar fetters for under trials and provisions regarding solitary confinement.

The Court observed, "The act of police officers in giving third degree treatment to an accused person while in their custody and thus killing him is not referable to and based on the delegation of the sovereign powers of

16 1994 SCC 260 see also Km. *Hema Mishra v State of U.P. and Others*, Criminal Appeal No. 146 of 2014, Decided on 16 January 2014 available at: www.stpl-india (visited on 10 January 2025).

17 Ibid.

18 Ibid.

19 *Sunil Batra(1) v Delhi Administration*, AIR 1978 SC 1575.

the State to such police officers to enable them to claim any sovereign immunity."[20]

In *Raghubir Singh v State of Haryana*[21] the Apex Court observed that, "the diabolical recurrence of police torture resulting in a terrible scar in the minds of common citizens that their lives and liberty are under a new peril and unwarranted because the guardians of law destroy the human rights by torture. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome of offences against them in reality perpetrate them." In this case the Supreme Court quoted Abraham Lincoln that – *"if you once forfeit the confidence of our fellow citizens, you can never regain their respect and esteem. It is true that you can fool all people some of the time and some of the people all the time but you cannot fool all the people all the time."*

The Supreme Court has made it clear through its pronouncements that the prisoners' rights does not only include protection from physical torture but at the same time, they should not be subjected to mental distress.[22] In *State of U.P. v Ramasagar Yadav*[23] where a person was found dead due to torture in police custody, the Sessions Court returned a verdict under Section 304 of Indian Penal Code. The Supreme Court restored the order of the Sessions Court on appeal and pointed out that, "the Sessions Court had been unduly lenient to punish the accused only under Section 304 of IPC and not for murder. Further, as police officers alone in such circumstances are able to give evidence in which a person in their custody dies due to police torture, often there is reluctance on the part of the colleagues to give evidence and they prefer to keep silent about the incident. Thus, no evidence is left of incidents done in the *sanctum sanctorum* of the police stations, and, therefore the lock-up death cases should raise a rebuttable presumption for it and the burden of proof must be shifted on to the concerned custodians." The Supreme Court said, "it wished to impress upon the Government the need to amend the law so that the burden of proof in cases of custodial deaths will be shifted to the

20 H.H. Singh, "Importance of Judicial Activism in Preventing Custodial Violence" XVI *Central India Law Quarterly* 431 (2003).
21 AIR 1980 SC 1088.
22 *Kishore Singh v State of Rajasthan*, AIR 1981 SC 625.
23 AIR 1985 SC 416.

police." In case of *Saheli*[24] the Court confirmed that, "the plea of immunity of State is no longer available and State will have to answer action for damages for bodily harm, which includes battery, assault, false imprisonment, physical injuries and death."

The Supreme Court in *D.K. Basu v State of W.B*.[25] laid down thirteen directions that "not only prohibit certain practices but also require the police to fulfil certain positive obligations such as preparation of memo of arrest, allow the arrestee to meet his lawyer during interrogation, notification of time, place of arrest and custody, telegraphically, getting arrestee medically examined after arrest and every 48 hours, information about arrest to police control room etc."

In *Smt. Selvi and Others v State of Karnataka*[26] , while dealing with the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the brain electrical activation profile test for the purpose of improving investigation efforts in criminal cases, a three-Judge Bench opined that, "the compulsory administration of the impugned techniques constitute 'cruel, inhuman or degrading treatment' in the context of Article 21. The Court further elaborated that, the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms." In *Haricharan and Another v State of Madhya Pradesh and Others*[27] , the Court held, "the expression 'Life and Personal Liberty' in Article 21 includes right to live with human dignity. Therefore, it includes within itself guarantee against the torture and assault by the State or its functionaries." In *Vishwanath S/o Sitaram Agrawal v Sau. Sarla Vishwanath Agrawal*[28] , the Court observed, "Reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."

24 *Saheli v Commissioner of Police,* 1990 (1) SCJ 390.
25 AIR 1997 SC 610.
26 AIR 2010 SC 1974.
27 (2011)3 SCR 769.
28 (2012) 6 SCALE 190.

The Supreme Court in case of *Dr. Mehmood Nayyar Azam v State of Chhattisgarh and Others*[29] observed, "when an accused is in custody, his Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatose. The right to life is enshrined in Article 21 of the Constitution and a fortiorari; it includes the right to live with human dignity and all that goes along with it. As such any treatment meted to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the Welfare State is governed by rule of law which has paramountcy. It is thus the sacrosanct duty of the police authorities to remember that a citizen while in custody is not denuded of his fundamental right under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner. On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities."

- **Unhygienic Conditions in Lock-up**

Right to healthy and clean environment is included in right to life under Article 21 of the Constitution. In *Indu Jain v State of M.P. and Others*[30] the Supreme Court ruled, "death of a detained person due to unhygienic conditions in Jail would amount to custodial death and could make officials liable for prosecution." On 14 July 2004 Sri R.K. Jain, Deputy Commissioner, Commercial Tax, Bhopal was arrested for interrogation by the accused officers on a bribery charge. On 15 July 2004; he was found unconscious in the bathroom of the office of the Lokayukta and later died at a hospital. The post mortem examination of the deceased revealed certain injuries on the body including broken ribs but the cause of death was shown to be on account of asphyxia. The Supreme Court observed that, "The condition of the room where the deceased had been detained was completely unsuitable for a patient of asthma as it was filled with dust and cobwebs which was sufficient to trigger an asthmatic attack which could have caused asphyxia which ultimately led to R.K. Jain's death."

29 2012 CriLJ 3934 (SC).
30 AIR 2009 SC 976.

In Court on *Its Own Motion v Union of India and Others*[31] , the Apex Court held that, "The appropriate balance between different activities of the State is the very foundation of the socio-economic security and proper enjoyment of the right to life."

- **Privilege against Self-Incrimination**

The Supreme Court decision in *Nandini Satpathy v P.L. Dani*[32] gave an interpretation to the constitutional guarantee against self-incrimination. The Apex Court speaking through Justice Krishna Iyer, accorded a new expanse to the privilege by making it available right from the early stages of interrogation, thereby giving a meaningful protection to an accused person in police custody. According to the Court, "the ban on self-accusation and the right to silence goes beyond the case in question and protects the accused in regard to other offences pending or imminent which may deter him from voluntary disclosure of incriminating facts." The Court further ruled, "if the police obtained information is strongly suggestive of guilt from an accused by applying any kind of pressure, subtle or crude, mental or physical, direct or indirect, it becomes a compelled testimony violative of privilege against self-incrimination."

- **Bail and Remand**

The criminal justice system aims at preserving the personal liberty of an individual, which holds an immense value under Indian constitutional system. The provisions as to bail have been inserted with a view to safeguard personal liberty and ensure that individuals are not unnecessarily inflicted with punishment even before conviction.[33]

Supreme Court has always come ahead to safeguard the rights of the individual if the right of bail is denied or when a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigating powers. In *Moti Ram's* case the Court held, "there is a need for liberal interpretation of social justice, individual freedom and indigent's rights and while awarding bail covers release on one's own

31 1(2012) 8 Supreme Court 646.

32 AIR 1978 SC 1025 see also *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, AIR 2012 SC 3565.

33 Renu Saini, "Right of Bail: A Human Right", in B.P. Singh Sehgal (ed.) *Law, Judiciary and Justice in India* 245(1993).

bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables."[34]

In the context of continuance of police remand the court ruled, "'bail not jail' should be the principle to be followed by Courts."[35] In *Kashmira Singh v State of Punjab*, Bhagwati, J. observed, "it would be indeed a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the court ever compensate him for his incarceration which is found to be unjustified?"[36]

In *Common Cause's Case* the Supreme Court treated the long pendency of cases and consequent incarceration itself an engine of oppression and issued several directions for release on bail the diverse categories of under- trials.[37] On the rights of bail Bhagwati, J. said that, "This system of bail operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of bail fixed by the Courts is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes almost impossible task for the poor to find persons sufficiently solvent to stand as sureties."[38]

- **Treatment of Women in Custody**

Women in custody are particularly vulnerable to physical and sexual abuse. Courts took a very serious note of complaints regarding rape in custody. Expressing serious concern about the safety and security of women in police lock up, the Supreme Court directed that a woman judge should be appointed to carry out surprise visit to police stations to see that all legal safeguards are being enforced. The Supreme Court directed[39] "that-

34 *Moti Ram v State of M.P.*, AIR 1978 SC 1594.
35 *Godikanti v Public Prosecutor*, High Court of A.P., AIR 1978 SC 429.
36 AIR 1977 SC 2147.
37 *A Common Cause's Registered Society v Union of India*, (1996)4 SCC 33, see also Siddharth Salingappa Mhetra v State of Maharashtra and Others, (2011) 1 SCC 694.
38 Justice P N Bhagwati, "Human Rights in the Criminal Justice System" 27 *JILI* 1 (1985).
39 *Sheela Barse v State of Maharashtra*, 1983 SCC 96.

1. Female suspects must be kept in separate lock-up under the supervision of female constable.
2. Interrogation of females must be carried out in the presence of female policepersons."

However, these directions have not been implemented. The Court issued detailed procedures to ensure enforcement of human rights of women and girls in police and prison custody in *Dr Upinder Baxi and Others v State of U.P.*[40] and *Christian Community Welfare Council of India and Others v Government of Maharashtra and Others*[41] when the Court's attention was drawn to horrible conditions in custodial institutions for women and girls. In *Mehboob Batcha and Others v State Rep. by Superintendent of Police*[42], the Court observed, "Crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment". The Court further held, "the horrendous manner in which victim was treated by policemen was shocking and atrocious, and calls for no mercy."

- **Prohibition against detention of Juvenile in Adult Custodial Institutions**

The practice of detaining juveniles along with adult criminals not only exposes them to the habits of hardened criminal, but also renders them on the brink of sexual abuse and other forms of exploitation. Keeping this in view the Supreme Court ruled against detention of children in adult prisons in *Munna v State*[43] .

In *Sheela Barse v Union of India and Others*[44] the Supreme Court held, "the State must ensure strict adherence to the safeguards of the jails so that children are not abused.

- take precautions that children below 16 years of age are not kept in jail.
- ensure that trial of children should take place only in juvenile courts and not in criminal courts. - ensure that if a First Information Report is lodged against a child below 16 yrs of age for an offence punishable with

40 AIR1987 SC 191.
41 1995 CriLJ 4223 (Bom).
42 (2011) 3 SCC 1091.
43 (1982)1 SCC 545.
44 AIR1986 SC 1773.

imprisonment of not more than seven years, then the case must be disposed of in three months."

The Supreme Court further pointed out that by ignoring the non-custodial alternatives prescribed by law and exposing the delinquent child to the trauma of custodial cruelty, the State and the society run the risk of sending the child to the criminal clan.[45] In *Sanjay Suri v Delhi Administration*[46], the Supreme Court gave specific directions to magistrates and the detention authorities. Ranganath, J. said, "We call upon every magistrate or trial judge authorised to issue warrants for detention of prisoners to ensure that every warrant authorising detention specifies the age of the person to be detained."

- **Compensation to Victims of Abuse of Power**

There is no wrong without a remedy. The law wills that in every case where a man is wronged, he must have remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up not by itself provide any meaningful remedy to a person whose Fundamental Right to life has been infringed, something more needs to be done in this regard.

Khatri (IV) v State of Bihar[47] was the first case where the question of granting monetary compensation was considered by the Supreme Court. Bhagwati, J. observed, "Why should the court not be prepared to forge new tools and device new remedies for the purpose of vindicating the most precious of the precious, fundamental rights to life and personal liberty." The Court further added that the Article 21 of the constitution would be reduced to nullity, 'a mere rope of sand' if State is not held liable to pay compensation for infringing Article 21."

The Supreme Court brought about revolutionary break – through in the 'Human Rights Jurisprudence' in *Rudal Shah v State of Bihar*[48] when it granted monetary compensation to the petitioner against the lawless acts of the Bihar Government, which kept him in illegal detention for over fourteen years after acquittal. The Supreme Court observed, "The refusal of this Court to pass an order of compensation in favour of the petitioner

45 Ibid.
46 AIR 1988 SC 414.
47 Supra note 287.
48 AIR 1983 SC 1086.

will be doing mere lip-service to jus Fundamental Right to liberty which the State Government has so grossly violated."

In *Nilabeti Bahera v State of Orissa and Others*[49] the Supreme Court observed, "The Court is not helpless and the wide powers given to the Supreme Court by Article 32, which itself a Fundamental Right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the Fundamental Rights guaranteed in the Constitution which enable the award of monetary compensation in appropriate cases." The Court further said that, "the purpose of law is not only to civilize public power but also to assure people that they live under a legal system which protects their interests and preserve their rights. Therefore, the High Courts and the Supreme Court as protectors of civil liberties not only have the power and jurisdiction but also the obligation to repair the damages caused by the officers of the State to Fundamental Rights of citizens."[50]The Supreme Court directed that;

1. The state has to mandatorily give compensation to the victim or his heirs, whose fundamental rights have been violated by the state itself or its agents.
2. The state can recover such compensation from erring officials.
3. Order of compensation by state in any criminal case does not bar the victim or his heirs from claiming further compensation in a civil case.

In *Sakshi Sharma and Others v State of Himachal Pradesh and Others*[51], the High Court has granted compensation of Rupees 15,60,000 to the victim and directed the suspension of the erring police officials. The High Court also directed the Chief Judicial Magistrate and the Sub Divisional Magistrate to visit police stations and submit reports to the Sessions Judge, who would take action against the persons who violated the constitutional provisions and legal mandate.

In *Dr. Mehmood Nayyar Azam v State of Chattisgarh And Others*[52] , the Court observed that, "the purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights.

49 AIR 1993 SC 1960.
50 Ibid.
51 CWPN. 3684 of 2009.
52 (2012) 8 SCR 651.

Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

Conclusion

The evolution of prisoners' rights in India, largely driven by the Supreme Court, has heralded a significant transformation in the recognition of human rights within the penal system. By affirming the principle that prisoners are entitled to dignity and humane treatment, the judiciary has laid a strong foundation for prisoner rights. However, despite these advancements, substantial gaps remain in the criminal justice system. The persistent issues of procedural and substantive deficiencies highlight the urgent need for reform. Prisoners, particularly those from marginalized backgrounds, often endure prolonged periods of incarceration without trial, further exacerbated by the complexities inherent in custodial laws. Wealthy individuals frequently navigate the legal system more effectively, highlighting systemic inequities that render justice elusive for the average citizen. This disparity raises critical questions about the integrity and accessibility of the justice system in a country that professes to be built on the principles of equality and fairness.

As the judiciary assumes the role of a vigilant guardian of civil liberties, it is imperative that it acknowledges and addresses these systemic flaws. The judiciary must ensure that legislative measures align with constitutional mandates and that executive powers are exercised within a framework that respects individual rights. The road to achieving true

social justice in India is fraught with challenges, but the momentum generated by the Supreme Court's recognition of prisoners' rights offers a beacon of hope. It is essential that this momentum continues to drive reforms aimed at bridging the gap between legal principles and real-world applications, ensuring that justice is not a privilege for the few but a right accessible to all. Only then can the ideals of dignity, fairness, and justice be genuinely realized in the Indian criminal justice system.

An Interpretational aspect of the Indian Constitution: From Literal to Liberal

Saba Manzoor*

Abstract

"The question of interpretation is the most important — how the court reads and interprets facts and relates it to the law requires a lot of skill, insight and vision. "So your political ideology is bound to color your judgment, you cannot avoid it. But it should not blind you to the words used by the Legislature."[1]

Keywords: *Interpretation, Ideology, Legislative intent, impartiality.*

Introduction

The methodology that judges use to interpret the Constitution has garnered significant public attention in recent decades, as judicial nominations, confirmation hearings, and constitutional controversies have enlarged the issue's political silence. In the simplest terms, the debate over methodology has been framed as a contest between two views. On one side are those who argue that the text of the Constitution should be construed according to its original understanding—that is, the way the Judicial Interpretation of the text was understood by the people who drafted, proposed, and ratified it. By contrast, others have argued in favor of treating the Constitution as a living document. On this approach, the Constitution is understood to grow and evolve over time as the conditions, needs, and values of our society change. Proponents of this view believe that such evolution is inherent in the constitutional design because the Framers intended the document to serve as a general charter for a growing nation and a changing world. Thus, constitutional interpretation must be informed by contemporary norms and circumstances, not simply by its original meaning.

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* Principle Kashmir Law College, Nowshehra Srinagar.

1 http://mylaw.net/Article/The_darkest_hour_of_Indian_history/ posted on Sept. 16,2011

Interpretation Of The Constitution

In the context of Indian Constitution, there has been interpretation on the parallels of two different aspects in jurisprudential terms: a conflict between American legal Realism and Austinian analytical positivism. American legal realism stands for the Supreme Court as a sole guiding institution of law. The law (or the Constitution) is what the court says it is' is the working principle of realistic jurisprudence. [2] On the other hand, in the United Kingdom the concept of sovereignty had led to legal positivism which regards Parliament as sovereign in modern times, as the ultimate source of positivity in law. The Constitution of India partakes of both the US and the British Constitution; it is natural that the two theories of law and jurisprudence may make an impact on each other continuously in the working of the Indian Constitution. In the infancy years of the Constitution of India, Mcwhinney[3] had remarked:

"*The high-watermark of legal positivism on the part of the Indian Supreme Court was attained in one of the Court's first opinions, Gopalan v. State of Madras* [4] *……"*

All the considerations which are likely to influence the judge who may be called upon to decide a matter such as his personal and professional background, his social, cultural or economical likes and dislikes are worthy of study for making accurate predictions because these will be reflected in his decisions making. This emphasis of legal realism is very much recognized by the former Chief Justice Hidayatullah. He stated:

"Every judge …has a distinct stream of tendency in him. Since he sees things with his own eyes, there works on his mind all those imponderable influences built round himself in life's experience. He may not be aware of the influence but they are there. The tendencies of Judges are as varied as the colours of an artist. There are also various

2 "we are under the Constitution , but the Constitution is what the Judges say it" a dictum of C.J. Hughes quoted in Abraham, The Judicial Process 326(2nd of 1968): Hart, The Concepts of Law 138(1961)

3 McWhinney, Judicial Review 130 (4th edition)1965

4 AIR 1950 SC 27

approaches and methods for viewing legal problems. Once a judge may be influenced by one approach more than another."[5]

The judge may not give a liberal interpretation to the law but may apply it to the matters with which it directly deals and within such limits may give a broad or limiting interpretation to the words to suit the ends of justice.[6]

To begin with, generally the predominant judicial approach of the Indian Courts was positivist, i.e. to interpret the Constitution literally and to apply to it more or less the same restrictive canons of interpretation as are usually applied to the interpretation of ordinary statutes. This is also described as the positivist approach, law as it is . This approach offshoots a concept of a judge not creating the law but merely declaring the law. .This principle was judicially laid down in these words by Justice Mukherjea:

"In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution makers".[7]

The Plain meaning rule, also known as the literal rule, is one of three rules of statutory construction traditionally applied by English courts. It means that statute is to be interpreted using the ordinary meaning of the language of the statute, unless a statute explicitly defines some of its terms otherwise. In other words, the law is to be read word for word and should not divert from its ordinary meaning. The plain meaning rule is the mechanism that underlines textualism and, to a certain extent, originalism.

The literal rule is what the law says instead of what the law was intended to say. In the Words of Austin what he called law as it is distinguished from Law ought to be. Prof. Larry Solum expands on this premise:

"Some laws are meant for all citizens (e.g., criminal statutes) and some are meant only for specialists (e.g., some sections of the tax code). A text that means one thing in a legal context might mean something else

5 M. Hidayatullah , A Judge's Miscellany,67(1972)
6 Paton's Jurisprudence 2nd edition (1951) at 187-188
7 Chiranjit Lal Chowdry v. Union of India AIR 1951SC 58

if it were in a technical manual or a novel. So the plain meaning of a legal text is something like the meaning that would be understood by competent speakers of the natural language in which the text was written who are within the intended readership of the text and who understand that the text is a legal text of a certain type."[8]

The advocates of literal interpretation argue that the Constitution itself incorporates the principle of statutory interpretation. Article 367[9] provides that the General Clauses Act, 1897,[10] shall apply for the interpretation of the Constitution as it applies for the interpretation of legislative enactments. We have the examples from the various case laws where courts have interpreted the words as defined in General Clauses Act, 1897, e.g. the words 'person' in Article 226 and 'offence' in **Article 20** have been interpreted in the same meaning as is defined in Section 3(42) and 3(37) of the Act In **Jawala Ram v. Pepsu.**[11]

A.K.Gopalan V. State Of Madras

In the very first instance of literal interpretation to the constitutional provisions the first case on fundamental rights, ***A.K. Gopalan v. State of Madras***[12] in which the limits of the rights under **Article 21**[13] and under article 19 were distinguished from one another on the principle of direct consequence of law and focusing just on the letters of the law by Justice Kania.[14] The Supreme Court rejected the idea of interpretation of the provisions of the Constitution "in the spirit of the Constitution".[15] The Judges thought that an extensive constitutional charter comprising 395 Articles and 9 schedules lends itself to the

8 Legal Theory Lexicon
9. Article 367(1) states that unless, the context otherwise, requires the General Clauses Act 1897, shall subject to any adaptations and modifications that may be made therein under Article 372 apply for the interpretation of this Constitution as it applies for the Interpretation of the an Act of the Legislature of the Dominion of India.
10 This Act contains as it were, a legislative dictionary for India.
11 AIR 1962 SC 1246
12 AIR 1950 SC 27
13 No person shall be deprived of his life or personal liberty except according to procedure established by law.
14 ibid 34-35
15 A.K.Gopalan 1950 (Supreme Court Journal) 174

application of strict and not liberal methods of interpretation.[16] The Supreme Court has emphasized that it will confine itself to the written text of the Constitution for the purpose of interpretation and not take recourse to any abstract or external concept like spirit of the constitution. It rejected this contention that the preamble should be the guiding star in its interpretation and Article 21 should be construed with natural justice. The Court with Majority held that Law in Article 21 refers to positive or state made law and not to natural justice and this language of Article 21 could not be modified with reference to preamble. Thus, being the glorifying example of literal rule of interpretation to the Constitutional provision. [17]

However, **Murtaza *Fazl Ali, J. disagreeing*** with the majority view, held that the principle of natural justice that "no one shall be condemned unheard" was part of the general law of the land and the same should accordingly be read into Article 21.[18]

Chief Justice Kania observed in **Gopalan's case** that:

"The Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the Fundamental law has not limited, either in terms or by necessary implication, the general powers conferred on the Legislature, we cannot declare a limitation under the notion of having discovered something in the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority."[19]

Gopalan was followed subsequently in many cases. In ***Ram Singh v. Delhi***[20] The court again invokes the literal rule of interpretation and excludes the relationship between Article 19 and Article 21. A person was detained for making speech prejudicial to public order. The Supreme

16 A different view was expressed by Sir Maurice Gwyer , Late CJ of India who advocated liberal interpretation of the Govt. of India Act, 1935 (1939 FCR, I, 18)
17 AK Gopalan 1950 SCR 88 (parah 120,198)
18 ibid
19 AIR 1950 SC 42
20 AIR 1951 SC 270

Court refused to assess the validity of the detention order with reference to Article 19(1)(a) read with Article 19(2) stating that even if a right under Art. 19(1) (a) was abridged , still the validity of the preventive detention order could not be considered with reference to Article 19(2) because of the Gopalan ruling that legislation authorizing deprivation of personal liberty did not fall under Art. 19 and cannot be judged by the criteria of Article 19 but validity of such law depends on compliance with Article 21 and 22 and the Court cannot go beyond the letters of the Law.

This preposition was reiterated by Supreme Court in **State of Bihar v. Kameshwar**[21]. Mahajan J. observed:

"*It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicitly in respect of a certain right or matter. When the Fundamental law has not limited either in terms or by necessary implication the general power conferred on the Legislature, it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the Constitution. This elusive spirit is not a guide in this matter.* ***The spirit of the Constitution cannot prevail as against its letters. The courts are not at liberty to declare an act to void because of being opposed to spirit supposed to pervade the Constitution but not expressed in the words."***

In Keshavan Madhava Menon v. State of Bombay,[22], *the Supreme Court applied to the Constitution the rule of statutory interpretation that every statute prima facie is prospective unless expressly or by necessary implications it is made to have retrospective operation. On this basis, the Court held that* ***Art. 13(1)*** *was wholly prospective in so far as any proceeding initiated before the commencement of the Constitution would not abate but continue even though the relevant law was hit by a Fundamental Right. An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution.* ***What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.***

21 AIR 1952 SC 252 at 309
22 AIR 1951 Bom 188

MAHAJAN J. held:[23]

"The only rule of construction applicable to the interpretation of article 13 of the Constitution is the one that concerns the determination of the question whether statutes intended to have any retrospective operations. If the well-known canons of construction on this point are applied, then it has to be held that article 13 was not intended to have any retrospective effect whatever; on the other hand, its language denotes that it recognized the validity of the existing laws up to the date of the commencement of the Constitution and even after its commencement except to the extent of their repugnancy to any provisions of Part III of the Constitution. On this construction of article 13 it cannot affect any past transactions, whether closed inchoate."

The judges used to give strict, narrow and rigid interpretations of what we call literal or statutory interpretation to the words, or by avoiding inferences. The confining of the term estate in article 31-A to agrarian reform or slum clearance by the Supreme Court in Kochuni case[24] or literal interpretation of penal and preventive detention statutes[25] (in the matter of exercise of constitutional powers for effecting preventive detention clause (3) to (7) of article 22 have been extensively interpreted to provide a code for the legislatures and the executive officers) are the instances of adopting a literal method of interpretation by the Supreme Court. The Supreme Court of India has been rather reluctant in adopting policy considerations as part of the process for reaching a decision.[26].

In ***ADM Jabalpur v. Shivkant Shukla*** [27]The court applies literal interpretation to "the concept of personal liberty" in Article 21 by laying down the practice of the Court not to pronounce on such points which have not been raised. Therefore law is declared and said to be bound only to the extent of observations on points raised and decided by the Courts in case. The Court in this case by 4:1 held that when Article 21 is suspended during emergency by presidential order under Article 359(1) any order of

23 AIR 1951 Bom 188
24 AIR 1960 SC 1080
25 M.P. Jain, Constitutional protection of personal liberty in India ch.v.
26 State of Bombay v. Bombay Education Society AIR 1954 SC 561
27 AIR 1976 SC 1207 (Parah 546)

detention or imprisonment could not be challenged on the ground that it was without law. There would be no right to writ of habeas corpus (i.e. loses his locus standii to regain his liberty on any ground and the Supreme Court and High Court loses its jurisdiction to grant him relief on any ground) during the suspension of Article 21; even though Article 32 and 226 are not suspended.

Therefore the court does not allow peeping through the letters of the law and by literal means held that when procedure established by law is suspended during emergency the same can't be asked from the court, therefore if such pleas are allowed then it would mean to enforce Article 21 itself, the enforcement of which has been suspended under Article 359(1).[28] This case is regarded as an example of narrow, restrictive, literal interpretation of the Constitution by the Supreme Court as the decision has been characterized as a hard blow on the very basis of constitutionalism and rule of law in the country. The Court failed to provide any protection to the people when its protection was needed most.[29]

The other example of judicial approach in application of literal rule to the Constitution is provided by the **Sankalchand case**[30] ,where the question was whether **Article 222**[31] should be so interpreted as to permit transfer of a Judge from one High Court to another only with his consent i.e. consensual transfer. The word "transfer" was to be interpreted only to mean consensual and not compulsory transfer? The majority[32] applies literal rules in interpreting Art. 222 and held that it is not consensual transfer but on its own terms i.e. transfer by the President of India after consultation with the Chief Justice of Supreme Court and there is no requirement of prior consent of the Judge before his transfer. The minority[33] In contrast , applied liberal approach of interpretation by

28 Ibid Parah 127,290.433,477,524
29 M.P.Jain Indian Constitutional Law (2010)
30 Union of India v. Sankalchand Himatlal Seth AIR 1977 SC 2328
31 Article 222(1) reads as: The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.
32 Chandrachud J. and Krishna Iyer J.
33 Bagwati J and Untwalia J

importing into Article 222 by necessary implication the consent of the Judge to transfer one High Court to another. Bagwati J. reads 'transfer' as 'consensual transfer' to give effect to the paramount intention of the constitution makers to safeguard the independence of superior judiciary by placing it out of the reach of the power of the executive.

The Post 1978 Journey of the Constitution.

The most important challenge which the courts faced while interpreting the Constitution was to achieve a proper balance between the rights of the individual and those of the state or between individual liberty and social control. The constitutional journey in India has passed through many ups and downs with notable developments like right to property in pre-1977 era where line shifted in favour of social control and Right of life and personal liberty in post 1977 where line shifted in favour of individuals. The constitutional jurisprudence of India witnessed the dynamic shift from traditional literal methods to wide interpretations when the Apex Court of India start peeping through the letters of the constitutional provisions in order to provide wheels for the justice to drive to the doors of needful, thanks to propositions laid down in Maneka Gandhi's Case. The Court laid stress on the relationship of Article 14 and 19 with Article 21 by invoking the doctrine of inclusiveness of Fundamental Rights in Maneka Gandhi's case. The Court observed:

"The law must therefore now be settled that Art. 21 do not exclude Art. 19 and that even if there is a law prescribing a procedure for depriving a person of personal liberty, and there is consequently no infringement of the fundamental rights conferred by Art. 21 such as a law in so far as it abridges or take away any fundamental rights under Art. 19 would have to meet the challenges of that Article. Thus, a law depriving a person of "his personal liberty" has not only to stand the test of Art. 21 but it must stand the test of Art. 19 and Art.14 of the Constitution.

Right to life guaranteed under Article 21 embraces within its sweep not only physical existence but the quality of life. If any statutory

provisions run counter to such a right, it must be held unconstitutional.[34] It is not mere animal existence but something more is meant. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.[35] All the factors which are responsible for the smooth running of life will fall within the meaning of life under Article 21. Baghwati J. has observed in Francis Corallie[36]:

"We think that the right to life includes the right to live with human dignity and all that goes with it, namely the bare necessaries of life such as adequate nutrition, clothing, and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings." A person's reputation is facet of his right to life under Article 21 of the Constitution.[37]. The reincarnation of Article 21 in Maneka Gandhi case added new dimensions to the constitutional jurisprudence of India.

The beginning of the new trend in the form of inclusiveness of fundamental rights was found in the ***Bank Nationalization Case***.[38] This case overruled doctrine of exclusiveness on the analogy of Gopalan view. In the Bank nationalization case Art. 19(1) (f) was applied to law enacted under Art. 31(2). It was that period when Supreme Court solicitors to protect the right to property in preference to the right to personal freedom. Since Article 31(2) had been drastically amended to dilute the protection of property, the court now established a link between Art 19(1) (f) and Art. 31(2) to provide some protection of private property. **This case was clearly the precursor of the trend to link Articles 19, 21, and 22.** It was held that the right to personal liberty in 21 must be read with 14 & 19, wherever necessary with a view to strengthen the right to personal liberty or to overcome the weakness of the guarantee of 'procedure established by law'.

34 Confederation of Ex-Service man Association v. Union of India AIR 2006 SC 2945
35 Munn v Illinois 94 US (1877)
36 Francis Corallie v. Delhi AIR 1981 SC 746
37 State of Maharashtra v. Public Concern for Governance Trust AIR 2007 SC 777
38 R.C...Cooper v. Union of India AIR 1970 SC 564

In *Khudiram Das v. State of West Bengal*,[39] Bagwati J asserted "it is not open to any one now to contend that a law of preventive detention, which falls within Article 22, does not have to meet the requirement of Art. 14 or 19.

In MANEKA GHANDHI[40] Bagwati J. observed:

"The expression personal liberty in Article 21 is of the widest amplitude and it *covers a variety of rights which go to constitute the personal liberty of man* and some of them have risen to the status of distinct fundamental rights and given additional protection of Article 19."

" The principle of reasonableness which was an essential element of equality or non-arbitrariness, pervaded Article 14 like a brooding omnipresence and the procedure contemplated in Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.

"The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."

Prior to Maneka Gandhi decision, Article 21 guaranteed right to life and personal liberty only against the arbitrary action of the executive and not from the legislative action. Broadly speaking, what this case did was extend this protection against legislative action too. The Court further articulated that the protection of Article 21 cannot be divorced from the procedural and substantive safeguards of Articles 14 and 19, establishing the doctrine of the "*Golden Triangle*" of fundamental rights.

It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation".[41]

In *District Registrar & Collector Hyderabad v. Canara Bank*[42] The Court held that if the procedure prescribed does not satisfy the requirement of 14, there would be no procedure at all within 21.

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39 AIR 1975 SC 550
40 AIR 1978 SC 597
41 Ajay Hasisa v. Khalid Mujib AIR 1981 SC 487 at 493.
42 AIR 2005 SC 186

While dealing with the provision of Article 21 in respect of personal liberty, Hon'ble Supreme Court put some restrictions in a case of *Javed and others v. State of Haryana,*[43] as follows: at the very outset we are constrained to observe that the law laid down by this court in the decisions relied on either being misread or read divorced from the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. **The requirement of reasonableness runs like a golden thread through the entire fabric** of fundamental rights.. Reasonableness and rationality, legally as well as philosophically, provide color to the meaning of fundamental rights.

Right to Sleep

In Ramlila Maidan Incident v. Home Secretary, U.O.I, 23-2-2012 (SC) it was held:

Right to privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India. The citizens/persons have a right to leisure; to sleep; not to hear and to remain silent. The knock at the door, whether by day or by night, as a prelude to a search without authority of law amounts to be a police incursion into privacy and violation of the fundamental right of a citizen? Illegitimate intrusion into the privacy of a person is not permissible. However, the right of privacy may not be absolute and in exceptional circumstances particularly surveillance in consonance with the statutory provisions may not violate such a right. Thus, it is evident that the right of privacy and the right to sleep have always been treated to be a fundamental right like the right to breathe, to eat, to drink, to blink etc. An individual is entitled to sleep as comfortably and as freely as he breathes.

The Relationship Between 20 ,21 & 22

The Indian Constitution provides a cluster of fundamental rights protecting personal liberty under Articles 20, 21, and 22. **Article 20** offers specific criminal immunities like *freedom from ex post facto criminal laws, double jeopardy, and self-incrimination,* while **Article 21** safeguards the broader *right to life and personal liberty*. **Article 22**, on the

43 AIR 2003 SC 3057

other hand, establishes *procedural protections against arbitrary arrest and preventive detention*.

It has been noted above that the impression of exclusiveness of different fundamental rights, which the AK Gopalan case *supra* had left, has been removed by the Maneka Gandhi case *supra*. The Court's decision in **Maneka Gandhi v. Union of India**[44] fundamentally redefined the relationship between Articles 20, 21, and 22. Justice Bhagwati in this case thus observed: "*The law is now settled that no article in Part III is an island but Part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis*".

Therefore, the Fundamental Rights under Part III of the Constitution are to be read as a part of an integrated scheme, so that a person who has been deprived of his liberty, whether by an order of punitive or preventive detention, is entitled to complain that his rights under **Arts. 14, 19, 20, 21, or 22** or any of them have been violated by the impugned order.[45]

The integrated interpretation was extended to Article 20 through **Nandini Satpathy v. P.L. Dani**[46] where the Court expanded the scope of the privilege against self-incrimination. Justice Krishna Iyer, interpreting Article 20(3), observed: "*The right to consult a lawyer of one's choice and the right to remain silent are now a recognised facet of the fair procedure guaranteed under Article 21. A suspect or an accused, called for interrogation, is entitled to have his lawyer by his side, although the lawyer should not interfere with the legitimate questioning"*. This case, therefore, harmonised Articles 20(3) and 21, holding that the constitutional guarantee against testimonial compulsion must be understood in the light of the broader right to life and personal liberty.

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44 *Ibid at 41*
45 AK Roy v. Union of India AIR 1982 SC 710
46 (1978) 2 SCC 424

In *Smt. Salvi v. State of Karnataka AIR 2010 SC 1974* it *was held:*

Article 20(3) should be construed with due regard for the inter-relationship between rights since this approach was recognized in Maneka Gandhi' case. Hence, we must examine the right against self incrimination in respect of its relationship with the multiple dimensions of personal liberty under Article 21 which includes guarantees such as the "right to fair trial" and substantive due process.

Under Art. 21 a person may not be deprived of his personal liberty except only in accordance with the procedure established by law. Therefore, in a matter of preventive detention, the Administration must follow scrupulously and strictly the procedural norms laid down in clauses (4) to 7 of Art. 22,

The Supreme Court moved to link Article 19, 21, and 22 in *West Bengal v. Ashok Dey*.[47] It held that West Bengal law of preventive detention valid with reference to Article 19 (1) (d) because in the disturbed law and order situation prevailing in the State and the law was enacted in the interest of the general public.

The connection between Articles 21 and 22 was further reinforced in **Hussainara Khatoon v. State of Bihar**[48], where the Court dealt with the plight of under trial prisoners detained for years without trial. **Justice P.N. Bhagwati** held: "*We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India (1978). Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law, and it is not enough to constitute compliance with this constitutional requirement that the procedure prescribed by law should be scrupulously observed; the procedure must be 'reasonable, fair and just.*"

The Court further observed, "*Speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused."* This judgment therefore,

47 AIR 1972 SC 1660
48 AIR 1979 SC 1360.

constitutionalized the right to speedy trial and demonstrated how Article 21 supplements the procedural guarantees of Article 22 by preventing the abuse of pre-trial detention powers.

Further, it is generally seen that in the realm of Preventive Detention laws, the range of administrative control over an individual's liberty is much wider than the judicial control. To overcome this, the linkage of Article 22 with 21, 14, 19 is absolutely necessary and will certainly prosper justice in this area. Therefore, in **Francis Corallie v. Union Territory of Delhi**[49] The Supreme Court took a very important step in this direction. The Court through **Justice P.N. Bhagwat**i, observed, "*The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. It includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings… The prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. The right to consult a lawyer of one's choice for any legal proceeding or to seek his aid in any matter is an integral part of the right to life and personal liberty guaranteed under Article 21 and is a right that clearly subsists even in a person subjected to preventive detention.*"

Subsequent decisions such as **Sunil Batra v. Delhi Administration**[50] and **D.K. Basu v. State of West Bengal**[51] continued this line of interpretation. In Sunil Batra, the Court condemned inhuman prison conditions, holding that "*Article 21 forbids torture or cruel, inhuman and degrading treatment.*" Similarly, in D.K. Basu, the Court laid down specific guidelines for arrest and interrogation, declaring that "*any form of torture or cruel, inhuman or degrading treatment falls within the inhibition of Article 21, whether it occurs during investigation,*

49 AIR 1981 SC 746
50 (1978) 4 SCC 494
51 (1997) 1 SCC 416

interrogation or otherwise." Both decisions read Articles 20, 21 and 22 as interlinked protections ensuring that the criminal process remains consistent with constitutional morality.

Therefore, when an accused is in custody, his fundamental rights are not abrogated in toto. His dignity cannot be allowed to be comatose. The right to life enshrined in Art. 21 of the Constitution includes the right to live with human dignity and all that goes along with it.[52] This means where a person's liberty is deprived under Article 21, still his rights under Article 22 are active and accused of being entitled to such rights. Therefore denial of access to such rights violates the accused's right under Article 21 and 22 of the Constitution.

In *J & K High Court Bar Association case*[53] Article 21 of the Constitution has the potential of conferring drastic power on the State. But before depriving an individual of his life and personal liberty the state has to follow the mandate of law in achieving such a goal.

In *Dipak Shubhashchandra Mehta v. CBI,*[54] The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. The Supreme Court has repeatedly held that when the under trial prisoners are detained in jail custody for an indefinite period, Article 21 of the Constitution is violated.

In Rattiram v. State of MP[55] The Court held that denial of 'fair trial' is crucifixion of human rights. It is ingrained in the concept of due process of law.

In conclusion, the Supreme Court's judicial interpretation of the relationship between Articles 20, 21, and 22 marks a journey from textual isolationism to doctrinal integration. *A.K. Gopalan's* formalism gave way to *Maneka Gandhi's* substantive fairness, and later cases deepened the connection through the lens of dignity and human rights. Today, Article 20 provides substantive immunities, Article 21 infuses due process and fairness into every deprivation of liberty, and Article 22 supplies the procedural framework for arrest and detention. This triadic protection

52 Nayar Azam v. State of Chattisgarh AIR 2012 SC 2573
53 J & K HCBA v. State of J & K 2010 (1)SLJ
54 Crl. A. No. 348 of 2012; Decided on 10-2-2012
55 AIR 2012 SC 1495

ensures that the coercive power of the State is circumscribed by fairness, reasonableness, and respect for human dignity, fulfilling the constitutional promise that no person shall be deprived of life or liberty except by a procedure that is "just, fair and reasonable.

The Relationship Between 21 & 23

Article 21 as already noted declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 23, on the other hand, prohibits traffic in human beings, begar (forced labour), and other similar forms of exploitation. Although initially both these Articles were interpreted narrowly, subsequent judicial interpretation has progressively revealed their intrinsic connection: the protection of life and liberty under Article 21 is incomplete without the elimination of exploitative conditions prohibited by Article 23.

This interpretative evolution was spearheaded by **Justice P.N. Bhagwati** in **People's Union for Democratic Rights v. Union of India**[56] **(Asiad Workers' Case).** The Court observed: "*Article 23 is intended to abolish every form of forced labour, begar or other similar forms of involuntary work which a person is forced to provide under the compulsion of economic necessity*." Justice Bhagwati went further, linking this to Article 21, stating that "*The right to live with human dignity, enshrined in Article 21, derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42. This is a constitutional goal which should be achieved by the State and every one must feel a sense of involvement in the effort to achieve this goal.*"

Therefore, by connecting prohibition of Article23 on forced labour with guarantee of dignified existence under Article 21, the Court established that exploitation born out of poverty and destitution is as much a constitutional wrong as physical coercion.

The Supreme Court, afterwards, continuing the trend of its liberal approach towards fundamental rights linked Arts. 21 and 23 in the context

56 (1982) 3 SCC 235.

of the bonded labour again in ***Bandhua Mukhti Morcha v. Union of India,***[57] where it observed:

"*It is the fundamental right of every one in this country, assured under the interpretation given to Article 21 by this Court in Francis Coralie Mullin v. Administrator, Union Territory of Delhi to live with human dignity, free from exploitation .... It must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and the State has to take affirmative action to satisfy these requirements."*

Justice Bhagwati attributed the process of identification and release of bonded labours "*as a process and transformation of non beings into human beings".* He further emphasized that it is a constitutional imperative that the bonded labourers must be identified and released from the shackles of bondage so that they can assimilate themselves in the mainstream of civilized human society and realize the dignity, beauty and worth of human existence."

The Apex Court not only emphasized identification and release of bonded laborers but also stressed on the need for their proper rehabilitation. The Court in *Neerja Chowdery v. State of Madhya Pradesh*[58] squarely placed the whole responsibility on the State. The Court observed:

"*….It is therefore imperative that neither the Government nor the Court should be content with merely securing identification and release of bonded laborers but every effort must be made by them to see that the freed bonded laborers are properly and suitably rehabilitated after identification and release".*

The Court emphasized that "*it is the plainest requirement of Arts. 21 and 23 of the Constitution that bonded labourers must be identified and released and, on release, they must be suitably rehabilitated*." The

57 AIR 1984 SC 802
58 AIR 1984 SC 1099

principle that economic destitution can infringe both liberty and dignity underscores the shared moral foundation of Articles 21 and 23.

The jurisprudence of the 1980s and 1990s further cemented this interrelationship. The right to livelihood, first recognised **in Olga Tellis v. Bombay Municipal Corporation**[59], was derived from Article 21, and the Court cited People's Union for Democratic Rights case *supra* to underline that economic deprivation and forced displacement could amount to a violation of both Articles 21 and 23. **Justice Chandrachud** observed that

"*As we have stated in People's Union for Democratic Rights v. Union of India, the right to life includes the right to live with human dignity and all that goes along with it... The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away... An equally important facet of that right is the right to livelihood because no person can live without the means of living. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of extinction.*"

In modern jurisprudence, the relationship between Articles 21 and 23 has been further refined through cases addressing trafficking, child labour, and bonded labour. In **M.C. Mehta v. State of Tamil Nadu**[60], concerning child labour in match industries, the Court held that failure to protect children from hazardous employment violated not only Article 24 but also the spirit of Articles 21 and 23. The Court directed the creation of a rehabilitation fund and observed that "*the right to life with dignity includes the right of children to be free from economic exploitation and to receive education that equips them for a dignified existence*."

Therefore, through a liberal and purposive interpretation, the Supreme Court has harmonized Articles 21 and 23 as interdependent guarantees of human dignity and freedom. The Court has asserted that Article 21 is the heart of the Fundamental Rights, possessing substantial

59 (1985) 3 SCC 545
60 (1996) 6 SCC 756

positive content and not merely negative in its reach, despite being worded in negative terms.[61] The Court has thus ensured that the right to life extends beyond mere existence to include the right to live with dignity and freedom from oppression, reaffirming the dynamic and evolving character of the Constitution.

The Relationship Between 21 and 25

The judicial approach has been to ensure that both Article 21 and Article 25 support and reconcile rather than conflicting with each other. Article 25 ensures that all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion. The judiciary has consistently held that both rights are mutually reinforcing, not conflicting. In simple terms, Article 21 gives meaning to life, and Article 25 adds a spiritual and moral dimension to that life, both working hand in hand to protect human dignity and liberty.

The decision in **Acharya Jagadishwarananda Avadhuta v. Commissioner of Police, Calcutta**[62] marks a crucial development in this regard. The case concerned the Ananda Margi sect's right to perform the Tandava dance in public, which the sect claimed as a religious practice. The Court in this case observed:

"*Restrictions by the State upon free exercise of religion are permitted both under Articles 25 and 26 on grounds of public order, morality and health. ... Though the freedom of conscience and religious belief are absolute, the right to act in exercise of a man's freedom of conscience and freedom of religion cannot override public interest and morals of the society, and in that view it is competent for the State to suppress such religious activity which is prejudicial to public interest.*"

In other words, the Court held that while the freedom of religion under Article 25 is protected, it is subject to public order, morality, and health, and therefore cannot be exercised in a manner that threatens social harmony or human dignity. The Court therefore implicitly recognized that public safety, dignity, and morality, which are elements intrinsic in Article 21's protection of life and liberty act as constitutional limitations on religious freedom. Similarly, earlier in **Mohd. Hanif Quareshi v. State**

61 Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2178
62 (1983) 4 S.C.C. 522

of Bihar[63] The Court had held that the ban on cow slaughter, though restricting a particular religious practice, did not violate Article 25 when viewed in light of Article 21 and the Directive Principles, as the restriction was imposed to promote public welfare and moral order.

A more progressive synthesis of the two Articles emerged in **Bijoe Emmanuel v. State of Kerala**[64] where the Court protected the right of Jehovah's Witness students who refused to sing the National Anthem on religious grounds. The Supreme Court held that the expulsion of the students violated both Article 19(1)(a) and Article 25, and implicitly Article 21, since it deprived them of their dignity and liberty of conscience. **Justice O. Chinnappa Reddy** emphasized that the state cannot compel individuals to act contrary to their faith and observed that "*personal liberty and freedom of conscience are cornerstones of a dignified human life.*" He further noted:

"*The question is not whether a particular religious belief or practice appeals to our reason or sentiment. The question is whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. If the belief is so held, it deserves protection under Article 25 …the freedom of conscience and the right freely to profess, practice and propagate religion are guaranteed to all persons alike. The State has no power to compel individuals to act against their genuine religious belief, so long as it does not interfere with public order, morality or health*."

Similarly, in **Indian Young Lawyers Association v. State of Kerala**[65] **(** also known as the Sabarimala Case) the Court adopted an expansive interpretation of Articles 21 and 25, holding that the exclusion of women of menstruating age from entering the Sabarimala temple violated their dignity and autonomy, both protected under Article 21. The majority opinion by Justice D.Y. Chandrachud explained that "the right to worship is an essential part of personal liberty and dignity." In simple terms, he meant that the freedom to follow one's faith is closely connected to the right to live with dignity. He further observed: "*To treat women as*

63 A.I.R. 1958 S.C. 731
64 (1986) 3 SCC 615
65 (2018) 10 SCC 1

children of a lesser god is to blink at the Constitution itself. Religion cannot become a cover to deny women the right to worship. The right to worship is equally available to men and women. The Constitution protects it as an essential facet of individual dignity."

Together, therefore, the rulings in Bijoe Emmanuel and Indian Young Lawyers Association cases *supra* show how the Supreme Court has thoughtfully balanced the right to life under Article 21 with the right to freedom of religion under Article 25. The Court made it clear that both human dignity and genuine faith are equally important, and one should not be compromised for the other.

Furthermore, in **Shayara Bano v. Union of India**[66]The Supreme Court invalidated the practice of *instant triple talaq* (*talaq-e-biddat*), declaring it unconstitutional for violating women's right to equality, dignity, and life under Article 21, read with Article 25. **Justice Nariman**, speaking for the majority, observed that "*instant triple talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. … Therefore, the Muslim Personal Law (Shariat) Application Act, 1937, insofar as it seeks to recognize and enforce triple talaq is within the meaning of the expression 'laws in force' in Article 13(1) of the Constitution and must be struck down as being void to the extent that it recognises and enforces triple talaq*."

This landmark decision reaffirmed that personal liberty and religious freedom must operate within the bounds of constitutional morality and human dignity. It further strengthened the jurisprudence that Article 21 serves as the moral foundation of all fundamental rights, which endured that faith-based practices remain consistent with the principles of justice, equality, and dignity enshrined in the Constitution.

This Constitutional harmony was reaffirmed earlier also when the Supreme Court, reproduced and asserted the foundational reasoning of the Delhi High Court in **Bhajan Kaur v. Delhi Administration**[67] in the case of **S.S. Ahuwalia v. Union of India and Ors.**[68] and held "*In the*

66 (2017) 9 SCC
67 CWP No. 1429 of 1996
68 2001 (4) SCC 452

expanded meaning attributed to Article 21 of the Constitution, it is the duty of the State to create a climate where members of the society belonging to different faiths, caste and creed live together and, therefore, the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be jeopardized or endangered."

Earlier, the Jammu and Kashmir High Court in **Abdul Gani Sofi & Others v. Haj Committee & Others**[69] held that the withholding of travel documents of a person intending to perform the Hajj pilgrimage, and the resultant deprivation of such an opportunity, amounted to a violation of the fundamental rights guaranteed under Articles 25 and 26 of the Constitution. The Court recognized that performing Hajj is an essential and integral part of the Islamic faith and that any unreasonable restriction on it infringes upon religious freedom. Read in conjunction with the Supreme Court's ruling in **Satwant Singh Sawhney v. D. Ramarathnam**[70] wherein the right to travel abroad was held to form an intrinsic part of the right to personal liberty under Article 21, these decisions affirm that the State cannot curtail religious practices essential to faith, such as the performance of Hajj, except on constitutionally permissible grounds, and that the right to travel abroad for such purposes is protected as an aspect of individual liberty and human dignity under Article 21.

The Relationship Between 21 & 32

No doubt the Constitution has provided to its people the fundamental rights to cherish their freedom and liberty. But these freedoms are redundant and appear mere paper slogans if there is no enforcement mechanism for the same. There is no fun of having individual liberty when the same is cribbed and cabined by non enforcement. Therefore the right to move the Court is the 'heart and soul' of the constitution.[71] Article 32 has the distinction of being the protector of other fundamental rights. In fact it acts as a shield, and without this Constitution would be a nullity.

69 2009 (1) SLJ 73
70 AIR 1967 SC 1836
71 Dr. Ambedkar C.A.D. Vol.VII at 953

It provides effective machinery for the enforcement of the fundamental rights. It is the remedy which makes the right real.

It must be remembered that the early interpretation of Article 21 was narrow and procedural, as seen in A.K. Gopalan *supra*, where the Court held that personal liberty could be curtailed by any procedure established by law. However, **Kharak Singh v. State of Uttar Pradesh**,[72] The Supreme Court recognized that the right to life and personal liberty under Article 21 includes not merely physical existence but also the right to live with human dignity. The Court observed that "*by the term 'life' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed.*" This interpretation marked an important shift by expanding the scope of Article 21 beyond a negative right against unlawful deprivation, and thereby transforming it into a positive guarantee of a dignified human existence.

However, as noted earlier, it was in **Maneka Gandhi** *supra* that the interrelationship between Articles 14, 19, and 21 was most powerfully articulated. The Supreme Court held that any law depriving a person of life or personal liberty must be "right, just and fair," and not arbitrary, fanciful, or oppressive. Justice P.N. Bhagwati famously stated that "*the principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence, and it must characterize every State action, whether under Article 21 or otherwise.*" The Court further observed that the right to move the Supreme Court under Article 32 for the enforcement of Article 21 is itself a fundamental right, thereby reinforcing the intrinsic connection between the two provisions and ensuring that the protection of life and personal liberty remains meaningful and effective within the constitutional framework.

Justice Bhagwati further observed that the phrase "*procedure established by law*" must be interpreted to mean a procedure that is not arbitrary, oppressive, or unreasonable. As he eloquently stated, "*The procedure prescribed by law has to be fair, just and reasonable, not*

72 AIR 1963 SC 1295

fanciful, oppressive or arbitrary; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied." This liberal interpretation transformed Article 21 into a dynamic source of substantive rights, including in itself the right to privacy, livelihood, health, and education. This ensured that violations of these rights could be redressed through Article 32 petitions directly before the Supreme Court. Thus, the Court developed a jurisprudence in which Article 32 functions not merely as a procedural remedy but as an essential and integral component of the right to life itself.

This understanding was further reinforced in **Sunil Batra v. Delhi Administration** *supra*, where the Supreme Court held that Article 32 is the "constitutional sentinel" of Article 21. The Court ruled that even prisoners retain their fundamental rights, and any form of torture, inhuman treatment, or solitary confinement amounts to a violation of Article 21, which can be remedied by invoking Article 32. Similarly, in **Francis Coralie Mullin v. Administrator, Union Territory of Delhi** *supra,* the Court reiterated that Article 21 is not merely a negative protection but embodies a positive obligation on the State to ensure conditions of life consistent with human dignity. The linkage with Article 32 was clear: enforcement of such dignity-based rights must be prompt and effective, for the right without remedy would be illusory.

The relationship between Articles 21 and 32, however, took on greater depth with the judicial innovation of Public Interest Litigation (PIL) in the late 1970s and early 1980s. This innovation meant that the most vibrant feature of Article 32 was that it shifted from its *traditional rule of locus standi* to dynamic approach of Public Interest Litigation at the instance of public spirited citizens. It would, therefore, not be wrong to call *judicial activism a tool gifted by Article 32*.

In **S.P. Gupta v. Union of India**,[73] **Justice P.N. Bhagwati** observed that "*where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, and such person or class of persons is by reason of poverty or disability unable to approach the Court for relief, any member of the*

73 1981 Supp SCC 87.

public can maintain an application for appropriate direction, order or writ in the High Court under Article 226 or in this Court under Article 32."

Thee **Hussainara Khatoon v. State of Bihar,**[74] A series of cases filed through a letter by advocate Kapila Hingorani marked the beginning of the PIL era in India. This case marked a landmark judgment that established the right to a speedy trial as a fundamental right under Article 21 of the Constitution, linked to the right to life and personal liberty. In this case, the Court treated the letter addressed to the Supreme Court as a writ petition under Article 32, thereby setting a precedent for the "epistolary jurisdiction" of the Supreme Court. **Justice P.N. Bhagwati** held that the Court could not remain a passive spectator where the violation of fundamental rights of large groups was evident. He stated: "*The procedure of approaching the Court by way of a letter addressed to the Court is in keeping with the spirit of Article 32. When the Court is apprised of the deprivation of liberty of a large number of persons who cannot themselves come before the Court, the Court must not stand on formality.*"

Similarly in **Bandhua Mukti Morcha v. Union of India** *supra*, using the tool of Public Interest Litigation (PIL), **Justice Bhagwati** observed that the right to life guaranteed under Article 21 is not confined to mere animal existence but includes the right to live with human dignity, free from exploitation. He further noted: "Where a member of the public brings an action for enforcement of constitutional or legal rights of a person or group of persons who, by reason of poverty, helplessness or disability, cannot approach the Court for relief, such members of the public can maintain an application under Article 32. The Court will not insist on a regular writ petition and may even act on a letter addressed to it."

Further in BALCO Employees' Union (Regd.) v. Union of India,[75] the Supreme Court reaffirmed the significance of PIL under Article 32, observing that it holds special importance in cases involving violations of Article 21 or fundamental human rights, particularly when such litigation

74 (1980) 1 SCC 81
75 AIR 2009 SC 350

is initiated for the benefit of the poor and the underprivileged who are otherwise unable to access justice due to social or economic disadvantage. The Court cautioned, however, that PIL must remain a tool for genuine social redress and not a means for personal or political gain.[76]

The Court's remedial creativity reached new heights in **Nilabati Behera v. State of Orissa**,[77] where it held that compensation for the violation of the right to life and personal liberty under Article 21 could be claimed directly through a petition under Article 32. **Justice A.S. Anand**, concurring with the majority, emphatically declared that "*the principle of sovereign immunity does not apply to cases of violation of fundamental rights, and the State is strictly liable for the acts of its agents which result in the deprivation of life or liberty of any person … a claim in public law for compensation for contravention of human rights and fundamental freedoms is an acknowledged remedy for enforcement and protection of such rights.*"

Therefore, through these landmark judgments, the Supreme Court has transformed Article 32 from a mere procedural safeguard into a substantive mechanism for social justice, ensuring that the constitutional promise of life, liberty, and dignity under Article 21 remain accessible and enforceable for every individual.

Conclusion

The Courts in India have travelled a long distance; from the time of Gopalan, when 'due process' was not even allowed to be pleaded, to the time when the court assumed powers that even the most liberal judges of US never contemplated. The contours of Article 21 have surrounded almost the entire aspect of life now, thanks to the multidimensional interpretation given to it. Even the directive principles of state policy laid down in Part IV have been raised to the status of fundamental rights. No Article in Part III can be read and understood in isolation as it is an integrated scheme of rights. However, it is very necessary that judicial activism should not be transformed into judicial adventurism, and instead some sort of judicial restraint is to be shown while dealing with the

76 Villanur Iyarkkai Padukappu Maiyam v. Union of India (2009)7 SCC 561.
77 (1993) 2 SCC 746

provisions of the constitution in particular with the Part III of the Constitution. Not only should Judges be wise enough to act as carriers of justice but the same is to be expected of the other two organs of the State to protect the rights of the people for the society as a whole.

Redefining Women's Dignity: A Jurisprudential Analysis Through The Lens Of Indian Tradition

Vinayak Sharma*
Ruchi Rawat**

Abstract

In every society, there has always been a contemplation regarding women - their rights, their status, and their dignity. This contemplation exists because the status of women is considered a reflection of the overall state of a society. Generally, a society is considered progressive where the rights and dignity of women are protected. In the Joseph Shine case, the Supreme Court rightly quoted Charles Fourier: "The extension of women's rights is the basic principle of all social progress." Ancient Indian jurist Manu reiterated this in the sloka: "Yatra nāryastupūjyanteramantetatradevatāḥ" - where women are respected, the gods reside. The Court also cited the next line of sloka: "Yatraitāstunapūjyantesarvāstatrāphalāḥkriyāḥ" - where they are not respected, all actions are fruitless. In the Indian context, the status of women has changed over time. The Vedic period is considered the most ideal in this regard. During the period of the Dharmashastra, various Smriti at times imposed restrictions on women, while at other times bestowed upon them a dignified status. Since Dharmashastra evolved according to the needs of society over time, these changes are evident. Then came foreign invasions, where the status of Indian women declined, and in trying to protect their dignity, some practices turned into social evils. Later, British rule brought criticism of Indian thought, with scriptures often misrepresented as suppressing women's rights. But the question remains - was the Indian thought toward women truly as regressive as it has been portrayed? Thus, this research paper tries to find out the answer to this very question. It aims to investigate the dignified

* Assistant Professor, Department of Law, Dr. B.R. Ambedkar National Law University, Sonepat.
** Assistant Professor, Department of Political Science, Ramjas College, University of Delhi.

status of women in ancient Indian scriptures and emphasizes why the concept of dignity has always been intrinsically linked to every woman in India.

Keywords: *Women; Dignity; Bharatiya tradition; Article 51A (e); Indian Constitution.*

I. Introduction

The Indian Constitution lays down the Fundamental Duties[1] of every citizen. Clause (e) specifically mandates that citizens must renounce practices derogatory to the dignity of women. This provision is not merely symbolic but a clear constitutional directive that reflects a moral and legal responsibility placed upon the citizenry. It infers three critical observations: first, that there is a specific and deliberate duty towards the welfare and respect of women; second, this duty is aimed directly at preserving and promoting the women's dignity; and third, that dignity is an intrinsic element associated with womanhood in the Indian constitutional framework. However, a fundamental issue arises from the fact that while the term 'Dignity' is often invoked in constitutional, legislative, and judicial discourses, it remains conceptually undefined, especially when applied to women. What constitutes 'Dignity' in the context of a woman's life and identity is not sufficiently conveyed in our modern legal schema. This lack of a well-defined understanding creates a conceptual vacuum, leading to inconsistent applications and interpretations of women's rights and status in both legal and social domains. The Bharatiya tradition, however, offers a rich, ancient and indigenous narrative of womanhood and dignity that can supplement and enrich current legal interpretations.

Our ancient primary Sanskrit texts including the *Veda, Upanishad, Smriti, Dharmasutra, Dharmashastra,* and *Mahakavya* provide a rich philosophical and cultural foundation that, in the context of ancient Bharatiya society, not only acknowledged women's dignity, agency, and

1 The Constitution of India, art.51A (e).

social importance but also contained profound insights into gender equality, women's empowerment, and social justice. Women enjoyed social esteem and had equal rights to men in various fields like education, rituals, marriage, livelihood, expression, and decision-making in the Vedic era. As a result, women's freedom in all areas signifies a positive social perspective on them. A.S. Altekar has rightly described:

"*The degree of freedom given to women to move about in society and to take part in its public life gives a good idea of the nature of its administration and enables us to know how far it has realised the difficult truth that women too have a contribution of their own to make to its development and progress.*"[2]

Yet, due to Eurocentric biases, our primary texts have been subjected to interpolation and deliberate misinterpretation by Western scholars, leading to the construction of a misleading narrative that the *Vedas* denigrate women. Interestingly, on the other side, when we study Western history and philosophy, women are noticeably absent. Their historical narrative largely revolves around male figures such as Alexander the Great, Julius Caesar, Napoleon Bonaparte, and Winston Churchill. It's a male-dominated record where the contributions or even presence of women are rarely acknowledged. Aristotle,[3] one of the greatest Western philosophers, has placed women and slaves in the same category and denied both the status of citizens. In his famous book, '*The Politics*', quoted: "*the male is by nature superior, and the female inferior; and the one rules, and the other is ruled; this principle, of necessity, extends to all mankind."*[4] As Davies has also rightly described in his work: "*There was no woman question at Athens because all women were as mere vegetables, and there was no woman question at Sparta because both men and women there were little better than animals*."[5]

2 A.S. Altekar, *The Position of Women in Hindu Civilization* 2 (The Cultural Publication House, Banaras Hindu University, 1st edn., 1938).

3 Aristotle was an ancient Greek philosopher, disciple of Plato and widely regarded as the Father of Political Science.

4 Aristotle, I *The Politics* (Oxford University Press, New York, 2009).

5 J.L. Davies, *A short History of Women* 172 (Jonathan Cape, Thirty Bedford Square, London, 1927).

It was only in the late 18th and early 19th centuries that the West began to acknowledge the historical marginalization and systematic oppression of women in Europe - entrenched for centuries. For the first time, this marked a significant shift, as people began seriously questioning gender-based inequalities and demanding equal rights and respect for women, thereby laying the foundation for modern-day Feminism.[6] The issue of gender equality and equity, which the western feminist theorists mentioned in the 19th century, has actually existed in Bharat since the Vedic age. However Vedic approach stands in complete opposition to this contemporary manifestation of the aggressive movement that originated in the West to support women's equal rights; emphasizing a positive, constructive, and holistic approach to achieving a gender-just and equitable society.[7]

A major argument presented in the paper is that the dignity of women, as implied in Article 51A (e), cannot be sustained by legal prohibition alone - it requires a cultural and moral foundation rooted in society's worldview. Ancient Bharatiya tradition provides such a foundation. The concept of dignity here is not based on the liberal idea of individual autonomy alone but is closely tied to the ideas of interdependence, sacredness of duty, and recognition of inherent worth. It is positive and constructive, healthy and balanced, based on the principles of mutual complementarity and respect. No doubt there is biological disparity between the sexes and therefore some difference in role-play has to be accepted but this is not to be regarded as a hindrance to social equality.[8] This is in stark contrast to the western deceptive portrayal of a masculinized Bharatiya society, aimed at destroying Bharatiya rich traditions that were more advanced than theirs today. The dignified portrayals of womanhood that emerged from our ancient tradition were uniformly impressive and eternally admirable. However, over time, this

6 According to Britannica, Feminism is the belief in social, economic, and political equality of the sexes.

7 Pankaj Jagannath Jayswal, "Western feminism vs women empowerment during the Vedic period" *Organiser,* August 27, 2023.

8 Shashi Prabha Kumar, "Indian Feminism in Vedic Perspective" 1 *Journal of Studies on Ancient India* 141 (1998).

concept has undergone significant changes often becoming more limited and restrictive.[9]

This research study is structured in two sections. The first section draws from ancient Bharatiya tradition and explores the dignified position of women as reflected in our primary Sanskrit literature. The second section provides a critical analysis of the judicial treatment of women's dignity in key Supreme Court judgements, including *Vishaka v. State of Rajasthan,*[10] *Sabrimala Temple Case,*[11] and *Joseph Shine v. Union of India,*[12] examining whether and how the courts have tried to define or interpret this concept.

II. Indian Thought on Womanhood And Dignity

The highly esteemed and dignified position of women, in the context of ancient Bharat, reflects their great potential to contribute to the rise, progress, and refinement of society, which embodied the strength of the civilization's value systems. As A.S. Altekar aptly observed: "*One of the best ways to understand the spirit of a civilization and to appreciate its excellences and realise its limitations is to study the history of the position and status of women in it.*"[13] Ancient Bharatiya knowledge tradition holds within it a complex yet coherent philosophy of gender, virtue, and dignity. The description of women's virtues, values, rights, duties, and social roles found in our ancient Sanskrit texts is unparalleled in any other religious or philosophical tradition in the world. The *Vedas* recognize women as vital to the sustenance of society, referring to them as *Brahma.*[14]Just as *Brahma* is considered the ultimate authority in knowledge and its dissemination, being the highest in wisdom and science, similarly, a

9 Shashi Prabha Kumar, "Persona of Women in the Vedas", in Bhuvan Chandel (ed.), *Women in Ancient and Medieval India* 31-42 (PHISPC, New Delhi, 2009).
10 AIR 1997 SC 3011.
11 AIR 2018 SC 243.
12 AIR 2018 SC 4898.
13 *Supra* note 2 at 1.
14 स्त्रीहिब्रह्माबभूविथ॥ Rigveda 8.33.19.

woman is called *Brahma* because she manages all activities, nurtures and nourishes her children, and thus is equated with *Brahma.*

Vedic society was founded on the home and the family as well-established institutions, with the proper place assigned to women under an advanced system of material laws. The *Rigveda* have indeed mentioned the woman as the home *(Jayedastam),*[15] reflecting how domestic life and sentiment centred around women at that time. The existence of a home *(Grah)* was being sustained through the housewife *(Grahani);* that is why she was being considered the mistress of the household *(Grahpatni).*[16] *Vedas* emphasizes the role of women in nurturing the home and fostering positive energy, as they continually cultivate knowledge and skills for the betterment of the household and to bring happiness and prosperity to all. Just as a father guides a child, a woman supports and nurtures those around her, while remaining content and dignified in her role.[17]

The *Veda* reflects an extensive reverence for the feminine. Deities in feminine form empower women by providing a sense of dignity, self-worth, assertiveness, and visibility.[18] The *Rig Veda's* tenth chapter comprises the *Devi Sukta* hymn, which recognizes the feminine element as the foundation of all creation, where Women were honored as the "very source of *Puruṣārtha (चतुष्कपर्दा),*[19] not only *Dhárma, Artha* and *Káma,* but even *Mokṣa*".[20] Women were being worshiped as divine energy or power, the *Shakti,* which resembles wisdom, knowledge, and empowerment in the true sense. The importance of *Shakti* is beautifully expressed in the *Rigveda* as *Shachi* (wife of *Indra*)[21] defining her inherent

15 जायेदस्तंमघवन्त्सेदुयोनिस्तदित्त्वायुक्ताहरयोवहन्तु। Rigveda 3.53.4.

16 गृहान्गच्छगृहपत्नीयथासोवशिनीत्वंविदथमावदासि॥ Rigveda 10.85.26.

17 स्वेर्दक्षैर्दक्षपितेहसीददेवानाँसुम्नेबृहतेरणाय।
पितेवैधिसूनवऽआसुशेवास्वावेशांतन्वासँविशस्वाश्विनाध्वर्यूसादयतामिहत्वा॥
Yajurveda 14.3.

18 Rita M. Gross, "Female Deities as a Resource for the Contemporary Rediscovery of the Goddess" 46 *Journal of the American Academy of Religion* 269-291 (1978).

19 चतुष्कपर्दायुवतिःसुपेशाघृतप्रतीकावयुनानिवस्ते। Rigveda 10.114.3.

20 Vikas Nandal and Rajnish, "Status of women through ages in India" 3 *International Research Journal of Social Sciences* 21-26 (2014).

21 अहंकेतुरहंमूर्धाहमुग्राविवाचनी। ममेदनुक्रतुंपतिःसेहानायाउपाचरेत्॥ Rigveda 10.159.2.

power and divine nature: "*That, I am the foremost in knowledge, like the banner in battle. Among women, I am preeminent, equivalent to the head. I am powerful, sharp-tongued, and victorious; my husband should act according to my intellect.*"[22]

Women were portrayed with great respect and dignity through various adjectival epithets that denoted their diverse roles and esteemed status in both the home and society.[23] For instance, a woman as wife referred to as *jāyā* (who gave birth to one's progeny),[24] *Jani and Patni* (wife),[25] all of which highlight her role with reverence and emphasize her equal standing and significance in the family. Similarly, talking about their rare virtues, *Vedas* designate women as *Aditi* (for she's boundless or infinite; not dependent),[26] *Aghnyā* (for she is not to be hurt or inviolable),[27] *Bṛhatī* (for she is Mighty Great One),[28] *Chandrā* (for she denotes brilliance, beauty or purity),[29] *Devī* (for she is divine),[30] *Dhruvā* (for she is firm),[31] *Havyā* (for she is worthy of being offered or invocation),[32] *Idā* (for she is worshippable, and associated with offerings, nourishment or the earth),[33] *Jyoti* (for she is illuminating, bright),[34] *Kāmyā* (for she is desirable),[35] *Mahī* (for she is great),[36] *Nārī* (for she is not inimical to

22 *Ibid.*
23 *Supra* note 9.
24 अर्षन्त्वापोजवसाविमातरोहनोवृत्रंजयास्वः॥ Rigveda 8.89.4.
25 The Rigveda uses the phrases पत्युर्जनित्वम्, denoting 'wifehood to a husband' (*see also*, Rigveda 10.18.8), as well as the expression जनयोनपत्नीः, 'like wives (who care) mistresses' (*see also*, Rigveda 1.186.7).
26 अदितिर्द्यौरदि तिरन्तरिक्षमदिति र्मातासपि तासपु त्रः।विश्वेदेवा अदितिःपञ्च जनाअदिति र्जातमदि तिर्जनित्वम्॥ Rigveda 1.89.10.
27 इडेरन्तेह व्येकाम्येच् न्द्रेज्योते ऽवं तेस रंस्व तिम हवि श्रु ति । एतातैऽअघ्येना मानिदेवेभ्यों मांसुकृतैब्रूतात्॥ Yajurveda 8.43.
28 उत्थायबृह तीभुवोदंति ष्ठध्रुवात्वम्। मित्रैतांतंऽ उखांपरिंद दाम्यर्भित्या ऽएषामा भैदि॥ Yajurveda 11.64.
29 *Supra* note 27.
30 याअकंन्तून्नवं युन्याश्चंतत्रे यादेवीरन्तौअभि तोऽदंदन्त। तास्त्वांजरसे संव्ययुन्त्वायुं ष्मतीदंपरिध त्स्ववासः ॥ Atharva Veda 14.1.45.
31 *Supra* note 28.
32 *Supra* note 27.
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*
36 *Ibid.*

anyone),[37] *Purandhih* (for she is Abundant/wealth-giving, symbolizing prosperity and generosity),[38] *Rtāvari* (for she is the protector of truth),[39] *Rantā* (for she is lovely, delightful and pleasing),[40] *Sanjayā* (for she is victorious),[41] *Sivā* (for she is benevolent),[42] *Suyamā* (for she is self – disciplined),[43] *Sumangalī* (for she is auspicious),[44] *Susevā* (for she is pleasant),[45] *Sarasvatī (for she's the* goddess of knowledge, speech and wisdom),[46] *Subhagā* (for she is fortunate),[47] *Vishrutā,* since she is learned),[48] *Vīriṇī* (for she is mother of brave sons),[49] *Yashasvatī* (for she is glorious),[50] - and many more such titles - each reflecting the spiritual and moral esteem accorded to women, who assumed various roles in Vedic society with dignity as an intrinsic element of their character. A woman's character serves as her ultimate shield, offering the highest form of protection and commanding genuine respect. Unlike material possessions such as a house, clothing, compound walls, doors, or even

37 उद्येच्छध्वमपर क्षोंहनाथेमांनारीं सुकृतेदंधात। धातावि पश्चित्पतिं मस्यै विवेदुभ योराजांपु रएंतुप्रजानन्॥ Atharva Veda 14.1.59.

38 आब्रह्मन्ब्राह्मणोब्रह्मवर्चसीजांयतामाराष्ट्रेरांजन्युःशूरंऽइषव्योऽतिव्याधीमंहार्थोजांयंदो ग्ध्रधिधिनुर्वोढा-
नड्वानांशुःसप्तिःपुरंन्धिर्योर्धाजिष्णूरंयेष्ठाःसभोयुवास्ययजंमानस्यवीरोजांयतांनिकामे निकामेनःपर्जन्ययोंवर्षतुफलंवत्योनऽओषंधयःपच्यन्तांयोगक्षेमोनंःकल्पताम्॥ Yajur Veda 22.22.

39 इमाब्रह्मसरस्वति जुषस्ववाजिनी वति।यातेम न्मगृत्सम दाऋताव रिप्रिया देवेषुजुह्वति॥ Rigveda 2.41.18.

40 *Supra* note 27.

41 ममपुत्राः शत्रुहणोऽ थोमेदुहिताविराट् ।उताहमस्मिसं जयापत्यौमे श्लोकउत्तमः॥ Rigveda 10.159.3.

42 ब्रह्मापरंयु ज्यंब्रह्मपूर्वंब्र ह्मनांन्ततोमंध्यतो ब्रह्मसर्वत। अमाव्याधांदेव पुरांप्रपद्येशिवास्यो नापतिलोकिवि राज॥ Atharva Veda 14.1.64

43 अदेंवृघ्न्यपति घ्नीहेधिंशिवाप शुभ्यः सुयमासुवच चींः। प्रजावंतीवी सूर्देवृकामास्यो नेममग्निंगार्ह पत्यंसपर्य॥ Atharva Veda 14.2.18.

44 सुमङ्गलीप्रतरंणी गृहाणांसुशे वापत्येश्वशुंरायशंभूः।स्योना श्वश्वैप्रगृहान्विशेमान्॥ Atharva Veda 14.2.26.

45 *Ibid.*

46 *Supra* note 27.

47 *Ibid.*

48 *Ibid.*

49 अवीरामिवमामयंशरारु रभिमन्यते।उताह मस्मिवीरिणीन्द्रपत्नीमरु त्सखाविश्वस्मा दिन्द्रउत्तरः॥ Rigveda 10.86.9.

50 हिरण्यकेशो रजसोविसारेऽहिर्धुनि र्वातइवध्रजी मान्।शुचिभ्राजा उ षसोनवेदाय शस्वतीरपस्यु वोनसत्याः॥ Rigveda 1.79.1.

royal honors, it is her moral integrity and virtue that truly safeguard and dignify her.[51]

Women in Vedic society were not regarded as morally low creatures,[52] contrary to how they are often perceived today in modern gender discourse. The position which women occupied in Hindu society at the dawn of civilization during the Vedic age is much better than what we ordinarily expect it to have been.[53] Although, like in every country and time, even in the Vedic period, a son was more desired than a daughter-based on the *Pumsavana* ritual[54] mentioned in *Atharvaveda*[55]- but, the prayers for the birth of a child may not always be meant for the birth of the son only or does not mean that a daughter was looked down upon. In Vedic literature, we found even kings, queens, and sages performed penance for the birth of daughters. For example, *Daksha Prajapati* performed penance for a daughter. Pleased by his austerity, the Goddess herself entered his wife's womb and was born as *Sati.*[56] In the *Mahabharata*, King *Drupada* performed a yajna to avenge himself against *Guru Drona.* From the sacrificial fire emerged both a son *(Dhrishtadyumna)* and a daughter *(Draupadi),* hence she was called *Yajñasenī.*[57] Adoption of daughters was also common. *Kunti,* born as *Pṛthā* in the house of King *Shurasena,* was adopted by the childless King *Kuntibhoja* and renamed after him.[58] Similarly, *Shakuntala* was adopted by *Rishi Kanva* after being left near the *Malini* River by her mother *Menaka.*[59] *Kanya-dāna* (gifting a daughter in marriage) was considered

51 नगृहाणिन वस्त्राणि नप्राकारस्ति रस्क्रिया ।नेदृशाराजसत्कारा वृत्तमा व रणंखियः॥Valmiki Ramayana, Yudha Kanda, 114.27.

52 M.A. Indra, *The status of Women in Ancient India* 3 (Minerva Bookshop, Lahore, 1940).

53 *Supra* note 2 at 407.

54 A rite performed for obtaining a male child.

55 पुमांसंपुत्रंजनयतंपुमाननुजायतात्।
भवासिपुत्राणांमाताजातानांजनयाश्चयान्॥ Atharvaveda 3.23.3.

56 Devi Purana MahabhagavataShaktipithank, 81-83 (Gita Press, Gorakhpur, 2005)**.**

57 Mahabharata Adi Parva, Ch.166.

58 Mahabharata Adi Parva 67.129-131.

59 Mahabharata Adi Parva 72.9-17.

highly meritorious, bringing spiritual rewards like *Brahma-loka,* unlike marrying off a son.[60]

The *Vedas* make no distinction between male and female in their pursuit to acquire knowledge, both physical and spiritual. Girls also had the right to receive education similar to that of the boys. Since the *Brahmacharya Ashram* (stage of celibacy) was equally obligatory for all boys and girls, Girls were also entitled to *Upanayana* (to receive sacred thread)[61] and passes to *Brahmacharya,* leading to the marital state.[62] There were educational institutions in society where students of both genders were educated equally. That's why descriptions of the entry of girls into hermitages and *Gurukuls* (traditional schools) and their practice of celibacy are clearly mentioned in the *Atharvaveda,* as a woman can only be successful after marriage if she has been educated during her celibate years,[63] highlighting the cultural or religious perspective that values celibacy equally for both male and female as a means of spiritual or personal development. In Vedic society, women students have been categorized into two groups: *Brahmavādíni,*[64] or *Rishika* and *Sadyodvāhā.*[65] Based on their marital status, Female teachers were called *Upadhyāyā* (who were themselves teachers) and *Upadhyāyānī* (wives of teachers).[66] Women were not only equally educated but also served as Vedic *Rishika* and composed several hymns.[67]

60 In Mahabharata, (Adi Parva 115.11) Gandhari too acknowledged that a daughter's son could lead her husband to higher realms.

61 Traditional Ceremonial initiation into the Vedic studies

62 *Supra* note 2 at 11.

63 ब्रह्मचर्येणकन्यायुवानंविन्दतेपतिम्। Atharvaveda 11.5.18.
The Mahabharata supports this idea when it says that Brahmachari (ascetic) should marry only other Brahmachari, because from the perspective of knowledge and wisdom, only those who are equal in both can be truly satisfied. Mahabharata Adi Parva 1.131.10.

64 One who never married and dedicated their lives to studying the Vedas. See also, *supra* note 2 at 13.

65 One who studied until marriage at the age of 15 or 16. See also, *supra* note 2 at 13.

66 *Supra* note 2 at 15.

67 In various Vedic texts, over 36 Rishika are specifically mentioned. *Ghosa* (Rigveda 1-117; X-39-40); *Lopamudra* (Rigveda 1.179); *Mamata* (Rigveda VI-10-2); *Apala* (Rigveda VIII-91); *Surya* (Rigveda X-85); *Indrani*

The *Upanishad* conferred a great respect and dignity upon women, recognizing them as equals in essence, intellect, and spiritual potential- by perceiving the existence of the same essence- the *Atman* (the inner self of all beings) and consciousness in both men and women.[68] Similar to *Pumsavana*, the ritual for having a birth of a scholarly daughter is mentioned in the *Brihadaranyaka Upanishad.*[69] Similarly Manu has proclaimed that a daughter is equal to a son in the family, as both are like one's own self and entitled to equal rights.[70] Equal, not opposite. Equal, but different. Equal, complementary, and supplementary not just applicable to son and daughter, but also to husband and wife. Vedic tradition places husband and wife on equal footing, showing how women were held in high esteem, especially in domestic affairs. In ancient Bharat, marriage was considered a sacramental institution, which made the couple joint owners of the household,[71] where husband and wife were seen as equal halves of one entity,[72] meant to share equal rights and responsibilities in contributing to the well-being of society; there is absolutely no distinction between them.[73] They act as if they are one single unit, hence the name *dampati*[74] (both are owners of the house), with the

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(Rigveda X- 86); *Saci* (Rigveda X-24), *Sarparajni* (Rigveda X-88) *and Visvavara* (Rigveda V-28) etc.

There are 422 mantras composed by the 24 Rishika mentioned in the Rigveda and 198 mantras by 5 Rishika in the Atharva Veda.

68 यःसर्वेषुभू तेषुतिष्ठन्सर्वेभ्योभू तेभ्योऽन्तरः, यंसर्वाणिभू तानिनविदुः, यस्यसर्वाणिभूतानिशरीरम्, यःसर्वाणिभूतान्यन्तरोयमयति, एषतआत्मान्तर्याम्यमृतः— इत्यधिभूतम्; अथाध्यात्मम्॥ Brihadaranyaka Upanishad 3.7.15.

69 अथैनंमात्रेप्रदायस्तनंप्रयच्छति—
यस्तेस्तनः शशयोयोमयोभूः, योरत्नधावसुविद्यः सुदत्रो।
येनविश्वापुष्यसिवार्याणिसरस्वतितमिहधातवेकर्॥इति॥ Brihadaranyaka Upanishad 6.4.27.

70 यथैवात्मातथापुत्रःपुत्रेणदुहितासमा।
तस्यामात्म नितिष्ठन्त्यां कथमन्योधनंहरेत्॥ Manusmriti 9.130. *See also*, Mahabharata 13.45-11
यथैवात्मातथापुत्रःपुत्रेणदुहितासमा।तस्यामात्मनितिष्ठन्त्यांकथमन्योधनंहरेत्।।

71 As the whole society depended upon the household for its maintenance; Marriage was regarded as the social and religious duty and necessity. See also, *supra* note 2 at 36-37.

72 उतघानेमोअस्तुतःपुमाँइतिब्रुवेपणिः। सवैरदेयइत्समः॥ Rigveda 5.61.8.

73 ApastambhaDharmasutra 2.6.14.16-19.

74 इहेमाविन्द्रसंनुदचक्रवाकेवदम्पती।

wife (as discussed earlier) symbolizing the home[75] and honored as *Sāmrājñi*[76]- the empress of the household. *Manu,* in the *Manusmriti,* has given a high status to the wife by stating that "the husband is declared to be the same as the wife," meaning that both are "half-selves of each other."[77] Ideal womanhood was illustrated as glorifying the values of *Pativrata* (devotion to one's husband) women. In *Ramayana, Sita* has been symbolized as a devoted wife, representing the ideal character that all women were expected to strive towards.[78]

In general, women were not compelled to marry, they had full freedom to choose their husband.[79] In the *Mahabharata,* we find instances where women exercised their right to choose a husband through the practice of *Swayamvara.* Notable examples include *Damayanti,*[80] *Savitri*[81] and *Draupadi.*[82] At that time, the purpose of marriage was to perform social and religious duty, but at the same time, there are examples in Vedic literature of girls who remained unmarried for a long time; such girls were called '*Amaju'*. Women had the right and privilege to actively engage in religious ceremonies and rituals. They were respected for their involvement in sacrifices alongside their husbands. Remarrying was also socially acceptable for widows to live a life with dignity. Child marriage and a harsh dowry did not then exist. Seclusion of women, or Sati, was not practiced, nor was untouchability.

The Brahmanical scriptures also describe the dignity of women, emphasizing the importance of marriage and the mutual support and companionship between partners. *Taittiriya Brahmana* suggests that a spouse completes a person and is an integral part of one's self (The other

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प्रजयैनौस्वस्तकौविश्वमायुर्व्यश्नुताम्॥ Atharvaveda 14.2.64.

75 Rigveda 3.53.4.

76 सम्राज्ञीश्वशुरेभवसम्राज्ञीश्वश्र्वांभव।ननान्दरिसम्राज्ञीभवसम्राज्ञीअधिदेवृषु॥ Rigveda 10.85.46.

77 एतावानेवपुरुषोयत्जायाऽत्माप्रजैतिह।
विप्राःप्राहुस्तथाचैतद्योभर्तासास्मृताङ्गना॥ Manusmriti 9.45.

78 SS Wadley, "Women and the Hindu tradition" 3 *Signs: Journal of Women in Culture and Society* 113-125 (1977).

79 भद्रावधुरभवतियत्सुपेषाःस्वयंसमित्रंवनुतेजनेसीत ॥ Rigveda 10.27.12.

80 Vana Parva (Nalopakhyanam Parva) Mahabharata, ch. 52-71.

81 Vana Parva (Ramopakhyana) Mahabharata, ch. 277-283.

82 Adi Parva (Swayamvara Parva) Mahabharata, ch. 183-187.

half of oneself is one's spouse).[83] Women's importance in a man's life is valued in the *Satapatha Brahmana*, which states that life is incomplete without a wife[84] and that insulting a woman is regarded as blameworthy.[85] *Manu* while emphasizing the importance of respect and dignity to women, has clearly stated that where women are honored and respected, there the gods reside; and hence neglecting or mistreating women results in the absence of divine attributes and pleasures in the lineage,[86] ultimately causing the family's downfall.[87] For example, *Ravana, Kamsa, Duryodhana* and *Karna* - all these people's downfall came only because they disrespected women or they thought women were inferior. Women bring fortune to a household through procreation; they deserve respect and reverence as they irradiate the house with their presence. In fact, there is no difference between the goddess of wealth and the woman.[88] *Manu* has expressed unmatched reverence for the mother, placing her above all. He stated that her worth is equal to that of a thousand fathers, as one *Acharya* equals ten teachers, one father equals 100 *Acharyas,* and one mother equals 1,000 fathers.[89] To honor the virtues of mothers, children were often named after their mothers, e.g., *Kaushalya Nandan* for *Shri Rama, Yashoda Nandan or Devki Nandan* for *Shri Krishna,* and *Pritha Putra* for *Arjuna,* reflecting the deep respect for the mother's role in shaping the child's identity. Apart from being an ideal mother, women in our ancient literature have been depicted as goddesses, knowledgeable individuals,

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83 अर्धोवाएषआत्मनःयत्पत्नी। Taittirīya Brāhmaṇa 3.3.3.5.

84 यावत्जयंनविन्दते, असवांहितावद्भवति। Satapatha Brahmana 5.2.1.10.

85 नैवस्त्रींहन्ति। Satapatha Brahmana 11.4.3.2.

86 यत्रनार्यस्तुपूज्यन्तेरमन्तेतत्रदेवताः।
यत्रैतास्तुनपूज्यन्तेसर्वास्तत्राफलाःक्रियाः॥ Manusmriti 3.56. *See also*, Mahabharata Anushasan Parva 46.5-6.

87 शोचन्तिजामयोयत्रविनश्यत्याशुतत्कुलम्। नशोचन्तितुयत्रैतावर्धतेतद्हिसर्वदा॥ Manusmriti 3.57. *See also,* Mahabharata Anushasan Parva 46.6.
जामयोयानिगेहानिशपन्त्यप्रतिपूजिताः।तानिकृत्याहतानीवविनश्यन्तिसमन्ततः॥ Manusmriti 3.58. *See also*, Mahabharata Anushasan Parva 46.7.

88 प्रजनार्थंमहाभागाःपूजार्हागृहदीप्तयः।स्त्रियःश्रियश्चगेहेषुनविशेषोऽस्तिकश्चन॥ Manusmriti 9.26.
See also, Mahabharata Anushasan Parva13.40.11.

89 उपाध्यायान्दशाचार्यआचार्याणांशतंपिता।सहस्रंतुपितृन्मातागौरवेणातिरिच्यते॥ Manusmriti 2.145.

brave figures, sisters, dutiful wives, the empresses of the home, the first teachers of their children, preachers who guide everyone on the right path, and beacons of truth and love in the world. All women are recognized as embodiments of *Adi Shakti* (the primal energy), accentuating their inherent power and divine nature. *Devi Mahatmyam*[90] (the part of the *Markandeya Purana*) describes women as - an incomparable radiance, which was born from all gods and pervaded the three worlds, came to one place and took the form of a woman.[91] Womanhood was idealized as an honorable position both within and outside the home, with women depicted as the root of Dharma, pleasure, and prosperity in ancient Bharatiya tradition. They are being worshippable, worthy of praise, beautiful, polite, learned, and have attained the rights, freedoms, and highest status that women today, across all lands and strata of society, continue to strive for.

III. Judicial Pronouncements on Women's Dignity

The Bharatiya Nyaya Sanhita, defines 'woman' as a female human being of any age.[92] Though factually accurate, this definition is limited in scope as it reduces womanhood to a purely biological or sex-based identity, overlooking the inherent attributes and values attached in a woman's persona such as- bodily integrity, dignity and modesty (as discussed earlier in ancient Indian tradition), thereby resulting in a more restrictive and limited understanding of womanhood. Although the term 'Dignity' has often been invoked in constitutional, legislative, and judicial discourses, it has remained conceptually undefined - especially when applied to women. What constitutes 'Dignity' in the context of a woman's life and identity has not been adequately articulated in our modern legal schema. This lack of a well-defined understanding creates a conceptual

90 A text on Shaktism, described stories of battles between good and evil, where the goddess Durga fights against a demon named Mahishasura and kills him. Durga is depicted as fierce and determined, embodying the ultimate reality in Hinduism, which can be understood as female.

91 अतुलंतत्रतत्तेजःसर्वदेवशरीरजम्।एकस्थंतदभून्नारीव्याप्तलोकत्रयंतविषा॥ Devi Mahatmyam 2.13.

92 The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023) s. 2(39).

vacuum, leading to inconsistent applications and interpretations of women's rights and status in both legal and social domains.

Over the years, beyond this conventional framework, it is interesting to see how the judiciary has addressed the profound concept of dignity and modesty inherently attached to womanhood. It has evolved from being a passive interpreter of laws to an active agent of social change, reinforcing the need for proactive legal mechanisms not only to protect but also to clearly define what constitutes women's dignity in its recent judicial pronouncements. In contrast to the earlier conservative judicial approach, which was characterized by narrow interpretations of personal laws and a reluctance to challenge religious and social norms, the post-independence constitutional framework in India provided a foundation for progressive judicial activism - particularly in the enforcement of constitutional rights, and gender justice.[93]

Drawing upon the principle of constitutional morality, the judiciary in recent times has delivered significant judgments that uphold the dignity of women by interpreting constitutional and statutory provisions in a broader manner, recognizing women's rights to equality, dignity, and protection from violence and exploitation. The Supreme Court undertook this shift in its landmark judgement of *Vishakha and Others v. State of Rajasthan and Others*[94] on sexual harassment at the workplace, held that such harassment violates women's fundamental rights - specifically the right to equality and the right to live with dignity - as enshrined under Articles 14, 15(1), 19(1)(g), and 21 of the Constitution of India, affirming: "*Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognized basic human right.*"[95]

Judgement resulted in what we know as the Vishakha Guidelines, which laid down basic definitions of sexual harassment at the workplace

93 Ritu Singh and Rajeev Kumar Singh, "Judicial Attitude Towards Redresser of Vulnerability of Women" 7 *Journal of Law and Legal Research* 830 (2025).
94 AIR 1997 SC 3011.
95 *Ibid.*

and provided guidelines to deal with it; it became the law of the land from 1997 to 2013 until the POSH Act[96] was enacted, as prior to this, there was no law in India to address the issue of sexual harassment at the workplace. Court has also referred to the judgement of the previous case of *Rupan Deol Bajaj and Others v. Kanwar Pal Singh Gill and Others*[97], that - "*any act capable of shocking a woman's sense of decency can be considered as an outrage to her modesty*."[98]

Outraging a woman's modesty can infringe upon her bodily integrity; thereby, in its judgement on *Suchita Srivastava and Others v. Chandigarh Administration case,*[99] the Court, by referring to the right to privacy, dignity, and bodily integrity under Article 21, has observed that the dimensions of personal liberty for women include the right to make reproductive choices; quoted:

"There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."[100]

Similarly, in another recent judgement of Supreme Court in *RIT Foundation v. Union of India*[101] The case has ruled: "*There can be no greater indignity that the law can heap upon a woman than to deny her the right to prosecute for the violation of her bodily integrity, privacy and dignity….*"[102]

Moving to gender-based justice, against the discrimination faced by women, the Supreme court in *Charu Khurana v. Union of India and Others*[103] *case,* has stated:

96 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act 14 of 2013).
97 AIR 1995 SC 309.
98 *Ibid.* See also, *supra* note 94.
99 AIR 2010 SC 235.
100 *Ibid.*
101 *RIT Foundation v. Union of India* (2022) SCC OnLine Del 1404.
102 *Ibid.*
103 AIR 2015 SC 839.

"The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the sphere of profession for which she is eligible and qualified, it is well-nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity."[104]

This Judgement held that gender discrimination against a woman, violating her right to equality, is a total denial of "*her capacity to earn her livelihood which affects her individual dignity.*"Another landmark judgement on gender-based equality has been given in the case of *Shayara Bano vs Union of India and Ors.*[105] Also known as the famous *triple talaq case,* stating:

"*Gender equality and the dignity of women were non-negotiable. These rights were necessary, not only to realize the aspirations of every individual woman, who is an equal citizen of this country, but also, for the larger wellbeing of society and the progress of the nation, one half of which is made up by women. It was submitted, that women deserved to be equal participants in the development and advancement of the world's largest democracy, and any practice which denudes the status of an inhabitant of India, merely by virtue of the religion he/she happens to profess, must be considered as an impediment to that larger goal.*"[106]

The Court has also put emphasis on its duty to declare laws that undermine women's dignity and violate gender equality as void, since they conflict with the fundamental rights in the Constitution. Articles 14, 15, and 21, which guarantee equality, non-discrimination, and the right to dignity, are core to the Constitution's basic structure. In the controversial Sabarimala Case[107] of the Supreme Court, it was ruled that *"any exception placed on women because of biological differences violates the Constitution."*[108] Justice Chandrachud has quoted:

104 *Ibid.*
105 AIR 2017 SC 4609.
106 *Ibid.*
107 AIR 2018 SC 243.
108 *Ibid.*

"*Physiological features of a woman have no significance to her equal entitlements under the Constitution –Menstrual status of a woman cannot be a valid constitutional basis to deny her the dignity of being and the autonomy of personhood –Menstrual status of a woman is deeply personal and an intrinsic part of her privacy.*"[109]

Justice Indu Malhotra, the only woman on the bench in the Sabarimala judgement, while stating that courts should only strike down religious practices if they are social evils, and personal views of morality or rationality should not influence decisions on forms of worship, has quoted: "*Social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values.*"[110]

The judiciary has always played a proactive role in interpreting constitutional morality to promote gender justice. In *Joseph Shine v. Union of India*[111] *case, Supreme* Court has ruled: "*Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution.*"[112]

It is interesting to note that this case has also referred to ancient Indian text- *Smriti*- which placed a woman in an elevated position. Court has mentioned the second line of the sloka from Manu Smriti:

यत्रैतास्तुनपूज्यन्तेसर्वास्तत्राफलाःक्रियाः॥[113]

Meaning: **"***All the actions become unproductive in a place, where they are not treated with proper respect and dignity.*"

As noted by court that *Nikku Ram*[114] case, had already reproduced the first line of the same sloka (यत्रनार्यस्तुपूज्यन्तेरमन्तेतत्रदेवताः). Another saying of a wise man of the past mentioned by the court:

भ्रातृभ्रातृपितृजनतिस्वस्रुष्वासुरदेवरायःबंधुभिश्चस्त्रियःपूज्यःभूषणच्छदानस्नैः।

Meaning: **"***The women are to be respected equally on a par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and*

109 *Ibid.*
110 *Ibid.*
111 AIR 2018 SC 4898.
112 *Ibid.*
113 Manu Smriti 3.56.
114 AIR 1996 SC 67.

while respecting, the women gifts like ornaments, garments, etc. should be given as a token of honor."

Yet again, the sagacity got reflected in following sloka:

अतुलंतत्रततत्तेजःसर्वदेवशरीरजम्।एकस्थंतदभून्नारीव्याप्तलोकत्रयंतविषा॥[115]

Meaning: "*The incomparable valor (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman.*"

The Judgement also referred to another previous case of *State Of M.P vs Madanlal*[116] , holding the view: "*Dignity of a woman is a part of her non- perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. It is sacrosanct.*"[117]

From the above judgments, we can see how the role of the judiciary in advancing the interpretation of women's dignity has evolved over the last several decades. Judicial pronouncements deeply rooted in constitutional morality have inculcated a sense of divinity and modesty towards women, reflecting the judiciary's commitment to upholding their inherent rights and status in society. Through its landmark judgements and progressive legal reforms, in response to evolving societal attitudes, growing awareness of gender justice, and the increasing influence of global human rights standards, the Indian judiciary has emerged as a key force in advancing women's rights and redefining the principles of gender equality and empowerment.

IV. Conclusion

Through this research paper, we tried to find out the answer to this question which we had put in the beginning: *Does Indian thought truly suppress women's rights?* However, our study reveals that the answer to this question appears to be negative. In the second section of this paper,

115 Devi Mahatmyam 2.13.
116 2015 AIR SC 4247.
117 *Ibid.* See also, *supra* note 111.

we found that in Indian tradition, women held a dignified position. They were revered in society. The adverse condition of women seen during the medieval period has been addressed only briefly, as medieval India is largely considered a period of foreign rule. The Constitution has made a unique effort to revive the dignified status of women. We find several constitutional provisions and legislations specifically aimed at protecting women's rights and dignity. In the third section, we observed how our Supreme Court has, time and again, prioritized the protection of women's rights and dignity through its various judgements. Beyond the courts, it is crucial for every individual in society to truly understand what Indian thought has traditionally been regarding women. Only then we can move beyond viewing women merely as biological beings and recognize the inseparable dignity attached to them. By doing so, we can uphold the fundamental duty enshrined in our Constitution to protect the dignity of women and contribute to the creation of a more progressive society.

E-Waste Governance: A Critical Analysis of India's Legal Framework in the Global Context

Dr. Vikas Kumar*
Dr. Ashish Kumar**

Abstract

This article critically explores India's e-waste governance, juxtaposing it with global legal frameworks to address the escalating crisis of e-waste. It delineates e-waste through authoritative frameworks, such as the EU's Waste Electrical and Electronic Equipment Directive and OECD taxonomies, spotlighting the toxic elements embedded within these materials that call for strict regulatory action. In this context, it briefly considers international laws, such as the Basel Convention (1989), and their congruence with the UN Sustainable Development Goals, notably SDG 12, which advocates for sustainable consumption and production. In India, the study charts the progression of e-waste laws, with a key focus on effectively implementing Extended Producer Responsibility (EPR) policies. The analysis notes that key decisions of the Supreme Court and National Green Tribunal have secured accountability in e-waste management to some extent. Yet, persistent enforcement gaps and reliance on informal recycling practices undermine policy effectiveness, necessitating critical reforms to ensure strict compliance with e-waste regulations. Moreover, the article examines circular economy initiatives, particularly formal e-waste recycling programs, which hold significant potential for resource recovery in India's e-waste governance. Finally, on the strength of the critical analysis presented herein, this article advocates for measures, including enhanced enforcement, infrastructure expansion and investments, and large-scale, sustained public awareness to match India's e-waste governance with global norms and standards, fostering fair practices for environmental sustainability.

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* Assistant Professor (Senior Scale) Faculty of Law, University of Delhi
** Assistant Professor (Senior Scale) Faculty of Law, University of Delhi

Keywords: *E-waste Governance, E-Waste Management Rules, Extended Producer Responsibility, Basel Convention, Sustainable Development Goals, Circular Economy, Informal Recycling.*

1. Introduction

"With mounting volumes of production and disposal, the world faces a mounting 'tsunami of e-waste', putting lives and health at risk."[1]

Dr. Tedros Adhanom Ghebreyesus

Electronic waste, commonly known as e-waste, constitutes the fastest-growing category of waste worldwide.[2] Loaded with toxic substances like mercury, it poses a major threat to humans, particularly their neurological health, the environment, and the fragile ecosystems that sustain life, leading to widespread repercussions for all living organisms. This unprecedented surge is attributed to rapid technological consumption and the modern society's growing penchant for disposable electronics, reflecting a broader throwaway culture. In other terms, the widespread adoption of and increased dependency on disposable electronics and digital gadgets has become an entrenched norm, largely fuelled by a culture of mass consumerism that prioritizes convenience and instant gratification over sustainability.

The rapid change of lifestyle has led to an exponential growth in discarded Electrical and Electronic Equipment's (*hereinafter* EEEs). This surge is scientifically captured in the Global E-Waste Monitor Report published in November 2024.[3] The Report highlights that the volume of

1 Statement by the WHO Director General in Children and Digital Dumpsites (2021, p. vii), World Health Organisation, Retrieved from https://iris.who.int/bitstream/handle/10665/341718/9789240023901-eng.pdf?sequence=1

2 Balde, C.P., Kuehr, R. et al.(2024). *The global e-waste monitor 2024* (p.18). United Nations Institute for Training and Research (UNITAR) & International Telecommunication Union (ITU). Retrieved from https://ewastemonitor.info/wp-content/uploads/2024/12/GEM_2024_EN_11_NOV-web.pdf

3 *Id*.

EEE introduced to the global market climbed from 62 billion kg in 2010 to 96 billion kg in 2022, demonstrating a substantial increase in demand over just over a decade. This upward trajectory is not slowing down, with projections estimating that EEE placed on the market will hit 120 billion kg by 2030. During the same timeframe (2010-2022), annual e-waste generation grew from 34 billion kg to a whopping 62 billion kg. In other terms, this malignant growth has risen by 82%. More alarmingly, it is forecasted to rise further to annual 82 billion kg by 2030.[4]

The alarming nature of e-waste surge can be gauged further from these figures. In 2019, the world generated 53.6 million metric tonnes (Mt) of e-waste, equivalent to stacking 4500 Eiffel Towers together. Across this figure, Asia generated the most e-waste (24.9 Mt), followed by America (13.1 Mt) and Europe (12 Mt), reflecting varied regional contributions to the e-waste.[5] In terms of absolute volume, Asia stands as the leading contributor to the global volume of e-waste; however, Europe surpasses all regions in e-waste generated per capita.[6] As noted by the Global E-Waste Monitor (*hereinafter* GEM), the 62 million tonnes of e-waste amassed in 2022 could roughly fill 1.55 million 40-tonne trucks, a staggering number capable of forming a continuous line of trucks encircling the Earth's equator without a single gap!

There is no denying that e-waste management has become a rapidly escalating crisis, requiring serious and urgent actions from all stakeholders. This is attested in the 2024 GEM report, which exposes that since 2010, the e-waste surge has outpaced proper collection and recycling efforts by a factor of five.[7] The gap shows a fragile system as most abandoned electronic items are dumped in landfills or unsafe recycling places, causing harm to the planetary environment and people's health. Weak rules further add to the current crisis. The report shows a concerning

4 *Id*. p. 28.

5 Barshal, A. (2023, October 20). *Global e-waste statistics. EMEW*. https://emew.com/blog/global-e-waste-statistics#:~:text=Which%20region%20is%20the%20largest,e%2Dwaste%20generated%20per%20capita.

6 *Id*.

7 *Supra* n. 2 at 18.

slowdown in the enactment and adoption of e-waste legislations/policies worldwide. As of June 2023, only 81 countries (i.e., 42% of the world), have such laws and policies, which is a marginal increase from 78 in 2019. Enforcement remains extremely challenging, with only 48 countries establishing collection targets, and a mere 37 set recycling objectives. Low public awareness, scarce disposal avenues, and weak recycling infrastructure intensify the crisis. Addressing this requires urgent investment in infrastructural facilities, efforts to halt illegal e-waste shipment, and other such strong, concerted actions to contain the spiralling crisis of e-waste management.[8]

The past half century has witnessed an unprecedented economic boom with exponential growth in technological innovations, accompanied by increased consumer purchasing power. As a result of this, devices such as mobile phones, televisions, computers, etc. have become considerably more affordable, making them globally accessible to the common people. In simple terms, these days anyone and everyone can have them. It is undeniably true that these devices have made human lives significantly easier and more comfortable. The future holds even greater, enhanced connectivity, mobility and access in rapidly urbanised societies, along with better salary, growth and opportunities. This upward trend is inextricably correlated with the expected dependency of the masses on electronic devices and gadgets in the immediate future. This, in turn, unfortunately, will lead to increased generation and dumping of e-waste, posing critical challenges for sustainable regulation and management.

2. What Makes Up E-waste?

From discarded phones, broken laptops to dead batteries - e-wastes are everywhere we look; therefore, how we define/describe them holds fundamental significance to how we fix them. In this context, European Union (EU) has officially defined e-waste as "waste of electrical and electronic equipment" (WEEE), encompassing any electrical or electronic device discarded by its owner as waste, including all components, sub-

8 *Supra* n. 2 at 15.

assemblies, and consumables forming part of the product at the time of discarding, typically with no intent of re-use.[9] Based on physical characteristics and function, the EU Directive of 2012, effective from 15 August 2018, categorizes electronic and electrical equipment (EEE) into six distinct groups[10] in order to provide a structured framework for managing e-waste. The first category, temperature exchange equipment, includes appliances such as refrigerators, air conditioners that manage temperature, addressing their environmental footprint. The second category comprises screens, monitors and devices with display surface larger than 100 cm^2 - such as television and laptops - notable for their common prevalence and the consequential challenges in their disposal. The third category, lamps, incorporates lighting devices such as fluorescent and LED lamps, requiring special handling due to hazardous material contents. The fourth category, large equipment, is defined by items exceeding 50 cm in any dimension, for example, washing machines, electric stoves and photovoltaic panels, excluding those in categories one to three. The fifth category, small equipment, covers devices not exceeding 50 cm in any dimension, including toasters, vacuum cleaners and small scale medical tools, excluding those listed in categories one to three. The sixth category, small IT and telecommunication equipment, also limited to 50 cm, includes mobile phones, computers and routers, highlighting innovation in IT waste strategies. The foregoing legal taxonomy aids in systemic regulation of e-waste, with the objective of enhancing the efficacy of recycling operations and waste management practices. In view of this classification, the diverse lifespan and economic value of each category, demand specialised logistical and recycling strategies/technologies. At the same time, differing consumer disposal behaviours pose challenges to the establishment of uniform waste

9 European Parliament and Council of the European Union. (2012, July 4). *Directive 2012/19/EU on waste electrical and electronic equipment* (WEEE). https://eur-lex.europa. eu/legal -content /EN/TXT/PDF/?uri= CELEX:32012L0019

10 *Id*.

management protocols and the mitigation of environmental and health risks arising from sub-par recycling processes.

While the EU's Directive of 2012 establishes a robust legislative framework classifying e-waste to facilitate sustainable practices, variations in the conceptualization and handling of e-waste are evident worldwide. In this context, the US Environmental Protection Agency's description is worth mentioning. It describes e-waste as used electronics, often referred to as e-scrap, that are nearing the end of their useful life, and are discarded, donated or given to a recycler for processing.[11]

On the other hand, Basel Action Network (BAN), a Seattle, US-based international environmental NGO illustrates 'e-waste' as any electronic device discarded by its user. It exemplifies this with a wide range of consumable electronic items including, smartphones, tablets, laptops, e-readers, stereo-systems, monitors, headphones, usb drives, and household electronic gadgets such as kitchen appliances or tools, refrigerators, air-conditioners and musical toys powered by cords or batteries.[12] BAN underlines that these items include valuable as well as harmful materials, revealing e-waste's twofold character as a resource (asset) and a disposal problem (handling issue). The expansive definition shows that e-waste is varied and complex, emphasizing its environmental and economic implications while calling for an integrated approach to its effective handling.

Further, the Organization for Economic Cooperation and Development (OECD) offers a succinct yet thorough understanding of e-waste. It describes e-waste as 'any' appliance that relies on electricity and has reached the end of its functional life providing an easily comprehensible

11 U.S. Environmental Protection Agency. (n.d.). *Cleaning up electronic waste (e-waste)*. https://www.epa.gov /international -cooperation /cleaning -electronic-waste-e-waste

12 Basel Action Network. (n.d.). *Electronic waste*. https://www.ban.org/e-waste

and inclusive framework for interpreting discarded electronics.[13] The use of the word 'any' in the definition renders it extensive, practical and adaptable. The broad scope enhances its utility, establishing a framework amenable to interpretation, adaptable for present-day contexts and projected future developments.

The description of e-waste formulated by the EU, Basel Action Network, US' Environmental Protection Agency and OECD presents a dual challenge of convergence and divergence. In other terms, currently there is no universally accepted standard legal interpretation of e-waste,[14] leading to definitional heterogeneity, as nations define the concept from their typical standpoints and interests. Consequently, legally harmonizing the concept of e-waste becomes complex and challenging. However, examining the EU's initiatives, the structured categorization in Directive 2012/19/EU offers a nuanced perspective/framework, promoting the prospects for a harmonized global conceptualisation of e-waste.

3. International Law and E-Waste in the Context of Sustainable Development Goals

Over the last two decades, the growing worldwide awareness of the e-waste problem has led to significant development in international law concerning this issue. For a long time, the lack of reliable international data on e-waste caused the issue to be overlooked, which in turn impeded effective global policy formulation. The first major international response emerged with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989),[15] which sought to restrict the shipment/transfer of dangerous waste, including

13 Organization for Economic Cooperation and Development. (2001). *Extended producer responsibility: A guidance manual for governments.* OECD Publishing.

14 Liu, K., Tan, Q., Yu, J., & Wang, M. (2023). A global perspective on e-waste recycling. *Circular Economy*, 2 (1), Article 100028. https://doi.org/10.1016/j.cec.2023.100028.

15 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989, 1673 U.N.T.S. 57.

elements found in e-waste, from more industrialized countries to less developed countries (LDCs). The Convention pushes for an environmentally sound management system (ESM) and assists LDCs in developing mechanisms for its safe disposal. Originally centred on hazardous waste in general, its importance to e-waste became obvious due to the presence of toxic elements like lead and mercury in electronics. Further, in 2002, the Basel Convention specifically focussed on e-waste by launching the Mobile Phone Partnership Initiative (MPPI)[16]. This initiative provided guidance on sustainable handling of discarded mobile phones. In addition, the Nairobi Declaration on the Environmentally Sound Management of Electronic and Electrical Waste (2006)[17] reinforced this mandate, explicitly instructing the Convention's administrative body to concentrate on global e-waste solutions as a core duty. These legal developments under international law have provided the groundwork for a co-ordinated global response to e-waste, but challenges in enforcement continue due to varying national capacities and levels of compliance.

Recent progress has expanded on this foundation. The 2019 Ban Amendment to the Basel Convention[18] forbids hazardous waste shipments to developing countries, thereby strengthening control mechanisms over e-waste falsely labelled as reusable products. In addition, as mentioned earlier, the 2024 Global E-Waste Monitor reports 62 million tonnes of e-

16 Basel Convention's *Mobile Phone Partnership Initiative (MPPI): Overview*. Retrieved April 14, 2025, from https://www.basel.int/Implementation/TechnicalAssistance/Partnerships/MPPI/Overview/tabid/3268/Default.aspx

17 Nairobi Declaration on the Environmentally Sound Management of Electronic and Electrical Waste, Conference of the Parties to the Basel Convention, 8th Meeting, Nairobi, Kenya, Nov. 27 - Dec. 1, 2006, Decision VII/2, https://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/cop/cop8/NairobiDeclaration.pdf

18 Basel Convention. (1995). (2019). Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Decision III/1). Adopted Sept 22, 1995 (entered into force Dec.5, 2019). https://www.basel.int /Implementation /LegalMatters /Ban Amendment/Overview/tabid/1484/Default.aspx

waste generated annually,[19] highlighting the urgency for a robust regulatory framework. Further, the 2008 Partnership for Action on Computing Equipment (PACE), revised in 2023,[20] offers technical guidance for recycling computing devices, whereas Partnership for Action on Challenges Relating to E-waste (PACE-II), launched in 2022,[21] addresses wider e-waste issues. both advancing circular economy objectives.[22] These ongoing measures comport with global sustainability goals but are hindered by illegal waste trafficking and insufficient infrastructure,[23] necessitating enhanced multilateral cooperation and coordination to address systemic challenges.

The current international law regime governing e-waste is fundamentally connected to the UN Sustainable Development Goals (SDGs).[24] Global efforts to regulate e-waste is significantly shaped by SDG 12, addressing Responsible Consumption and Production). In this context, the Circularity Gap Report 2024 shows that global circularity - the degree to which materials are reused and recycled - has alarmingly

19 *Supra* n. 2.

20 Basel Convention. (2008). Partnership for Action on Computing Equipment (PACE): Overview. United Nations Environment Programme. https://www.basel.int/Implementation/PartnershipProgramme/PACE/Overview/tabid/3243/Default.aspx .

21 Basel Convention. (2022). Partnership for Action on Challenges Relating to E-waste (PACE II): Overview. United Nations Environment Programme. https://www.basel.int/Implementation/TechnicalAssistance/Partnerships/PACEII/Overview/tabid/9284/Default.aspx .

22 Circular economy objectives, adapted as, "minimizing wastes, extending product durability, and maximizing resource efficiency through reuse, recycling, and sustainable design practices," are outlined in United Nations Environment Assembly. (2019). Innovative pathways to achieve sustainable consumption and production (UNEP/EA.4/Res. 1). https://wedocs.unep.org/bitstream/handle/20.500.11822/28517/English.pdf?sequence=3&isAllowed=y .

23 Meneghini, C., Aziani, A., & Ducato, M. (2023). Transnational trafficking networks of end-of-life vehicles and e-waste. *Global Crime*, 24(3), 215-237, pp. 216-217.

24 United Nations. (2015). *Transforming our world*: *The 2030 Agenda for Sustainable Development* (A/RES/70/1). United Nations General Assembly. https://sdgs.un.org/2030agenda .

declined from 9.1% in 2018 to 7.2% in 2023,[25] underscoring the need for stronger recycling laws and effective policy interventions. The earlier 2021 Report highlighted that integrating circular economy principles with climate mitigation strategies, including robust e-waste management, could set the world on a path by 2032 to maintain global warming well below 2° C in the decades ahead.[26] As a core component of the circular economy, e-waste recycling targets to reduce reliance on virgin materials and mitigate the release of toxic substances into soil and water, thereby advancing the cause of SDG 6 (Clean Water and Sanitation) and SDG 15 (Life on Land). Economically, it cuts production expenses and stimulates the development of innovative designs for recyclable products, thus advancing the cause of SDG 9 (Industry, Innovation, and Infrastructure). Socially, the e-waste recycling sector could generate significant job opportunities globally,[27] contributing to SDG 8 (Decent Work and Economic Growth) and promoting SDG 10 (Reduced Inequalities) by fostering inclusive economic participation and social equity. Moreover, decreased exposure to hazardous compounds through effective e-waste management can yield significant health benefits, thus advancing SDG 3 (Good Health and Well-being) by promoting safer living conditions. Against this backdrop, it is worth mentioning the UN General Assembly's resolution, adopted on 14 December, 2022, proclaiming 30 March as the

25 Fraser, M., Conde, A., Haigh, L. (2024). *Circularity Gap Report 2024*: *A circular economy to live within the safe limits of the planet*. Circle Economy Foundation, p. 8. https://www.circularity-gap.world/2024 .

26 Circle Economy. (2021). *Circularity Gap Report 2021*: *Solutions for a linear world that consumes over 100 billion tonnes of materials and has warmed by 1-degree*. p. 8. https://www.circularity-gap.world/2021 .

27 The potential for substantial employment opportunities in e-waste recycling is emphasized in discussions on circular economy prospects, as reported in a news release by the International Labour Organization (2023, May 9). *Global South: Circular economy could generate millions of job opportunities.* https://www.ilo.org/resource/news/global-south-circular-economy-could-generate-millions-job-opportunities. See also, Stoevska, V. (2024, Aug. 26). *Beyond the bin: Decent work deficits in the waste management and recycling industry*. https://ilostat.ilo.org/blog/beyond-the-bin-decent-work-deficits-in-the-waste-management-and-recycling-industry/.

International Day of Zero Waste.[28] This measure underlines the critical nature of the global waste crisis and fortifies legal advocacy for sustainable waste management, including e-waste, across countries.

Implementing these aforesaid objectives within the framework of international law faces legal and operational challenges. Variations in national e-waste legislation and lax enforcement erode the efficacy of universal standards. Initiatives such as the UN E-waste Coalition,[29] aim to unify policies and fund recycling infrastructure in LDCs. It needs reiteration that effective integration of e-waste strategies into SDG frameworks will require concerted actions under international law to advance environmentally prudent practices, equitable resource sharing, and sustainable development worldwide.

4. E-Waste Governance in India: Context and Imperatives

India grapples with a formidable e-waste challenge, a direct result of its accelerated economic boom and technological leaps. The 2024 Global E-waste Monitor reveals that India generates around 4.1 million tonnes of e-waste annually, making it the world's third largest contributor,[30] following China and the USA. This volume is propelled by India's rapidly growing consumer electronics market, underpinned by increasing urbanization, increasing disposable income, and the extensive use of devices like smartphones, laptops, and home appliances. Yet, the prevalence of the

28 United Nations General Assembly. (2022). International Day of Zero Waste (A/RES/77/161). https://docs.un.org/en/A/RES/77/161.

29 Formed in 2018, the UN E-waste Coalition unites several UN entities (International Telecommunication Union, UN University, UN Industrial Development Organisation, UN environment Programme, the Secretariat of the Basel, Rotterdam and Stockholm Conventions, International Labour Organisation, UN Human Settlements Programme, International Trade Centre, UN Institute for Training and Research, and the World Health Organisation to optimize e-waste management through collaboration, advocacy, knowledge sharing, and country-specific interventions, fostering global sustainable waste solutions. United Nations Environment Management Group. (n.d.). *Inter-agency group on tackling e-waste.* Retrieved April 17, 2025 from, https://unemg.org/our-work/emerging-issues/innter-agency-issue-management-group-on-tackling-e-waste/.

30 *The Global E-waste Monitor 2024*, supra n. 2 at 78.

informal recycling sector, which processes nearly 90% of e-waste through unregulated and harmful methods, aggravates environmental and health hazards. Poisonous elements like lead, mercury, cadmium, embedded in discarded electronics, seep into soil and water resources, endangering ecosystems and residents near informal recycling zones like Seelampur[31] in Delhi and Moradabad[32] in Uttar Pradesh. Overcoming this growing problem calls for a clear legal and policy framework attuned to India's complex socio-economic conditions.

India's approach to e-waste management must conform to international norms, in particular those enshrined in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) and the UN SDGs, notably SDG 12, which advocates for responsible consumption and production to mitigate environmental degradation. These global instruments call for environmentally sustainable management and circular economy approaches, directing countries to curtail waste through effective recycling practices. However, India's endeavours to regulate waste are hindered by domestic barriers, including lax regulatory enforcement, underdeveloped recycling facilities, and prevailing low public awareness about proper e-waste disposal techniques. As is seen, the predominance of the informal sector in India hampers the effectiveness of formal e-waste management systems, while the lack of standardized collection infrastructures permits large volumes of e-waste to end up in landfills or undergo incineration, exacerbating environmental contamination.

31 Seelampur in Delhi is now reported to be India's largest e-waste dismantling market. Bhat, A. (2023, February 9). India: E-waste provides poor children a dangerous living. *DW*. https://www.dw.com/en/india-electronic-waste-provides-poor-children-a-dangerous-living/a-64656699

32 Doron, A., Jeffrey, R. (2028, July 9). India's unofficial recycling bin: The city where electronics go to die. The Guardian. https://www.theguardian.com/cities/2018/jul/09/indias-unofficial-recycling-bin-the-city-where-electronics-go-to-die-moradabad

This section critically explores India's legal and policy framework governing e-waste management, examining its strengths, limitations, and enforcement challenges. It maps the historical evolution of e-waste laws and regulations, assessing core instruments such as the E-Waste (Management) Rules, 2016 and 2022, and key policy interventions that have influenced e-waste governance in the country. Additionally, it investigates the adoption of circular economy principles in India, stressing their transformative potential to enhance sustainability. Further, through the identification of requisite reforms, this analysis aims to propose actionable steps to synchronize India's legal framework with international norms, thereby arguing for sustainable and inclusive e-waste management practices in keeping with global environmental mandates.

5. Evolution of E-Waste Laws in India

The evolutionary trajectory of laws demonstrates a transition from general environmental statutes to specialised e-waste regulations, designed to tackle the distinct challenges arising from discarded electronics in an increasingly digitized society/economy. Before 2011, the e-waste problem was largely addressed under general environmental laws. The Hazardous Wastes (Management and Handling) Rules, 1989, established under the Environment (Protection) Act, 1986, constituted the primary regulatory framework. These rules of 1989, as amended in 2008,[33] in general manner, targeted hazardous substances like lead, mercury, cadmium, and polychlorinated biphenyls (PCBs) present in electronics. In line with India's commitments to the Basel Convention, 1989 (ratified in 1992), these rules aimed to control the transboundary movement of hazardous materials and facilitate their safe disposal, providing an early basis for e-waste regulation within the broader waste management policy.

33 The Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, notified in the *Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i)*, vide Notification No. S.O. 2265(E), dated 24th September 2008, notified by the Ministry of Environment and Forests (MoEF), Government of India.

E-waste must be differentiated from solid waste, managed under the Solid Wastes (Management and Handling) Rules, 2000, and later under the Solid Waste Management Rules, 2016.[34] These rules address non-hazardous waste, such as household garbage, food scraps and commercial waste. E-waste containing hazardous electronic components, occasionally, mingles with solid waste during collection. This potential overlap justified the distinct need for a dedicated e-waste policy in India to manage its toxic nature effectively.

For an extended period, the absence of dedicated e-waste laws impeded effective management of electronic waste. By 2007, India's e-waste output reached an estimated 330000 tonnes annually,[35] Yet much of it remained poorly handled due to the lack of specific laws addressing electronic waste. The informal recycling sector, which managed the bulk of discarded electronics, operated without a regulatory framework, causing extensive health risks and harm to the surrounding ecosystem. This gap in regulatory measures mirrored the prevailing lack of awareness about the mounting volume and environmental impact of e-waste in India.

Addressing the regulatory lacuna and mounting e-waste challenge, the E-Waste (Management and Handling) Rules, 2011,[36] ushered in India's first dedicated e-waste policy framework. Inspired by the Basel Convention, 1989, these regulations marked a significant shift by designating electronic waste as a distinct waste stream, thereby

34 Solid Waste Management Rules, 2016, notified in the *Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii)*, vide Notification No. S.O. 1357(E), dated 8th April 2016, notified by the Ministry of Environment, Forests and Climate Change (MoEFCC), Government of India.

35 This estimate included e-waste generated from computers, mobile phones and televisions only. GTZ-MAIT. (2007). *Assessment of e-waste in India*, IMRB International. Cited in Toxics Link, *Waste electrical and electronic equipment* (p. 14). https://toxicslink.org/wp-content/uploads/2022/08/Waste_Electrical_Electronics_Equipment_.pdf

36 E-Wastes (Management and Handling) Rules, 2011, notified in the *Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii)*, vide Notification No. S.O. 1035(E), dated 12th May 2011, Ministry of Environment and Forests (MoEF), Government of India.

establishing a regulatory system for sustainable e-waste management. The regulations mandated obligations on producers, consumers, and recyclers, calling for secure disposal methods and sustainable recycling. However, the 2011 Rules suffered from critical gaps, such as ambiguous enforcement provisions and minimal producer obligations, which constrained their operational efficacy.[37] Further, delegation of oversight to state pollution control boards often led to uneven regulatory compliance across India's heterogeneous regions.

A transformative measure in India's e-waste governance was adopted with the E-Waste Management Rules, 2016,[38] which formally and unambiguously incorporated the concept of Extended Producer Liability (EPR). EPR required manufacturers to collect and recycle a designated portion of their end-of-life electronics, reassigning accountability from consumers to manufacturers. This brought India's regulatory model in line with global standards, such as the 2012 EU Directive on Waste Electrical and Electronic Equipment.[39] EPR with specific e-waste collection targets has been outlined in Schedule III of the 2016 Regulations. Accordingly, during the first two years of implementation, producers must collect 30% of the wastes from their products, as indicated in the EPR plan. The recycling target reaches 40% during the third and fourth years, progresses to 50% in the fifth and sixth years, and stabilizes at 70% from the seventh year onward.[40] These incremental targets are intended to enforce EPR across the product lifecycle, thereby incentivising efficient e-waste recovery and recycling systems. Reflecting a commitment towards ecological harmony, the 2016 Regulations spell out distinct obligations of

37 See generally, Bhaskar, K., & Turaga, R. M. R. (2018). India's e-waste rules and their impact on e-waste management practices: A case study. Journal of Industrial Ecology, 22(4), 930-942. https://doi.org/10.1111/jiec.12619.

38 E-Wastes (Management) Rules, 2016, notified in the *Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i)*, vide Notification No. G.S.R. 338(E), dated 23rd March 2016, Ministry of Environment, Forests and Climate Change (MoEFCC), Government of India.

39 EU Directive on WEEE, 2012. *Supra* n. 9

40 E-Waste Management Rules, 2016, Schedule III, Ministry of Environment, Forests and Climate Change, Government of India.

stakeholders, including dismantlers and recyclers, to uphold environmentally conscious practices certified by the Central Pollution Control Board (CPCB). To an extent, it has started to curb the dominance of the informal sector in line with the Basel Convention, 1989. However, the promise of these progressive measures remains poorly realised due to frail enforcement, with only 5-10% of e-waste processed through formal channels, as reported by NEC Technologies India and ASSOCHAM in 2018,[41] exposing the enduring gap between ambition and reality.

In light of the limitations of the 2016 regulatory framework, the E-Waste (Management Rules), 2022[42] were enacted to redefine the paradigm of e-waste governance, bolstering EPR through an online portal for (CPCB) oversight and incorporating 'environmental compensation' for regulatory breaches. The 2022 Rules widened their reach to include solar panels and new IT equipment, responding to technological advancements in electronics. The expansion was spurred by domestic exigencies, as India's e-waste was seen rapidly approaching 3 million tonnes in 2020,[43] pointing to the imperative for revised policies to address rising waste volumes. Moreover, the 2022 Rules conformed to international obligations under the Basel Convention's Ban Amendment (2019), banning hazardous waste exports to developing countries. Under this global pledge, India, like other countries, must strengthen its domestic recycling systems,

41 NEC Technologies India & Associated Chambers of Commerce and Industry of India (ASSOCHAM). (2018). *Electricals and Electronics Manufacturing in India 2018* (p. 44). https:// in.nec.com/en_IN/pdf /Electricals and Electronics Manufacturing in India2018.pdf. ; See also, Down to Earth. (2021, Jan. 15). *India collected just 3% e-waste generated in 2018, 10% in 2019: CPCB report*. https://www.downtoearth.org.in/waste/indianorway-collaboration-to-check-aquatic-pollution-has-helped-agra-improve-waste-circularity.

42 E-Wastes (Management) Rules, 2022, notified in the *Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i)*, vide Notification No. G.S.R. 801(E), dated 2nd November 2022, Ministry of Environment, Forest and Climate Change (MoEFCC), Government of India.

43 Forti, V., Balde, C.P., Kuehr, R., & Bel, G. (2020). *The Global E-Waste Monitor 2020: Quantities, flows and the circular economy potential* (p.74). United Nations University/UNITAR. https://ewastemonitor.info/wp-content/uploads/2020/11/GEM_2020_def_july1_low.pdf.

strictly enforce producer responsibility, and minimize reliance on cross-border waste shipments. In this context, environmental compensation, as stipulated in the 2022 Rules, stands as a monetary atonement, compelling producers, manufacturers, and non-compliant entities to bear the cost of their lapses, thereby encouraging legal conformity and sustainable e-waste disposal.

India's E-Waste Rules of 2011, 2016 and 2022, which constitute the legal framework for e-waste management, are mere regulations, operating as subordinate or ancillary legislation under the Environment Protection Act, 1986, without the full legal weight of a dedicated, comprehensive parliamentary legislation. It is often pointed out that a standalone parliamentary statute would bolster enforcement, provide clear and authoritative mandates to all stakeholders, and raise public awareness, addressing the current obscurity in complex and often overlapping regulations.[44] Globally, several countries have enacted dedicated parliamentary statutes on e-waste, reflecting direct legislative will to tackle this issue. Prominent examples include Japan's Home Appliances Recycling Act of 1998, South Korea's Act on Resource Circulation of 2008, and Germany's Waste Electrical and Electronic Equipment (WEEE) Act of 2015. These primary legislative enactments, unlike secondary regulations, underline the critical significance of direct and superior legislative frameworks to effectively address e-waste problems. India's attempt to legislate similar laws - the Electronic Waste (Handling

44 The Indian Express. (2016, August 11). Bring separate law, central authority for e-waste management. https://indianexpress.com/article/india/india-news-india/bring-seperate-law-central-authority-for-e-waste-management-2968463/. Manish, A., & Chakraborty, P. (2019, November 6). E-waste management in India: Challenges and opportunities. TerraGreen, The Energy and Resource Institute (TERI). https://www.teriin.org/article/e-waste-management-india-challenges-and-opportunities.

and Disposal) Bills, 2005[45] and 2015[46] - was derailed by parliamentary inaction, conflicting legislative agendas, and an inclination towards lenient regulatory approaches to the e-waste problem. Therefore, enacting standalone parliamentary legislation on e-waste is critical to ensure stringent compliance frameworks in accordance with the Basel Convention, 1989.

6. Adjudications Shaping E-Waste Governance

The legal institutions of India, including its judiciary and quasi-judicial bodies have critically influenced e-waste governance, addressing gaps in the regulatory framework and fostering responsible management in keeping with national and global environmental norms. The Central Pollution Control Board, a statutory body under the Environment (Protection) Act, 1986, assumes a critical role in e-waste governance by issuing guidelines and monitoring compliance with the E-Waste (Management) Rules. CPCB Guidelines[47] detailed protocols for producers, consumers, collection centres, dismantlers and recyclers. The Guidelines implement EPR to facilitate structured e-waste collection and transfer to authorised units. Every stakeholder must register State Pollution Control Boards (SPCBs), diligently maintain records, and commit to eco-friendly disposal practices. While CPCB prescribes standards for recycling and EPR to regulate e-waste, yet, its endeavours often get stuck due to limited enforcement means.

45 The Electronic Waste (Handling and Disposal) Bill, 2005, introduced by VIjay J. Darda in Rajya Sabha in December 2005, lapsed in July 2010 with the expiry of the tenure of the Member of Parliament.Research Unit (LARRDIS), Rajya Sabha Secretariat. (2011). *E-waste in India* (pp.53-54). https://greene.gov.in/wp-content/uploads/2018/01/e-waste_in_india-Document.pdf.

46 The Electronic Waste (Handling and Disposal) Bill, 2015, Bill No. XXVII of 2015. https://sansad.in/get File /BillsTexts /RSBill Texts /As introduced/ elecwast-237w-E.pdf?source=legislation.

47 Central Pollution Control Board. (2016). Guidelines for Implementation of E-waste Management Rules, 2016. https://cpcb.nic.in /display pdf. php?id=aHdtZC9HVUlERUxJTkVTX0VXQVNURV9SVUxFU18yMDE 2LnBkZg==

Further, as a key pillar of India's environmental governance, the National Green Tribunal (NGT), a specialised quasi-judicial tribunal, under the National Green Tribunal Act, 2010, has established itself as a watchful authority in addressing cases of environmental harm including e-waste mismanagement. The Act, under Section 22, stipulates that appeals from NGT decisions are routed directly to the Supreme Court[48] (on substantial questions of law or constitutional issues), circumventing High Courts to ensure focussed and expert environmental adjudication. High Courts may entertain matters involving NGT decisions under their writ jurisdiction, typically when constitutional questions (e.g., fundamental rights issues) arise.[49] Being a tribunal, NGT does not have the judicial review power in the constitutional sense, but it has the jurisdictional ability to take suo-motu actions in critical environmental matters as affirmed by the judgments of the Supreme Court[50]. This jurisdiction has enhanced NGT's capacity to proactively address environmental violations, including those pertaining to e-wastes in the country. In a notable 2019 order,[51] It addressed the illegal e-waste disposal along the Ramganga River in Moradabad District, Uttar Pradesh, detecting mercury contamination. It ordered the state government to implement scientific storage and disposal/dismantling of e-waste in strict compliance of applicable rules. Similarly, in another order,[52] It directed the CPCB to strengthen enforcement, noting that 95% of e-waste was processed informally, causing soil and groundwater pollution in nearby

48 National Green Tribunal Act, 2010, Act No. 19 of 2010. Retrieved from https://greentribunal.gov.in/sites/default/files/act_rules/National_Green_Tribunal_Act,_2010.pdf.

49 *Madhya Pradesh High Court Advocates Bar Association* v. *Union of India*, SC, Writ Petition (Civil) No. 433 of 2012. (May 18, 2022). https://indiankanoon.org/doc/19326425/.

50 *Mantri Technoze Pvt. Ltd.* v. *Forward Foundation*, AIRONLINE 2019 SC 495. https://indiankanoon.org/doc/82379995/. *Municipal Corporation of Greater Mumbai* v. *Ankita Sinha*, AIRONLINE 2021 SC 861. https://indiankanoon.org/doc/5754869/.

51 *Mahendra Pandey* v. *Union of India*, Original Application No. 621/2018. (NGT, Principal Bench, January 15, 2021).

52 *Shaliesh Singh* v. *State of UP*, Original Application No. 324/2016. (NGT, Principal Bench, March 3, 2021).

areas. The decision prompted CPCB to submit compliance reports, but informal recycling persists in undermining regulatory efforts. These cases demonstrated NGT's influential role in addressing the crisis of e-waste, but at the same time, they exposed critical deficiencies in e-waste management infrastructure and systemic gaps in enforcing e-waste regulations at the ground level.

India's apex judiciary has significantly shaped general waste management policies through its critical interventions. In the *Research Foundation for Science Technology and Natural Resources Policy* v. *Union of India* (2005)[53] The SC examined implications of hazardous waste imports, affirming India's obligations under the Basel Convention, 1989, and issued directives to curb illicit waste inflows. The directives issued in this case established groundwork for the subsequent Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, which influenced India's evolving e-waste framework.

The continuing case of *M.C. Mehta* v. *Union of India*[54] stands as a cornerstone in the Apex Court's endeavour to address the Delhi-NCR's grave pollution crisis. This SC-monitored case has implications, among other things, for solid waste including e-waste, which, in recent years, has alarmingly spiralled in the NCR region, with Delhi's Seelampur now reported as India's largest e-waste dismantling market.[55] In this ongoing case, SC recently issued significant orders in 2024,[56] spotlighting governmental lapses in implementing Solid Waste Management Rules, 2016, and implicitly advocating for the enhanced segregation of e-waste and its scientific disposal to uphold environmental sustainability and

53 (2005) 1 S.C.R. 115

54 *M.C. Mehta* v. *Union of India*, Writ Petition (Civil) No. 13029/1985 (Supreme Court, 1985-present).

55 *Supra* n. 31.

56 *M.C. Mehta* v. *Union of India*, Writ Petition (Civil) No. 13029/1985 (Supreme Court, November 18, 2024).

constitutional obligations under Article 21 (right to life includes right to a clean environment).

India's efforts to manage growing e-waste are fraught with legal challenges, as seen in a recently instituted case, revealing the friction between policy interests and industry concerns. In April 2025, two leading MNCs, LG Electronics India Pvt. Ltd. and Samsung India Electronics Pvt. Ltd. (joined by others such as Voltas, Daikin, Havells, Bluestar) initiated judicial proceedings in the Delhi High Court,[57] challenging amendments to the E-Waste (Management) Rules, 2022, notified in September 2024 by CPCB.[58] According to the petitioners, these amendments have significantly burdened them with an arbitrary and inflated pricing policy. This new policy requires manufacturers to pay ₹ 22 per kg for recycling general e-waste (e.g., TVs, washing machines) and ₹ 34 per kg for smartphones. Companies argue that these increased rates are 5-15 times higher than the price currently paid under the existing market norms, potentially tripling their expenses.[59] They contend that the pricing policy will disproportionately favour recyclers, undermining their legitimate commercial interests. The policy, they argue, is manifestly arbitrary and violates right to equality (Article 14) and right to carry on business or trade (Article 19.1.g). According to them, the amendments were carried out without proper consultation with industry stakeholders and fail to address the informal sector's dominance, which recycles 80-90% of India's 4.1

57 India Today. (2025, April 22). LG, Samsung sue government over e-waste recycling policy, cite surging costs. https://www.indiatoday.in/india/story/lg-samsung-daikin-sue-government-electronic-waste-policy-financial-burden-2712678-2025-04-22.

58 Central Pollution Control Board. (2024, September 9). Environmental Compensation (EC) Guidelines under E-Waste (Management) Rules, 2022. Retrieved from https://eprewastecpcb.in/assets/PDF/EC-Guidelines-under-E-Waste-Management-Rules-2022-09.09.24.pdf.

59 The Hindu. (2025, April 22). LG, Samsung sue Centre over electronic-waste pricing policy. https://www.thehindu.com/business/Industry/india-e-waste-pricing-policy-lg-samsung-sues-modi-govt-environmental-rules-waste-management-practices/article69477494.ece.

million tonnes of e-waste generated annually (GEM 2024).[60] In essence, MNCs seeking judicial review of these recent amendments, argue that their exclusive focus on producer responsibilities, while overlooking the unchecked practices of informal recycling, generates disparities that further undermine India's e-waste management systems.

Although judicial and quasi-judicial interventions have strengthened India's e-waste governance, systemic barriers continue to limit their impact. The ongoing *LG-Samsung case* (2025) exposes these persistent challenges. Achieving global benchmarks, such as SDG 12 (Responsible consumption and Production) requires stronger executive action, public awareness, and massive investment in formal recycling systems to support judicial rulings and ensure sustainable e-waste management.

7. Enforcement Challenges and Circular Economy Solutions

Currently, India's regulatory framework for e-waste faces significant barriers that hinder effective governance. Circular economy approaches[61] present viable strategies to effectively address the mounting waste disposal challenges. While progressive regulations, such as the E-Waste (Management) Rules, 2016 and 2022, have been enacted, the challenge of consistent implementation persists. As previously noted, only 10% of India' s e-waste (4.1 million tonnes annually) is formally recycled.[62] The informal sector, processing 90% of e-waste, employs unsafe practices that contaminate soil and water ecosystems. Insufficient infrastructure, comprising merely 567 registered e-waste recyclers/dismantlers in 2023[63], severely limits collection capabilities. Further, lack of consumer awareness leads to improper handling/disposal of e-waste, jeopardising EPR targets and compliance. Compounding this, weak oversight by

60 *The Global E-waste Monitor 2024*, *supra* n. 2 at 78.

61 *Supra* n. 22.

62 *Id*.

63 Ministry of Environment, Forest and Climate Change, Government of India. (2023, April 6). Rajya Sabha Unstarred Question No. 3883: Registered e-waste processing and recycling units in the country. https://sansad.in/getFile/annex/259/AU3883.pdf?source=pqars.

SPCBs, coupled with uneven regional practices hinder progress, leaving policy aims unrealised.

Circular economy solutions,[64] which encourages reusing, recycling, and recovering resources in India's e-waste sector, can offer practical means to create a sustainable model while addressing enduring enforcement gaps. Adopting a circular economy model for e-waste management will optimize resource utilization, reduce waste and pollution, extend product lifespans, enable recovery of critical and scarce materials, and mitigate occupational health risks. This strategy will also catalyze the growth of a structured recycling sector, sparking employment generation and fostering sustainability.[65]

In this regard, Attero Recycling and E-Parisaraa, two leading private Indian ventures, spearhead formal e-waste recycling initiatives. Attero, located in Noida (NCR), uses cutting-edge technology to recover 98% of key metals, including lithium and cobalt, processing 144,000 metric tonnes yearly at its eco-friendly Roorkee facility in Uttarakhand.[66] Similarly, E-Parisaraa, Bengaluru's first government-authorized recycler in Karnataka, specializes in extracting metals, plastics and glass to reduce landfill waste.[67] However, high operational costs and limited geographical reach hinder competition with the informal sector, which dominates e-waste processing. This constraint significantly reduces their scalability, undermining the sustainability goals enshrined in the E-Waste (Management) Rules, 2022. despite adherence to circular economy principles.

64 *Supra* n. 22.

65 Ministry of Electronics and Information Technology, Government of India. (2021). Circular economy in electronics and electrical sector (Policy Paper), p. 6. https://worldtradescanner.com/Circular_Economy_EEE-MeitY-May2021-ver7.pdf.

66 Gupta, N. (2024, November 6). How Attero is tackling India's e-waste problem. ET Edge insights. https://etedge-insights.com/resources/in-conversation/how-attero-is-tackling-indias-e-waste-problem/.

67 E-Parisaraa Pvt. Ltd. (n.d.). About us. https://www.ewasteindia.com/about.

In addition, in line with circular economy goals, the 2023 MoEFCC Awareness Initiative[68] advocates for refurbishing electronics, thereby extending their usability. EPR framework under the 2022 E-Waste Rules, mandates producers to develop recyclable products, supporting SDG 12's commitment to responsible consumption. However, difficulties continue as informal recyclers outcompete formal systems by providing cheaper options. Scarce recycling infrastructure and poor community participation obstruct broader implementation.[69] In contrast to the EU's Eco-design for Sustainable Products Regulation (ESPR) (2024)[70], which mandates sustainable product design emphasizing durability, repairability, and recyclability, India's policies currently fall short of stringent eco-design standards.[71] To address this, the Government of India introduced the Ecomark Rules, 2024,[72] on 26 September 2024 replacing the previous Ecomark Scheme of 1991 to certify eco-friendly products through voluntary certification. However, unlike eco-design policies, which legally require producers to adhere to sustainable product design, India's Ecomark Rules focus on optional labelling to certify environmental performance. This approach fosters green consumption and consumer

68 GreenE. (n.d.). About e-waste awareness. https://greene.gov.in/. Official portal for India's e-waste initiatives, advocating responsible recycling to mitigate ecological harm.

69 Turga, R. M. R., Bhaskar, K., Sinha, S. et al. (2019). E-waste management in India: Issues and strategies. *Vikalpa: The Journal of Decision Makers*, 44(3), 127-162. https://journals.sagepub.com /doi /10.1177/ 02560909198806555.

70 European Parliament and Council of the European Union. (2024). *Eco-design for Sustainable Products Regulation (ESPR), EU Regulation 2024/1781*. Official Journal of the European, L 2024/1781. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401781.

71 Pandey, K. (2024, December 17). India's e-waste surges by 73% in 5 years. Down To Earth. https://www.downtoearth.org.in/waste/indias-e-waste-surges-by-73-in-5-years.

72 Ecomark Rules, 2024, notified in the *Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i)*, vide Notification No. G.S.R. 596(E), dated 26th September 2024, Ministry of Environment, Forest and Climate Change (MoEFCC), Government of India.

awareness but lacks mandatory eco-design standards, limiting the regulatory impact on manufacturers.

As the recently instituted *LG-Samsung case* (2025) reveals, high costs encumber producers while failing to curb informal recycling practices. To advance circularity, financing for infrastructure and public awareness campaigns are critical. Enhancing EPR implementation and incentivizing formal recycling could yield better outcomes.

8. Conclusion and Suggestions

In the shadow of rapidly surging e-waste menace across the globe, proactive reflection, planning, and action are imperative for sustainable governance. As the world's third largest e-waste producer, India's ongoing efforts are critical to the global fight for e-waste reduction. Against this backdrop, this article has critically explored India's e-waste governance, regulatory frameworks, adjudicatory interventions, and circular economy solutions, highlighting both progress and challenges. As articulated herein, pursuant to international e-waste standards, Basel Convention objectives, UNSDGs, EU's ESPR, and key global reports, the worsening e-waste crisis calls for stringent management measures to ensure planetary health and sustainable development compliance. India's progression from the initial generic regulation i.e., Hazardous Wastes (Management and Handling) Rules, 1989 to the modern, standalone E-Waste (Management) Rules, 2022 illustrates commitments to Extended Producer Responsibility for e-waste. Key rulings from the Court and NGT on e-waste management have helped increase regulatory compliance and stakeholder awareness. Yet, lax enforcement, reliance on informal recycling, and scarce infrastructure create barriers. India needs to act swiftly to close these gaps to ensure sustainable e-waste management and meet global environmental standards effectively.

Building on the insights here, to strengthen India's e-waste governance system, six critical reforms are required. *First*, enact a standalone Parliamentary Act on E-Waste as primary legislation to streamline and reinforce laws, bringing clarity and overcoming inconsistencies caused by the fragmented, overlapping secondary regulations. *Second*, strengthen

the CPCB's monitoring authority by implementing thorough checks and punitive measures to ensure strict compliance with e-waste management laws. *Third*, incentivise formal e-waste recycling systems by offering subsidies and fostering public private collaborations, reducing reliance on the informal sector. *Fourth*, increase investment in recycling infrastructure to scale up registered e-waste recyclers, thereby alleviating India's challenge as the world's third largest e-waste source. *Fifth*, introduce enforceable eco-design standards, drawing from the EU's Eco-design for Sustainable Products Regulation (ESPR), 2024, requiring sustainable product designs to facilitate circular economy goals, in contrast to India's voluntary Ecomark Rules, 2024, which hinge on optional eco-labelling. *Sixth*, implement sustained educational initiatives through schools, colleges and community participation, ensuring measurable outcomes, such as enhanced e-waste collection rates, to encourage sustainable disposal habits in the society. These suggested measures can transform India's e-waste governance, promoting environmental sustainability and just future while fulfilling SDG 12's commitment to responsible consumption and production.

The Generic Pharmaceutical Industry and Existing Patent Laws in India: A Critical Legal Study

Aneequa Ahmed*
Dr. Mohammadi Tarannum**

Abstract

Patents grant inventors temporary exclusivity to profit from their inventions, incentivizing research and development. However, it can create problems when it restricts others from using the invention for the greater good, particularly in pharmaceuticals, where patented drugs could save lives or improve quality of life for many. The current patent system, by creating pharmaceutical monopolies, excludes billions from accessing needed medications due to cost. The core question is how to balance pharmaceutical innovation with access to medicines, considering whether legislative changes are needed at both international and domestic levels. The introduction of product patents for pharmaceuticals in India, threatening the established generic drug industry, sparked unprecedented national and international protests. The resulting legislation attempts to balance the interests of generic producers, domestic and foreign pharmaceutical companies, and public health advocates.[1] While this balancing act is commendable, some hastily introduced provisions deviate from established patent law principles and may lead to future legal challenges.

Keywords: *Pharmaceutical patents, generic drugs, right to health, affordable healthcare, public health, patent laws, TRIPS Agreement, pharmaceutical industry.*

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* LL.M., University of Calcutta, Kolkata, India ; Email: aneequa.ahmed@gmail.com

** LL.M., Ph.D., Vice Principal, Surendranath Law College, University of Calcutta, Kolkata, India ; Email: snlcollege@gmail.com

1 F.M. Abbott, "Beginning of a New Policy Chapter: A Hopeful Way Forward in Addressing Public Health Needs" *FINANCIAL EXPRESS*, Apr. 6, 2005, http://www.financialexpress.com/fe_full_story.php?content_id=87112 (last visited Oct. 15, 2024).

I. Introduction

It is said that 'no other issue so clearly epitomizes the clash between human rights and intellectual property as access to patented medicines', since 'the idea of withholding lifesaving drugs from individuals suffering from fatal or debilitating diseases when the means exist to distribute those drugs cheaply and effectively is anathema to all notions of morality'.[2] This research examines the clash between human rights and intellectual property rights, specifically regarding access to patented medicines. Focusing on the vital role of generic medicines in ensuring access to essential medicines, this article will analyse the impact of pharmaceutical patents on generic drug production, offering a human rights critique of the conflict between these patents and the right to health. Using a human rights lens, the research will explore how patents affect the generic pharmaceutical industry and access to medicines.

II. The Generic Pharmaceutical Industry and its Vital Role in Affordable Healthcare Sector

The Indian pharmaceutical industry occupies a special position among developing countries having demonstrated strong innovation capabilities, strength in developing cost-efficient processes and significant capacity in setting up manufacturing plants for drugs satisfying international quality norms, earning worldwide recognition as the 'pharmacy of the developing world'.

The Indian pharmaceutical industry has grown consistently over the decades, emerging as a successful, technologically advanced sector. Privately owned domestic companies have dominated the local market, aided by supportive government policies and limited foreign competition. India has over 20,000 registered pharmaceutical manufacturers. The market dynamics have dramatically shifted since 1971: multinational companies' market share dropped from 75% to about 35%, while Indian companies' share rose from 20% to nearly 65%. With economic liberalization, these companies are now preparing to transition from

2 L. R. Helfer and G. W. Austin, "Human rights and intellectual property: mapping the global interface", *Cambridge University Press*, p. 90, (2011).

domestic focus to international market engagement. India ranks fourth globally in pharmaceutical production volume but thirteenth in sales. In 2005, the industry was valued at US$5.3 billion, representing less than 1% of the world market. Despite this, India's pharmaceutical sector has grown dramatically. By 2006, domestic companies supplied 95% of the national market, up from just 20% in 1970.

A. Definition and Characteristics of Generic Drugs

Generic drugs are pharmaceutical products that are essentially copies of brand-name drugs, typically with the same active ingredients, dosage, safety, strength, quality, and intended use. Unlike brand-name drugs, which are protected by patents and exclusivity rights, generic drugs are developed and marketed after the expiration of these protections.

B. The Regulatory Framework for Generics

The development and approval of generic drugs are subject to a robust regulatory framework, which varies across different jurisdictions. At the global level, the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights agreement has played a significant role in shaping the regulatory landscape for generic pharmaceuticals.[3]

In India, the Central Drugs Standard Control Organization is the primary regulatory body responsible for the approval and oversight of generic drugs.[4] The regulatory process for generics typically involves demonstrating bioequivalence to the original brand-name drug, thereby ensuring similar safety and efficacy profiles. The regulatory framework also includes measures to protect patient safety, such as post-market surveillance and pharmacovigilance.[5]

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3 Thomas A. Hemphill, "Pharmaceutical patent expropriation and technology strategy: strategic options to compulsory licensing", *Technology Analysis & Strategic Management*, 22(1), pages 19–41, (2009), doi: 10.1080/09537320903438039.

4 S.L. Lee, B. Saluja, A. García-Arieta, *et al,* "Regulatory Considerations for Approval of Generic Inhalation Drug Products in the US, EU, Brazil, China, and India", *AAPS Journal,* Volume 17, pages 1285–1304 (2015). https://doi.org/10.1208/s12248-015-9787-8

5 Sandeep Kumar Dhiman, Vikram Gummadi, *et al,* "Partnership Efforts – Their Potential to Reduce the Challenges that Confront Regulators and

C. Market Dynamics and Trends

The global generic pharmaceutical market has experienced substantial growth in recent years, driven by factors such as the expiration of patents on blockbuster drugs, increasing cost-consciousness in healthcare systems, and the growing demand for affordable medicines, particularly in developing countries.[6] India has firmly established itself as a global leader in the generic pharmaceutical industry, accounting for a significant share of the world's production and export of generic drugs.[7] The global generics market was valued at over $350 billion in 2021 and is projected to grow at a compound annual growth rate of around 8% between 2022 and 2030.

III. The Role of Generic Drugs in Access to Essential Medicines

A. Affordability and Accessibility

Access to medicines in developing countries is hampered by a confluence of factors, including inadequate healthcare infrastructure, shortages of healthcare professionals, ineffective regulatory oversight, and deficient procurement and distribution systems,[8] exorbitant drug prices.[9] However, a key factor driving both the unavailability and unaffordability of medicines is the existing intellectual property framework, which enables pharmaceutical companies holding monopolies to charge high prices, prioritizing profits over equitable access for the poor and underinsured while neglecting research into essential medicines for these populations.[10]

Pharmaceutical Industry", *Applied Clinical Research, Clinical Trials & Regulatory Affairs*, 2019, Volume 6, pages 7-17.

6 Ibid.

7 Andrieux-Meyer, Isabelle *et al*, "Disparity in market prices for hepatitis C virus direct-acting drugs", *The Lancet Global Health*, Volume 3, Issue 11, e676 - e677

8 Brook K. Baker, "Patents, Pricing, and Access to Essential Medicines in Developing Countries", *AMA Journal of Ethics, Virtual Mentor.* 2009;11(7):527-532. doi: 10.1001/virtualmentor.2009.11.7.pfor1-0907

9 Brook K. Baker, "Patents, Pricing, and Access to Essential Medicines in Developing Countries", *AMA Journal of Ethics, Virtual Mentor,* (2009), Volume 11, Issue 7, pages 527-532, doi: 10.1001/virtualmentor.2009.11.7.pfor1-0907

10 Ibid.

In this context, the rise of the generic pharmaceutical industry, particularly in countries like India, has played a crucial role in improving the affordability and accessibility of essential medicines. Indian pharmaceutical companies have been instrumental in driving down the prices of lifesaving treatments for conditions such as HIV/AIDS, tuberculosis, and hepatitis C, making these therapies more accessible to patients in developing countries.

B. The high cost of brand-name medicines and the role of generics in reducing costs

The TRIPS agreement established minimum global standards for intellectual property rights, encompassing patents, copyrights, and trade secrets, including pharmaceutical products.[11][12][13][14] It addresses fundamental principles, standards, enforcement, dispute resolution, and other related matters.[15] Member countries are obligated to provide at least 20 years of patent protection from the filing date for inventions meeting novelty, inventiveness, and utility criteria.[16]

The TRIPS agreement eliminated pre-existing variations in patent rules, such as exclusions for medicines and preferential treatment for local products, thereby granting multinational pharmaceutical companies greater control over production locations[17]. This consolidated their global monopoly power, giving them exclusive rights to restrict the manufacture, use, sale, and import of patented pharmaceuticals[18,19] Consequently,

11 Intellectual Property (TRIPS) - Fact Sheet - Pharmaceuticals, 2011
12 Overview of TRIPS Agreement, 1996
13 Intellectual Property (TRIPS) Agreement, 2017
14 TRIPS Agreement, 2023
15 Sigrid Sterckx, "Patents and Access to Drugs in Developing Countries: An Ethical Analysis", *Developing World Bioethics*, Volume 4, Issue 1 p. 58-75, (2004).
16 Overview of TRIPS Agreement, 1996.
17 Access to Medicines and Knowledge, and the "Trade-Related Intellectual Property Rules (TRIPS)" Agreement of the WTO, 2024.
18 Ibid.
19 Hemphill, T. A., "Pharmaceutical patent expropriation and technology strategy: strategic options to compulsory licensing", *Technology Analysis & Strategic Management*, Volume 22, Issue1, pages 19–41, (2009) doi: 10.1080/09537320903438039.

patent holders often leverage this power to charge monopoly prices, maximizing profits by selling medicines at high prices to affluent consumers in developing countries, even if this excludes the majority of the population.[20,21]

C. Impact on Public Health

The availability of affordable generic medicines has had a profound impact on public health, particularly in developing countries. The increased access to quality-assured and affordable generic drugs has contributed to significant improvements in health outcomes, such as reduced mortality rates and increased life expectancy.

Despite these successes, significant challenges remain in ensuring equitable access to essential medicines, particularly for non-communicable diseases, which are on the rise globally.

Pharmaceutical patents keep drug prices significantly higher than production costs, limiting access to essential medicines.[22] This was evident during the late 1990s HIV/AIDS crisis, when an estimated 40 million people in developing countries, including 24.5 million in sub-Saharan Africa, were infected with HIV.[23] At that time, only a tiny fraction had access to ARV treatment, resulting in over 8,000 daily deaths in the developing world.[24] While effective ARVs were available in wealthy nations by 1996, they remained largely inaccessible or prohibitively expensive in low- and middle-income countries due to patent protection.[25]

The role of generic pharmaceutical firms, particularly in countries like India, has been critical in driving down the prices of essential medicines and expanding access. The importation and local production of generic ARVs, facilitated by India's liberal patent laws, allowed prices to

20 Ibid.
21 Richard D. Smith, *et al.*, "Trade, TRIPS, and pharmaceuticals", *The Lancet*, Volume 373, Issue 9664, pages 684 – 691.
22 Ellen 't Hoen, *et al.*, "Driving a decade of change: HIV/AIDS, patents and access to medicines for all", *Journal of the International AIDS Society,* Volume 14, Issue 1 p. 15-15, (2011).
23 Ibid.
24 Ibid.
25 Ibid.

drop from over $10,000 to under $300 per patient per year.[26,27] This has enabled millions of people in developing countries to access life-saving HIV treatment.

Generic ARV production, largely centred in India due to its patent laws since 1970, has expanded access to these medications in Africa and Asia. Exploiting patent loopholes that allowed new patents for minor manufacturing modifications, Indian companies offered HIV drugs at a fraction (as low as 4%) of brand-name prices. Indian manufacturers also developed coformulations of ARVs, potentially simplifying treatment regimens and reducing errors, treatment failure, and drug resistance. However, newer patent legislation in India may hinder the development of such beneficial products.

Similar trends have been observed for other essential medicines, such as those used to treat tuberculosis, hepatitis C, and certain types of cancer. The availability of affordable generic drugs has been instrumental in advancing public health goals, reducing mortality rates, and improving life expectancy in resource-limited settings.[28,29,30,31]

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26 Diane V. Havlir, *et al*, "Patents versus Patients? Antiretroviral Therapy in India", *The New England Journal of Medicine*, (2005), Volume 353, pages 749-751, DOI: 10.1056/NEJMp058106.

27 W. Byanyima, "HIV or COVID-19, inequity is deadly", *Nature Human Behaviour,* Vol. 6, pg. 176 (2022).

28 Richard D. Smith, *et al.*, "Trade, TRIPS, and pharmaceuticals", *The Lancet*, Volume 373, Issue 9664, pages 684 – 691.

29 Ellen 't Hoen, *et al.*, "Driving a decade of change: HIV/AIDS, patents and access to medicines for all", *Journal of the International AIDS Society,* Volume 14, Issue 1 pages 15-15, (2011).

30 Ellen 't Hoen, T. Kujinga, & P. Boulet, "Patent challenges in the procurement and supply of generic new essential medicines and lessons from HIV in the southern African development community (SADC) region", *Journal of Pharmaceutical Policy and Practice,* Volume 11, Issue 31 (2018). https://doi.org/10.1186/s40545-018-0157-7

31 Hema Viswanathan and J. Warren Salmon, "India's Pharmaceutical Industry: A Growing Influential Force in the World Pharmaceutical Market", *Journal of Managed Care Pharmacy*, Volume 8, Number 3, https://doi.org/10.18553/jmcp.2002.8.3.211

IV. India's Role in the Global Generic Pharmaceutical Market

The Indian Patents Act, 1970 eliminated pharmaceutical product patents based largely on the 1959 Ayyangar Commission's recommendations. The Commission argued that patent laws should reflect a country's economic conditions, scientific capabilities, and future requirements, while minimizing potential monopolistic abuse. This approach was designed to ensure medicines remained affordable for the public.

Under India's resulting patent law, which excluded pharmaceutical product patents, Indian generic manufacturers could produce combination HIV/AIDS medications (ARVs) at dramatically lower prices than those charged by multinational pharmaceutical patent holders. The absence of patent restrictions also enabled Indian companies to develop fixed-dose combination ARVs, which became crucial tools in expanding global HIV/AIDS treatment.

The evolution of the Indian pharmaceutical industry post-TRIPS compliance

When India reintroduced pharmaceutical product patents on January 1, 2005 to comply with TRIPS requirements, it sparked worldwide concerns about Indian companies' ability to continue supplying generic medicines. Recognizing its responsibility to patients both domestically and globally, India's Parliament responded pragmatically by implementing TRIPS flexibilities to help maintain medicine availability, affordability, and accessibility.

Generic medicines offer substantial cost savings, typically ranging from 30% to 80% less than their brand-name counterparts.

The UN Secretary General's Special Envoys on HIV/AIDS for Asia Pacific and Africa made an unprecedented joint appeal to India's government in 2005, emphasizing how Indian generic HIV medications were crucial for achieving universal treatment access.[32]

32 Ibid.

V. Patent Laws in India

A. Overview of the Patent System

The extent of patentability in India has been largely determined by the Patents Act[33], 1970 and its later amendments. Important clauses like the method for compulsory licensing and Section 3(d)[34], which prohibits the "evergreening" of patents, have drawn attention and scrutiny from all over the world. These clauses have been crucial in preserving a balance between the public interest and patent protection, but they have also resulted in disputes with industrialized nations and international pharmaceutical companies that seek more robust IP protections[35].

B. TRIPS Compliance and Amendments (2005)

India was required to abide by the Trade-Related Aspects of Intellectual Property Rights (TRIPS)[36] Agreement when it joined the World Trade Organization (WTO)[37] in 1995. India's generic medication business faced a major obstacle when TRIPS required the creation of product patents in all technological domains, including pharmaceuticals.

India changed the Patents Act in 1999, 2002, and 2005 to conform to TRIPS. The Patents (Amendment) Act of 2005 brought about the most notable modifications, which:

1. Product patents for chemicals, food, and pharmaceuticals have been reinstated.

2. Stricter standards for patentability, with the addition of Section 3(d) to stop "evergreening"—the technique of prolonging a patent's life by small changes.

3. Permitted mandatory licensing under certain restrictions, guaranteeing that patents could not be used to prevent access to necessary medications.

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33 The Patents Act, 1970 (Act 39 of 1970), s 2(j).
34 Bayer Corporation v. Natco Pharma Ltd., (2014) 7 SCC 102.
35 Novartis AG v. Union of India, (2013) 6 SCC 1.
36 Shamnad Basheer, “India’s Tryst with TRIPS: The Patents (Amendment) Act, 2005”, *Journal of Intellectual Property Law*, Vol. 10, 2005, page 65.
37 WTO, “Compulsory Licensing of Pharmaceuticals and TRIPS Flexibilities,” available at https://www.wto.org (last visited Jan. 28, 2025).

4. Stakeholders can now contest pointless patents thanks to established pre-grant and post-grant opposition procedures.

C. Key Features of the Patents Act, 1970

India's dedication to promoting indigenous businesses, especially medicines, while preserving public health was reflected in the original Patents Act, 1970[38], which superseded the Patent and Designs Act, 1911, which was passed during the colonial era. When it comes to drugs, some of the Act's most significant aspects are:

1. Exclusions from Patentability (Section 3 and Section 4):

- **Section 3:** Outlines what cannot be patented in India, including:
  - **Section 3(d):** prohibits new formulations of recognized substances from being patented unless they show a notable improvement in efficacy. This clause inhibits "evergreening," which is the practice of making little changes to already-approved medications in order to prolong their patents without actually innovating.
  - **Section 3(e):** Prohibits patents for mere admixtures resulting in the aggregation of properties.
  - **Section 3(i):** Excludes methods of medical, surgical, or diagnostic treatment.
- **Section 4:** Prohibits patents for inventions related to atomic energy.

2. Process Patents in Pharmaceuticals (Pre-2005): Pharmaceuticals were only eligible for process patents prior to the 2005 amendment. This promoted the expansion of the Indian pharmaceutical business by enabling Indian firms to reverse-engineer medications and create affordable methods for making generic medications.

3. Opposition Mechanisms: The Act provides robust mechanisms for challenging patents:

- **Pre-grant opposition (Section 25(1))**: Enables any person to oppose a patent application before it is granted.
- **Post-grant opposition (Section 25(2))**: Allows any person to challenge a granted patent within one year of its grant.

38 The Patents Act, 1970 (Act 39 of 1970), s 84.

4. Compulsory Licensing (Section 84 and Section 92):

- **Section 84:** Permits third parties to be granted forced licenses in the event that the patented invention is not properly developed in India, is not reasonably priced, or does not satisfy public demand[39].
- **Section 92:** Enables compulsory licenses during national emergencies or extreme urgency.

D. Amendments in 2005

The **Patents (Amendment) Act, 2005** was introduced to bring India into compliance with the **TRIPS Agreement**. The 2005 amendments fundamentally altered the patent landscape in India, particularly for the pharmaceutical sector.

1. Introduction of Product Patents:

- The reinstatement of product patents for chemicals, food, and pharmaceuticals was the biggest shift.
- Because businesses could no longer produce generic versions of proprietary medications using alternate techniques, this put an end to the age of process patents and presented difficulties for the generic pharmaceutical sector[40].

2. Strengthening Section 3(d):

- **Section 3(d)**, a unique provision, was explicitly strengthened to address evergreening practices.[41]

Section 3(d) harmonizes the patent system with public health objectives by incentivizing pharmaceutical companies to concentrate on significant discoveries that improve therapeutic efficacy.

Section 3(d) and Sections 84 and 92, which require compulsory licensing, are examples of provisions that show India's dedication to upholding its international commitments under the TRIPS Agreement while putting public health first.

39 Pfizer Products Inc. v. Union of India, W.P. (C) 4417/2012 (Del HC).
40 UNDP, "Patent Pools and Public Health," Policy Brief, 2018, available at https://www.undp.org (last visited Jan. 28, 2025).
41 Cipla Ltd. v. Union of India, (2012) 44 PTC 17 (Del).

- In **Novartis AG v. Union of India (2013)**[42]Since the altered version of the medication failed to show improved therapeutic efficacy, the Supreme Court maintained the denial of Novartis' patent application for the cancer medication Glivec. This historic case underlined India's resolve to prioritize access to necessary medications over pointless patents.

3. Pre- and Post-Grant Opposition:

- Increased inspection of patent applications was made possible by improved opposition processes provisions, which gave interested parties—including generic manufacturers—the opportunity to contest weak or pointless patents.

4. Compulsory Licensing Provisions:

- The **2005 amendment** retained and strengthened provisions for **compulsory licensing**.
- The **Natco Pharma v. Bayer Corporation (2012)**[43] case was the first time Section 84's mandatory licensing was used. Since Bayer had not made its cancer medication Nexavar accessible or inexpensive in India, Natco was given permission to manufacture a generic version of the medication.

E. Patentability Criteria Under Indian Law

Under the **Patents Act, 1970**[44], as amended, an invention is patentable if it satisfies the following three criteria:

1. **Novelty (Section 2(1)(l)):**

o An invention must be novel, which means that previous work hasn't foreseen it. Any information made public in India or elsewhere prior to the date of patent filing is considered prior art.

o This implies that the chemical ingredient, formulation, or manufacturing process in pharmaceuticals should not have been revealed in any way. A brand-new molecular entity, for instance, would meet the novelty criteria.

42 Novartis AG v. Union of India, (2013) 6 SCC 1

43 Natco Pharma Ltd. v. Bayer Corporation, Compulsory Licence Application No. 1 of 2011 (Controller of Patents).

44 The Patents Act, 1970 (Act 39 of 1970), section 2(1)(ja).

2. **Inventive Step (Section 2(1)(ja)):**

o For an invention to be considered non-obvious to a knowledgeable practitioner, it must incorporate an innovative step.

o For the pharmaceutical industry, this may entail proving that a novel medicinal molecule, formulation, or dose offers a noteworthy improvement over current products or a surprise technological benefit. However, incremental advances, such as polymorphs or new versions of existing medications, are especially difficult to prove innovative steps.

3. **Industrial Applicability (Section 2(1)(ac)):**

o Any industry must be able to make or use the invention. This requirement is frequently satisfied for pharmaceuticals if the innovation has a medicinal use and can be manufactured commercially[45].

VI. The TRIPS Agreement and its Impact on Pharmaceutical Patents

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has been a subject of intense debate and criticism since its inception in 1995. As technology evolves and global health crises emerge, the dialogue surrounding TRIPS has intensified, particularly concerning the balance between fostering innovation and ensuring access to essential medicines. While patents can encourage the development of new medicines, they must be managed carefully to avoid hindering access to essential medications for the Indian population.[46] While patents can incentivize innovation, they are not the sole driver, and alternative mechanisms can play a significant role.[47]

A. Post-Pandemic IP Landscape

With the WHO declaring the COVID-19 global health emergency over, the urgency surrounding global health discussions has diminished. The pandemic brought intense focus to intellectual property's role in

45 Sudhir Krishnaswamy, "Compulsory Licensing and Its Discontents: A Review of Bayer v. Natco", *Journal of Intellectual Property Rights*, Volume 18, (2013), page 75.

46 Jay Shambaugh, *et al*, "Eleven facts about innovation and patents", *The Hamilton Project*, (2017).

47 Paul Herrling, "Patent sense", *Nature* 449, 174–175 (2007).

accessing health technologies, leading to initiatives like the TRIPS waiver proposal, C-TAP, and various national/regional efforts to boost health goods production, all prioritizing public need over profits and monopolies.[48]

This shift in focus from profit to public need resonates with the discussion of pharmaceutical patent reform in India within your document. The proposed reforms, such as documenting traditional knowledge and developing a sui generis system, aim to ensure access to essential medicines for the Indian population, reflecting a similar prioritization of public health over exclusive rights.[49]

The TRIPS Waiver

The India/South Africa TRIPS waiver proposal during the COVID-19 pandemic highlighted the tension between intellectual property and access to health technologies. The proposal's broad support signalled widespread dissatisfaction, concern, and mistrust, particularly in the Global South, where scepticism exists about the TRIPS agreement's ability to balance IP protection with access to innovation.[50,51]

Many felt frustrated by the perceived hoarding of vaccines and essential health technologies by the EU and G7 nations, which further fuelled support for the TRIPS waiver.[52] The TRIPS waiver proposal and subsequent discussions leading up to the 12th WTO Ministerial Conference exposed deep divisions regarding the role of intellectual

48 Ezekiel J Emanuel, *et al*, "Obligations in a global health emergency", *The Lancet*, Volume 398, Issue 10316, page 2072, December 04, 2021.

49 Salla Sariola, "Intellectual property rights need to be subverted to ensure global vaccine access", *BMJ Global Health*, Vol. 6, Issue 4, (2021).

50 WTO, "Members discuss TRIPS waiver request, exchange views on IP role amid a pandemic", (2021), available at: https://www.wto.org/english/news_e/news21_e/trip_23feb21_e.htm, accessed on: August 24, 2024.

51 M. Okereke and M.Y. Essar, "Time to boost COVID-19 vaccine manufacturing: The need for intellectual property waiver by big pharma", *Ethics, medicine, and public health,* Volume 19 (2021).

52 "The European Union's vaccine-acquisition strategy" (2021) *Strategic Comments*, 27(4), pages i–iii; Fatima Bhutto, "The world's richest countries are hoarding vaccines. This is morally indefensible", *Opinion*, 17 March, 2021; Gavin Yamey, "Ensuring global access to COVID-19 vaccines", *The Lancet*, Volume 395, Issue 10234, pages 1405-1406, May 02, 2020.

property protection for health technologies. The need for new approaches is widely recognized.

VII. Reforms Needed in India's Pharmaceutical Patent laws

A. Suggestion to link generic approvals with patents

In India, generic drug manufacturers can seek marketing approval even if the originator drug's patent is valid, but they cannot launch the generic while the patent remains in force.[53] Different authorities handle patent grants and marketing approvals, without coordination or a "patent linkage" system. Unlike the US "orange book," India lacks a centralized register of patented pharmaceuticals, forcing generic manufacturers to launch drugs at their own risk, often unaware of potential patent conflicts.[54] While Bristol-Myers Squibb attempted to establish a form of patent linkage through legal action, formal linkage proposals face obstacles.[55] As a temporary measure, the DCGI now requests patent information from the industry to consult with the Indian Patent Office before approving generics.[56]

B. Biological Products

Biotechnology patents face the challenge of proving "novelty," demonstrating that an invention is a new process, not simply a natural one, and the first of its kind globally. Patent eligibility requires meeting criteria for subject matter, utility, novelty, non-obviousness, and lack of prior

53 Vijaypriya Lalgudi Ramachandran, "A Critical Study of Access to Medicines in Light of Indian Patent (Amendment) Act, 2005", *SSRN Blog,* (March 15, 2020). Available at SSRN: https://ssrn.com/abstract=3554639 or http://dx.doi.org/10.2139/ssrn.3554639

54 Pallavi Mahajan, "Advent of Intellectual Property Rights in the Pharmaceutical Industry" (May 13, 2011). Available at *SSRN*: https://ssrn.com/abstract=1840627 or http://dx.doi.org/10.2139/ssrn.1840627

55 Hamida K. Serajuddin and Abu T.M. Serajuddin, "Value of Pharmaceuticals: Ensuring the Future of Research and Development", *Journal of the American Pharmaceutical Association*, Volume 46, Issue 4, pages 511-516, July-August, 2006.

56 Jae Sundaram, "India's trade-related aspects of Intellectual Property Rights compliant pharmaceutical patent laws: what lessons for India and other developing countries?", *Information & Communications Technology Law*, Volume 23, Issue 1, pages 1–30. doi: 10.1080/13600834.2014.891310.

disclosure. Demonstrating novelty is particularly difficult in biotechnology, where inventions often build upon naturally occurring processes. Gene-editing technology exemplifies this challenge, especially after the *Myriad v. Association for Molecular Pathology*[57] Supreme Court decision. Many biotech firms find patent law unclear regarding biomolecules like nucleic acids and polypeptides, with eligibility determinations remaining subjective.[58] Further concerns include limitations on allowable products under Section 3(d) and requirements to disclose the geographical origin and source of biological materials, which some firms believe could expose them to opposition.[59]

C. The Patents ahead

Despite expanding their presence in India, major pharmaceutical companies remain wary of patent infringement and are cautious about introducing new products until patent effectiveness is proven. A key long-term concern is "evergreening," where minor improvements are patented to extend protection, potentially hindering access to medicines, especially in developing countries, by maintaining high drug prices compared to generics.[60] This poses a significant problem for low-income and underserved populations who may be unable to afford these higher costs. Additionally, the evolving patent laws in developing countries create uncertainty about patent eligibility and enforceability, making these markets a testing ground for pharmaceutical products.[61]

57 Mateo Aboy, Johnathon Liddicoat, *et al,* "After *Myriad*, what makes a gene patent claim 'markedly different' from nature?", *Nature Biotechnology*, Volume 35, pages 820–825 (2017).

58 Leah Octavio, "The Patent Eligibility of Personalized Medicine Technologies", *Journal of Legal Medicine*, Volume 35, Issue 3, pp.423-431, (2014).

59 Lara Ionescu Silvermann, Flagg Flanagan, *et al*, "Identifying and Managing Sources of Variability in Cell Therapy Manufacturing and Clinical Trials", *Regenerative Engineering and Translational Medicine*, Volume 5, pages 354–361, (2019).

60 Feroz Ali, Sudarsan Rajagopal, "Rampant evergreening in Indian pharma industry", *The Mint,* 30 Apr 2018.

61 Shamnad Basheer, "Trumping TRIPS: Indian patent proficiency and the evolution of an evergreening enigma", *Oxford University Commonwealth Law Journal*, (2018), Volume 18, Issue 1, pages 16–45.

The Tarceva case[62] highlights the complexities of pharmaceutical patenting in India. Roche's Tarceva patent, granted in 2007 after an application in 1996, was challenged by Cipla's 2008 launch of a generic version.[63] Despite Roche's infringement lawsuit, the Delhi High Court allowed Cipla to continue selling its generic due to the significant price difference, prioritizing public access to affordable medication. This decision marked the first time an Indian court considered public interest in an injunction ruling. While multinational corporations employ "evergreening" to extend patents, Section 3(d) aims to protect patients from high drug prices. However, innovator companies argue this prevents them from recouping drug development costs. Such cases highlight the need for specialized legal expertise in India's legal system, while the government balances public interest with international pressure.[64]

Researchers should consult patent experts before applying for a patent, carefully considering patentability requirements. India's patent law aims to balance inventor and public interests, but its complexity requires expert guidance.

D. Recommendations for Reform in Patent Laws in India

India's patent law includes strong protections that, if rigorously enforced, could significantly reduce patent-related obstacles to affordable generic drug production. Recent court decisions and Patent Office precedents suggest that many of these provisions are indeed being interpreted and applied robustly.

While India's patent law has safeguards to limit questionable patents, these provisions aren't consistently applied unless challenged by civil society or generic competitors.[65] Furthermore, difficulty accessing legally

62 F. Hoffmann-La Roche Ltd. And Anr. vs Cipla Limited, 148(2008)DLT598.
63 Ibid.
64 Ayush Sharma, "Section 3(D) Of Indian Patents Act 1970: Significance And Interpretation", *Mondaq*, 26 February 2014, available at: https://www.mondaq.com/india/patent/295378/section-3d-of-indian-patents-act-1970-significance-and-interpretation; accessed on December 02, 2024.
65 Sandeep Rathod, "The Curious Case of India's Bolar Provision", *SSRN,* (May 21, 2017). Available at

mandated public information hinders full participation by these groups in opposing such patents.[66,67]

That there exists difficulty accessing granted patent information suggests a need for a more thorough analysis of how patent provisions are interpreted and implemented by Patent Offices, once such information becomes readily available. However, this initial assessment proposes immediate policy reform options for the Indian government's consideration:

- **Expedite the process of making patent information online:** Make all patent information, including applications, granted patents, specifications, examination reports, decisions, oppositions, and applicant-Patent Office correspondence, readily available and searchable online.[68]
- **Facilitate access to information at each of the Patent Offices:** Decentralize patent information, making details of applications and granted patents from any patent office accessible at all patent offices.[69]
- **Clarify through patent examination guidelines or through legislative change the robust exclusions:** Use patent examination guidelines or legislation to clarify and strengthen the exclusions of new

SSRN: https://ssrn.com/abstract=2971521 or http://dx.doi.org/10.2139/ssrn.2971521

66 Vijaypriya Lalgudi Ramachandran, "A Critical Study of Access to Medicines in Light of Indian Patent (Amendment) Act, 2005", *SSRN*, (March 15, 2020). Available at *SSRN*: https://ssrn.com/abstract=3554639 or http://dx.doi.org/10.2139/ssrn.3554639

67 Yogesh Pai, "The Growing Irrelevance of a TRIPS Challenge to India's Patent Law", (October 13, 2015), *Prof. Won-Mog Choi (Eds), International Economic Law: Asia Pacific Perspectives,* published by *Cambridge Scholars Publishing, London* (2015), Available at SSRN: https://ssrn.com/abstract=2779682

68 Lemley, Mark A., and R. Anthony Reese. "Reducing Digital Copyright Infringement without Restricting Innovation." *Stanford Law Review*, Volume 56, no. 6, 2004, pages 1345–434. *JSTOR*, http://www.jstor.org/stable/40040194, Accessed 14 May 2025.

69 Sudip Chaudhuri, Chan Park, *et al,* "Five Years into the Product Patent Regime: India's Response" *United Nations Development Programme, Poverty Reduction and HIV/AIDS* (2010)

use, method of treatment, and "Swiss-style" claims to prevent applicants from circumventing these exclusions.[70]

- **Strengthen the interpretation of section 3(e):** Reinforce the interpretation of Section 3(e) to mandate a strong demonstration of synergy for composition, formulation, and dosage form claims. This synergy requirement should be distinct from inventive steps, recognizing that formulation techniques and compound ranges for pharmaceutical product development are generally known to those skilled in the art.[71]

- **Clarify the definition of non-patentable products under section 3(d):** Patent examination guidelines or legislation should clarify that common "advantageous properties" resulting from converting a known drug into a new form, such as improved bioavailability, potency, stability, hygroscopicity, flow properties, or ease of manufacture, are not patentable under Section 3(d).[72]

E. Reforms needed in the TRIPS Agreement and its applicability for developing and least developed countries

The criticisms of TRIPS highlight the complex challenge of designing a global IP system that can accommodate the diverse needs and capacities of countries at different stages of development. They also underscore the tension between private rights and public interests in the realm of intellectual property.[73]

As global challenges like climate change, pandemics, and food security become more pressing, the debate over TRIPS is likely to intensify. Future reforms or alternatives to TRIPS will need to grapple with balancing innovation incentives with broad access to knowledge and

70 Sudip Chaudhuri, Chan Park, *et al,* "Five Years into the Product Patent Regime: India's Response" *United Nations Development Programme, Poverty Reduction and HIV/AIDS* (2010).

71 Ibid.

72 Ibid.

73 Z. Jafri, "The Exceptions to Patent Rights under the WTO-TRIPs Agreement: Is the Right to Health Denied?", (February 7, 2009). Available at *SSRN*: https://ssrn.com/abstract=2213216 or http://dx.doi.org/10.2139/ssrn.2213216.

technologies, ensuring that the global IP system serves the needs of all countries and promotes sustainable and equitable development.[74]

Conclusion

The relationship between intellectual property rights and access to pharmaceuticals is complex and multifaceted. The mere existence of IPRs doesn't guarantee innovation or prevent generic competition. IPRs' value varies significantly across countries and drugs, with unenforced or low-profit potential IPRs holding little weight. While patented drugs typically command higher prices, this premium has decreased following TRIPS compliance, possibly due to increased price controls and other countermeasures.

India presents a compelling case study in the discourse surrounding intellectual property and development, demonstrating how a developing nation can strategically leverage patent law to align with its unique developmental objectives. Through astute interpretation and implementation of international agreements, India has sculpted its patent regime to foster domestic innovation while remaining compliant with global standards.[75]

The proposed reforms, such as documenting traditional knowledge and developing a sui generis system, aim to create a more balanced approach that considers the specific characteristics of the Indian pharmaceutical sector and its reliance on both patent and non-patent mechanisms for innovation. The goal is to foster innovation while ensuring access to essential medicines for the Indian population.

74 Allison Bostrom and Shivani Nayyar, "Fit for purpose? The patents regime, the Fourth Industrial Revolution, and sustainable development", *Data & Policy*, 5, p. e18. doi:10.1017/dap.2023.17.

75 Shamnad Basheer, "Trumping TRIPS: Indian patent proficiency and the evolution of an evergreening enigma", *Oxford University Commonwealth Law Journal*, (2018), Volume 18, Issue 1, pages 16–45.

New approach towards reservations & rationalization thereof. Sub- categorisation for unrepresented Scheduled tribes & Scheduled castes. Subsuming all statutory reservations in OBCs.

Pandit Nehru's "tryst", on the stroke of midnight intervening August 14 & 15, 1947 heralded the promised beginning of modern India where inter-alia the individual potential of her denizens shall countenance no fritters in expanding on all directions within & beyond the shores of Country. Confronted by reality of abysmal & disrespectful life and deplorable living conditions of Scheduled Castes and Tribes & their societal ostracism coupled with vehemence with which the members of the constituent Assembly pleaded for reservations for them, the acknowledged man of twentieth century had to acquiesce for affirmative action plan for them in the form of reservations in Govtt services, Lol Sabha and State Legislative Assemblies. Its inevitability also lay in The Govtt of India Act 1935 mandating representation on communal basis between the two major communities & under the subterfuge of social justice special dispensations for marginalised communities including SCs, Women and labourers.

Legal framework

3) Articles 15(4) & 16(4) of the Constitution of India govern reservations for SCs, STs & other socially & educationally backward classes from out of the Indian Citizens. Article 15(3) & (4) form two exceptions to the guarantees provided under Article 15 (1) & (2) against every form of discrimination by the State on the basis of only religion, Caste, race or Sex. Under the first, the State has been enabled to make special provisions for the benefit of Women and Children and under Second the same benevolent demeanor extended for advancement of SCs, STs & Socially & educationally backward classes. Article 335 makes a special provision for taking into consideration the claims of STs & SCs thereby acting as an inalienable shield for them against any arbitrariness of the State. Article 16(4) specifically empowers the State to make provisions for the reservation in appointments or posts in favour of backward classes who in the opinion of the State on the basis of

quantifiable data, generated in Survey conducted by relevant State personnel, aren't adequately represented in the State Services. Under Article 366 (24) & (25) Schedule Castes & Schedule Tribes have been respectively defined & it is President who under Article 341 by public Notification specifies castes, races or tribes or parts of the respective three categories as "Schedule Castes" & under Article 342 "Schedule Tribes ". The SCs have 15% & STs 7.5 % reservations in central services and other Institutions under control of the Union Govtt at national level & in Lok Sabah their share proportionate to their respective population.

Backward classes

Under the Govtt of India Act of 1935 the electoral rights were exercisable by not more than 12% of the population of British India which propelled into political activism heretofore dormant segments of the Indian political landscape who after independence had greater expectations for their amelioration by getting rid of poverty and assured dignity of lives & share in Govtt jobs. In tandem with constitutionally guaranteed reservations for SCs & STs, these people equally at the receiving end on the basis of socio - economic indicators galvanized for their pie from out of national resources and employment opportunities prompting the Govtt to set up Ist Backward classes Commission in 1953 (Kalelkar Commission) who submitted report in 1955 but couldn't be implemented due to identification of huge magnitude of castes as backward and out them equally large number of castes as most backward amongst the backward classes. To overcome the fall out of the political, social and economic aspirations of backward classes, the concept of casteless society was disseminated without a road map for their all-round and holistic development and economic growth. In sixties & seventies the socialists including leaders from backward classes in Jan Sangh (precursor to BJP) rallied around the fulcrum of social justice resulting in establishment of Mandal Commission (MC) in 1979 (2nd Backward classes Commission) who submitted its report during 12/1980 but remained pending for want of implementation till 1990 when V. P. Singh led coliation Govtt accepted the report.

The eleven point social, economic and educational indicators spelt out by the MC for determining the entitlement of a caste or Class in a State or District to be specified as backward are as relevant in today's context as they were during 1979 - 1980 period. This can be appreciated by referring to the planks adopted by the MC for declaring Castes or Classes as backward provided they had scored out of 11 indices 11 viz State or Distt averages. These included Manual Labour for livelihood, Kacha residential Houses, share in Govtt jobs, literacy rates, share of Matriculates & Graduates, Male and Female marriage ages in rural and urban areas, participation of women in works, number of children out of Schools, student dropouts, average value of family assets and incidence of Household consumption loans .The report accepted by the Govtt covers 54.4 % population of the Country as members of the backward classes but percentage of reservation halved by restricting it to 27% only. This was a conscious decision taken by the Commission & accepted by the Govtt without introducing any modifications leading to overall percentage of reservations capped @ 50 % & in the process the principle of earmarking percentage for reservations proportionate to population as for as practicable reiterated clearing decks for reducing the percentage of statutory reservations for purposes of not exceeding 50 % moratorium fixed by Apex Court in myriad cases and an acknowledgement of difference between SCs & STs on one side of the spectrum and Backward classes and others on its other side. The total reservations in Govtt of India for SCs, STs & OBCs by now is 49.5 % .By 103rd Constitutional Amendment Act 2019 10% reservations for Economically Weaker Sections from out of the OM category has been made reducing the quota to 40.5% for general category candidates. 4% reservation for persons with disabilities and 10 to 20 % for Ex- servicemen is horizontal cutting across all categories. Practically the percentage of reservation has risen to 59.5% apart from horizontal for physically challenged & Ex-servicemen(intra each category depending upon the roaster points).

Judicial interventions

A nine Judge Constitutional Bench of the SC in Indra Sawhney & Others V/s Union of India (1992) upheld 27% reservation for OBCs but

introduced the concept of " Creamy layer" in order to disable the affluent sections from OBCs from taking benefit of reservations, reiterated & capped 50 % limit on reservations and laid down law disallowing reservations in promotions. The embargo on reservations in promotions was undone through Constitution Amendment Act 1995 which was also upheld in M. Nagaraj V/s Union of India (2006) . 10% reservations for EWSs brought in under 103rd Constitutional Amendment Act 2019 was also upheld by the Supreme Court (SC) on November 7,2022 in Janhit Abhiyaan Vs Union of India.

Scenario in J&K

Sheikh Mohammed Abdullah, the Great Helmsman of J&K, in Introduction to Naya Kashmir 1944, a Politico- socio – economic treaties during freedom struggle , has referred to Vladimir Lenin's quotes like " Progress is a relay race. It is no easy race… … .. But every new generation has received the torch from bleeding hands of men of thought & light… … " and while concluding he pledged to " build again men & women of our State who have been dwarfed by centuries of servitude & create a people worthy of our glorious motherhood. " The structure of State Constitution (now repealed) therefore envisaged social justice which gained popularity and prominence in rest of the Country only from mid seventies.

From 1947 to 1967, in absence of codified reservations, the appointments to Govtt Jobs were being made by the Govtt Deptts themselves or by the Recruitment Boards wherever provided who in their own wisdom would take into consideration the socio- economic status of the candidates & their respective domicile areas while finalising the selections and nominations. The entry into Govtt services was used as a bait for seeking political legitimacy to post 1953 era, fully patronised by the Union Govtt. The recruitment to the gazetted posts was through the successor forum of pre- partition State Agency & from 1957 by J&K Public Service Commission.

Based on the recommendations of P. B. Gajindergadkar Commission, the State Govtt vide order No 252-GD of 1969 Dated February 3, 1969 appointed a Committee headed by J. N. Wazir, Retd

Chief Justice J&K HC, for identification of Backward classes in the State on the basis of their social and educational backwardness . Acting on the recommendations of Wazir Committee the State Govtt formulated The J&K Schedule Castes & Backward classes ((Reservation) Rules 1970 and The J& K Scheduled Castes and Backward classes Reservation (Appointment by promotion) Rules 1970. These Rules came before Apex Court in WP Nos 175, 359 & 360 of 1979 titled Janki Prasad Parimoo and others V/s The State of J&K and others. The court identified areas of defects in the impugned Rules and till their rectification the Rules declared not capable of being given effect to. In compliance with this Decision a Committee under Chairmanship of Justice Dr Adarsh Sen Anand was constituted under Govtt order No 540-GR of 1976 Dated 24.08.1976 for addressing the drawbacks pointed out earlier by the Apex Court together with other related matters. Against Wazir committee restricting to social and educational paradigms the Anand Committee was tasked to include economic indicators also while determining backwardness for purpose of identifying classes or sections thereof as backwards. Anand Committee in its recommendations made a paradigm shift in identification of Socially & educationally backward classes by adopting area specific approach on the basis of social, educational and economic indicators & consequently all genuine residents irrespective of castes in an area or village declared backward become eligible for reservations including those persons residing in the areas adjoining Line of Actual Control subject to fulfillment of prescribed conditions. The other sections of the Society declared weak and under privileged (social castes) were traditionally stigmatised on the basis of hereditary caste based professions resulting in their backwardness & ostracization from general societal fabric. Subsequent to acceptance of Anand committee report & its recommendations, the Dy Commissioners and Directorate of Economics and Statistics were charged with responsibility for verifications on fresh representations & quite a good number of areas or Villages came to be notified as backward areas and also additional caste based classes till fresh Constitution of Backward classes Commissions from 1993 (K. K Gupta led Commission) till date who too have

recommended to the Govtt the inclusions of areas or Villages in great numbers as backward areas / Castes as Social Castes (now OBCs) little realising that the criterion followed has already become pass`e & outdated. These commissions without any exception have perpetuated the inclusions of new areas or Villages as backward without ever caring about excluding the areas or Villages who by now no longer qualified to subsist as backwards. Similar is the status of other categories, be it areas falling within the Line of Actual Control Or other Social Castes. The Supreme Court has recently upheld the decision of Madras High Court whereunder in respect of 10.5 % internal quota for Vanniyars within most backward classes of Tamil Nadu under the Act of 2021 was struck down on the ground of " antiquated data". In absence of a proper survey based on criteria akin to one adopted by the MC, all additions made by the Govtt on the recommendations of the Govtt Deptts & BCCs shall not generally stand judicial scrutiny if ever challenged. Whatever modicum of neutrality & autonomy was associated with the predecessors of the current Commission (term expired) , the same too has vanished by now which can be established by the castes & areas recommended by it for declaring them as Social Castes & backward areas respectively. Jogi & Nath are Drum beaters, Dubdaby Brahman & Achariys are Priests performing rites on various occasions, Goda Brahman perform marriage ceremonies and Conduct Havans, Badara (Gilters of utensils) & Bojra (Beggers for food and clothes) have been notified as OBC without assessments about their counterparts in other religious communities. A classic example is of Jats who by no stretch of imagination are socially & economically backwards but notified as such. The approach of the last BCC has been specific to certain communities and not holistic based on proper survey.

SC's, STs & Concerns

The Constitution (Jammu & Kashmir) Scheduled Castes Order 1956 was a maiden development towards codified reservations in the erstwhile State. As compared to STs, the SCs have been continuously & without any interruption enjoying the outcome of the reservations for last 68 years & by now are adequately represented in almost all organs of the UT proportionate to their population. However out of 13 castes notified during

1956 there are a few who haven't harvested the benefits of reservations due to poverty which prevents them from seizing the available educational opportunities. It is high time for figuring out the quantifiable data for drawing conclusions about adequacy of representation held in Govtt jobs by each of the 13 castes and those who are found with inadequate share ought to be categorised as a separate entity entitled for separate quota proportionate to their population .The sub- categorisation Within a category on the strength of quantifiable data about adequacy or inadequacy has met with nod from the Supreme Court also.

Under The Constitution (Jammu and Kashmir) Scheduled Tribes Order 1989 , twelve tribes and sub-tribes mostly residents of the Distts of Leh & Kargil were notified as Scheduled Tribes in relation to the State of J&K for the purposes of the Constitution of India. The non- inclusion of Gujjar & Bakarwal led to furor in the State deploring the lopsided approach of the Union Govtt. Meanwhile an uprising like situation erupted in the beginning of 1990 in greater parts of the state & the Union Govtt realised the perils of leaving Gujjar & Bakarwal communities in antagonised state of affairs and in such a situation their susceptibility to exploitation by the votaries of armed struggle couldn't have been ruled out. By The Constitution (Scheduled Tribes) Orders(Amendment) Ordinance 1991, among others in the State of Karnataka, Gujjar & Bakarwal in J&K were also declared as Scheduled Tribes. This was followed by another order in 8/1991 bringing within the ambit of Scheduled tribes "Gaddi " & "Sippi" also. The ground work for eligibility of these communities was already forthcoming from the report of the Special Socio- economic Survey conducted in J&K during 1987 by State Census Organization.

Out of the total tribal (Ist) population of 12.75 Lakhs (Census 2011) the percentage hailing from Kashmir Division is 36.41% and Chenab Valley 9.18% . In recruitments against gazetted posts and equivalent one may hardly find selected candidates from these two regions except Shina & Balti. The chaotic outcome in appointments against non- gazetted jobs witnessed selected candidates from Poonch, Rajouri & Jammu Distts with little representation to the locals, even in

selection against Class Iv posts. Due to Decentralization & Cadrisation at Distt & Divisional levels and weightage for being conversant with local respective Distts & Divisions the state of affairs isn't that alarming but necessitates codification on solid grounds enabling all regions to have share in employment opportunities to the desired extent. The Sub-categorisation for most backwards within various tribes can be invoked on the basis of quantifiable data obtainable by undertaking a Special Survey for the purposes. The sub- category could be Gujjar & Bakarwal from temperate regions against quota due to them in proportion to their population. Some of the castes of Gujjar & Bakarwal domiciled in J&K are considered as Pothwari with Iranian royal ancestry lineages like Keyani. While most of the Scholars from the community attribute their origin to Russia and Georgia but their counterparts in the mainland are contrarians. The Sippi & Gaddi are by profession Shepherds & ethnic Dogras under the influence of Pahari habitat. Chopans, Koshur, moving to highland meadows for grazing cattle during summer and foothills & Local plains during remaining periods are also qualified for grant of ST status on the analogy of above two Caste based professions from amongst Dogras but so for denied.

Under The Constitution (J&K) Scheduled Tribes Order (Amendment) Act 2024 , Gadda Brahmin, Koli, Paddari tribe & Pahari Ethnic Group have been declared as Scheduled Tribes in J&K for the purpose of Indian Constitution. No UT level survey was undertaken for identifying tribes or sub tribes for consideration for grant of ST status. During Census 2011 it is Scheduled castes & Scheduled Tribes (I) who have been counted as such through enumeration. In the Mother Tongue count under Census 2011 it is Pahari speaking people & not Pahari ethnic group who have been counted as 977692 i-e 8 % of UT population. By fixing reservation @ 10 % for STs (II) it emerges that the population of Gadda Brahmin, Koli & Paddari is over 2.20 Lakh which is unlikely after having regard for ground level demographic positions. Is the figure related to population of 2011 Census or as it existed during 2023/2024 begs answers from BCC? All non-Pahari population who, before the demand for ST status gained momentum, we're proudly identifying

themselves as Koshur, Dogra & Punjabi during door to door census counts upto 1981 Census. Having settled in Peer Panchal region centuries before these migrants assimilated with locals who were Pahari speaking & in abundance from West Punjab but mostly landlords, Chieftains & traders and therefore a social contract between them and fresh arrivals from Kashmir and surrounding Dogra principalities. The Gujjar & Bakarwal, being peasantry & landless cheap Labour force, couldn't be the cynosure for the new non Pahari migrants. Pahari / Pothwari are largely scattered over Rawalpindi Division of Pakistani Punjab, Pthohar plateau, apart from in Mirpur- Poonch - Muzaferabad track on both sides of the LOAC. Most of these people link their ancestry to Middle East while others particularly non- Muslims to Indo- Gangetic civilisations but by now there is greater unanimity amongst the Scholars that Pahari are Indo- Aryan ethnic groups native to Pothwar. In Ladakh Kashmiri people settled for over 700 years and merged with locals through languages and matrimonial relationship are called "Argon" & not eligible to ST status since in 12 tribes and sub tribes notified as STs they don't figure. Out of the total population of 133487 of Leh & 140802 in Kargil , the ST population in these two Distts is 95857 & 122336 respectively. Hence defining Pahari as an ethnicity can't be delayed for long lest this language speaking people as their mother tongue may out number in distant future the genuine pahari ethnic population.

Gadda Brahmin basically fall in Brahmin hierarchy & perform religious rites & Koli are farmers and both embodiment of Dogra ethnicity. What about the counter parts of these two classes living in the UT with almost all commonalities excepting the faith? How these people [including their Muslim & Punjabi counterparts in non Dogra regions] fulfill the criteria in totality spanning over factors of indigenousness, primitive traits, geographic isolation, economic backwardness, social distinctiveness & shyness of contact which have been laid down for accepting claims for grant of ST status ?

Statutory position

The J&K Reservation Act 2005 read with J&K Reservation (Amendment) Act 2023 and J&K Reservation Rules 2005 amended vide

SO176 Dated March 15 , 2024 govern reservations in services & admission to professional Courses in UT of J&K. The quota for jobs for STs is 20%, SCs 8%, OBCs (other Social Castes) 8%, RBAs 10% & LOC/IB 4% .(50%)

10% for EWSs from General Category other than STs, SCs, OBCs, RBAs & LAC/IB.

40% for General category.

Horizontal for Persons with disabilities 4% and Ex- servicemen 6%.

Relevance of Indo-Pak borders

Anand Committee, instead of including border areas or Villages with areas and Villages declared socially & educationally backwards, chose to carve out a separate nomenclature for them primarily due to adverse effects on the people arising out of division of families and habitations caused by Line of Actual Control (LOAC) accompanied by uncertainty about future and frequent skirmishes (from 1990 virtually war like scenario) between Indian & Pakistani forces unleashing untold hardships for the residents including adverse impact on education of children and other students. By leveraging settled & peaceful International Borders (IB) with LOAC the going for residents from former has become tougher due to incompatibility between the two. Kashmir Division and Chenab Valley has, based on official data, lost about 45000 lives, thousands disabled and injured and almost five working years cumulatively lost during thirty years from 1990 due to militancy, operations and strikes. The example set for IBs would Peter out into insignificance against the entitlement of candidates from the two regions who have against all odds survived , spurned militancy dragnets & attained education in highly disturbed security environs. A bad precedent but capable of being an unchallengeable one in arguments for its application to the residents o/ domiciles of North-east & west Bengal sharing borders with Bangladesh & Punjab, Rajasthan & Gujarat bordering Pakistan.

Admissions to professional courses

Ordinarily a policy decision with far reaching consequences should have been left for consideration by an elected Govtt. Instead the LG led

administration during 2022 made a departure from the stated policy stand points of the successive popular Govtts by joining national pool (NP) whereby 50 % seats (173 out of 346) in PG & PGD & 15% (166 out of 1107) in MBBS in UT Medical Colleges (MCs) during 2024 became components of the National Pool enabling apparently local aspirants also to compete for berths from out of the vast pool of seats at national level. In absence of a thorough survey and analysis of gains and losses of parting with huge slots in local eleven MCs the Govtt went ahead primarily by the logic of national integration based on "one Nation & uniformity in eligibility in admissions to professional courses". Those of the States and Union Territories (UTs) who came to conclusion about the NP likely proving for them as a bonanza opted for it & the data by now about demographic profile of selected candidates proves beyond doubt that the perceived national integration and assimilation of candidates from varied ethnicities & linguistics has been actually a one way incoming movement only for the candidates from States and UTs where opportunistic considerations reigned supreme due to their advantageous positions. The profile in J&K isn't only an exception but in a way highly depressing inasmuch as the category candidates from rest of the country make it to JK outnumbering General category candidates (GC). The communication skills of these outsiders hardly synchronize with local population in major parts of the UT bursting the bubble of " competition between locals and natives from outside the UT & further compounded by unfavourable climatic conditions of the temperate regions for outsiders. Against the surrender of 173 slots in PG & 166 in UG (MBBS) during 2024 in NP the corresponding gains are meagre & that too in disciplines and faculties where the UT is fully saturated with additional unutilised manpower. Quite agonizingly the burgeoning aspirants for Medical Education have been left to fend for 50% slots in PG & 85% in UG programmes of MCs which are publicly treated as MCs in J&K for medical education instead of MCs of J&K.

Under Reservation Rules as amended up-to-date the percentage of vertical reservation category wise is STs 20 % , SCs 8 %, RBA 10%,

OBCs 8%, LAC/IB 4% & EWS 10% (intra GC & to the exclusion of all other categories).

Children of Defence Personnel, Children of para- military forces & JK Police and Candidates possessing proficiency in Sports have 01% each horizontal reservations in PG Courses while as for UG admissions the percentage for JK PM is 1%, CDP 3%, Sports 2%, & PWD 4% (10%)

Apparently GC has 40 % but ultimately gets reduced to below 40 % due to inter-play of two factors. A) an unimaginable number of candidates from categories particularly RBA, SCs, LAC/IB & OBCs fall in GC on the basis of merit and cut off fixed and in their places in respective category the eligible substitutes replace them. Consequently all the candidates in GC don't belong to said category but admixture of general and other categories. & b) the candidates eligible for horizontal reservations are in general from General category but meritorious due to availability of quality education in Schools catering to the children of Army, Security and police forces and therefore a further slice cut being faced by merit anchored & hardworking general category candidates. Ideally the roaster points should have been fixed for them across the categories on the analogy of horizontal reservations in the jobs. After August 5,2019 no case is made out for perpetuating special provision for the children of personnel in khaki as by reason of long spells of postings & stay put of their families entitles them to "Domicile status " & hence can be candidates for admissions to the UT MCs. Out of quota of 68+ seats @ 40% for open merit in PG programmes the number of candidates from other categories selected in GC is 23 & 01 against 05 under horizontal reservation (total 24) & therefore effectively reducing quota from 68 to 44 seats which in percentagem is 25. 43 % against 40 % earmarked for GC. Likewise against 376 seats @ 40 % at UG level 46 candidates from other categories have made it through GC reducing the percentage from 40 % to 35 %. Under horizontal reservations @ 10 % 68 seats utilized.

Dyarchy in practice

The current state of affairs resembles dyarchy introduced under the Govtt of India Act 1919 in the Provinces of British India and replicated

subsequently in a modified form under the Act of 1935 at central level also. Under the Colonial rule in the Provinces the subjects like Police and Law & order, Law & Judicial administration and Finance were reserved subjects for administration by the British Govtt through Governors which in free India is existing in UT of J&K, a Country in recorded history of 5000 years for over 3800 years & a Province (State) for about 1200 years. Just as the dyarchy invigorated the popular sentiment for getting rid of foreign yoke before independence, the same way & manner people even in traditionally BJP bastions have started gravitating towards the local Govtt on the plank of self rule through locally elected Govtt.

Short term measure

Meanwhile the UT Govtt my on the basis of fallout of joining NP reverse the decision taken during 2022 atleast, to begin with, to the extent of PG courses followed by a well considered policy option on continuance or otherwise of pooling in UG courses.

Public outrage

The alarming facets of the public discourse on reservations for admission to PG Courses & Super Specialties calls for review of the current dispensation nationally on factors namely a) the justifications for reservations at entry level lose ground for reapplication at the stage of admissions to Specialities & Super- Specialities due to commonalities & uniformities available to the aspirants irrespective of categories viz -a-Vie quality education, facilities, Institutions and academic ambiences together with eco systems reverberating professional Organizations. To a great extent the afore factors are loaded in favour of category candidates who during UG courses are entitled to scholarships & other kinds of financial support from the Govtt & faculty overreach as a sequel of affirmative action for their all around growth and development b) no frontiers imposed in top notch developed countries in disciplines warranting quest & discovery of highest score by " genius & inquisitive" minds and therefore the reason for their monopoly on outcomes of higher education in Medical, Technology, Information Technology and Artificial intelligence c) introduction of creamy layer in STs & SCs also for reaching out to uncovered sections from the two categories and d) as part

of debatable roadmap for benefiting the targeted categories the process of weaning out all those including their legal heirs who stand covered & benefited at one time under reservations.

Economically Weaker Sections.

One can be eligible for EWS Certificate provided the conditions listed below are met with:-

I) Should not belong to any category entitled to reservations;

II) Annual family income from all sources including Agriculture, Business & salary should be less than eight lakhs;

III) Applicant's family should not own more than five acres of agriculture land (40 kanals) ;

IV) Applicant's family residential flat, if any, should be less than 1000 Sq ft. &

V) Applicant's family residential plot should be less than 100 Sq yards (3.3 Marla) within notified Municipalities & less than 200 Sq yards (6.6 Marla) outside the notified Municipalities.

Assessment & calculation of income of the salaried classes is free from bottlenecks but in respect of persons associated with trade & commerce/ Industry the cunning strategy by an unscrupulous bread earner of an applicant may lead to issuance of EWS certificate at the cost of highly deserving eligible candidates.Even a Green grocer in an urban area may attract mischief of cap on income limiting eligibility of candidate provided annual income isn't less than eight lakhs. The business community having more income than the highest paid civil servants succeed in managing certificates by manipulation. The inquiry officers should take into consideration the Cash Books, stock registers, Purchase & Sale details, Banking transactions and trails of huge money transfers, local purchases & counter verifications in records of the Stockists & equivalent, imports from rest of the country, GST & income tax documentary proofs for arriving at correct income of all those claiming contribution to monthly family income of the certificate seeker.

A comprehensive format need be formulated in order to prevent the possibility of under assessment of the monthly/ yearly income derived from business activities.

83.78 % of the holdings in J&K fall in marginal category representing 47.17 % of the area under cultivation (2015-16) with average size of holding @ 0.42 in the Valley,0.77 % in Jammu Division & 0.59 (ha) at UT level. The per kanal average production in Quintals is 1.10 for Rice, 1.031 Wheat & 0.99 Maize but on the other hand yield of irrigated land per kanal in Quintals is 3.5 for Rice & 0.5 oil seeds . The valve of average yield of Rice on 40 kanals @ Rs 2500 per Quintal (MSP for common Paddy 2300 & Wheat 2275 during 2024) works out to Rs 1.10 Lakhs while for irrigated land it is 3.5 lakhs for kharief crop & Rs 2 Lakhs for Rabi crop & therefore well below the ceiling on income. But in respect of orchards on forty kanals the annual income in kandi/ Upper areas can be 18 – 20 Lakhs & in plains 16 to 18 Lakhs subject to favourable weather conditions. The phenomenon of alternate bumper fruit production may prove as a double edged weapon for candidates depending upon the year of assessment of income for EWS Certificate and therefore two years consecutive cycle could be the option for realistic calculation of income. (Guava & Mangos in sub tropical & Cherry, Almonds, Peach, plump & some varities of Apple in tropical areas fall in this category) By allowing 30% of the projected income for fertilizers, Insecticides , routine sprays & labour charges the net income would nevertheless surpass ceiling on income . Hence reduction from five Acres to three Acres for Orchards.

Suggested course

Pan UT level fresh survey through Directorate of Economics & Statistics undertaken for sub categorization of tribes, sub- tribes and Castes from STs & SCs respectively who aren't adequately represented in services and admissions to professional Courses, defining Ethnic Pahari Group in distinguishment with Pahari speaking people, recommending such groups for ST status as have total commonalities with their counterparts notified as STs (excepting belief systems) & abolishing RBA, LAC/IB, Social Caste (OBCs) categories and subsumed in OBCs on the 11 point criterion adopted at national level by the Mandal Commission to be supplemented by " Tough terrain(altitude above 5500 ft from sea level) and weather hazards", " Dependable connectivity " & " fall out of militancy " (Mental Health) as 12th , 13th & 14th Points. The

percentage of reservations for proposed "OBCs" should be half of the share otherwise proportionate to OBC population on the analogy of national level position under Mandal commission and such a dispensation shall increase quota in GC also. Horizontal reservation @ 6% for ex-servicemen needs relook & linked with their population. All other forms of horizontal reservations dispensed with in professional courses excepting "sports persons" category. The reference to population should be "projected population " 2024 by applying State level Decadal Growth Rate of 2001-2011 decade.

The unpopular & ungainful decision about NP to be reviewed by reversing it in respect of PG disciplines and a well considered option exercised after assessing pros and cons of continuing 15% share towards NP.

Latief U Zaman Deva*

* The author is IAS (Retd), former Chairman J&K Public Service Commission & Advocate at Srinagar.