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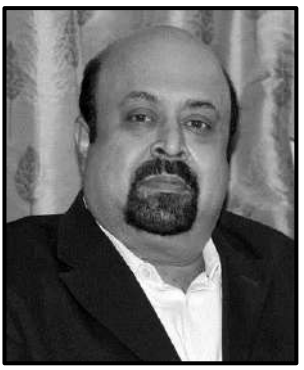

From the Editor-in-Chief

The diverse themes explored in this volume illuminate the complex interplay of law, society, and justice, offering profound insights into constitutional significance, gender justice, technological innovation, social equity, and global human rights. The articles presented critically engage with legal systems, societal transformations, and emerging challenges in governance and policy-making. Through rigorous research and incisive analysis, the contributors shed light on the dynamic forces shaping contemporary law and social sciences.

The volume opens with a compelling examination of recent procedural reforms in investigations, highlighting their potential to enhance transparency and efficiency. Complementing this, an article on religious freedom adopts an individual-centric perspective, drawing comparative insights from the Australian constitution. Together, these contributions underscore the delicate balance between enduring legal principles and evolving societal values.

A significant focus of this issue lies on marginalized communities and vulnerable groups. One article celebrates the transformative role of women leaders in reshaping Indian politics, while another delves into the intersection of freedom of speech and arrest laws, analyzing the constitutional implications of recent judicial decisions. The socio-legal recognition of live-in relationships is explored alongside a critique of greenwashing, which exposes unethical practices and advocates for stronger regulatory frameworks within India and globally. These discussions emphasize the journal's commitment to the intersection of societal norms, ethics, and legal accountability.

Structural injustices in Indian society are further scrutinized through an analysis of unpaid care work, its legal invisibility, and the plight of manual scavengers. These articles offer a critique of existing frameworks while advocating for equitable reforms and rehabilitation initiatives to address systemic discrimination. Gender justice emerges as a recurring theme, with one piece exploring the judiciary's evolving role in advancing transgender rights and another addressing the legal challenges faced by LGBTQ+ communities in reconciling gender identity with current legal systems. These works highlight the pressing

need for inclusive policies that bridge the gap between legal recognition and lived realities.

The tension between secularism and religious education is thoughtfully addressed in an article on the regulation of Madrasa Boards, while another piece provides a sociological and legal perspective on juvenile delinquency, advocating for rehabilitation-oriented legal frameworks. The implications of technological advancements on law and society are also prominently featured, with analyses of the socio-legal challenges in navigating the metaverse, privacy concerns under India's Telecommunications Act of 2023, and the broader impacts of digital transformation on fundamental rights. These articles underscore the necessity of balancing technological innovation with the protection of individual freedoms.

This issue further examines constitutional and legislative developments through the lens of transformative constitutionalism and the evolution of socio-economic rights in landmark Supreme Court cases. The ongoing debate on the Uniform Civil Code is analyzed, reflecting on its potential to promote equality while addressing cultural sensitivities. Additional contributions explore critical issues in dispute resolution, healthcare, and criminal justice. Articles assess the legal implications of the Group of Companies Doctrine in alternative dispute resolution, barriers to healthcare access in prisons, and the transformative potential of the Mediation Act, 2023. An analysis of remission jurisprudence traces its development through landmark judgments, providing valuable insights into evolving philosophies of justice.

The volume concludes with a critique of India's inadequate response to crimes against women and an exploration of the future of secularism in Indian politics. Collectively, these contributions call for introspection and a renewed commitment to advancing justice, equity, and inclusivity in society. I congratulate the Editorial team on this second volume for their painstaking edit and publication which would not have been possible without the timely contribution of quality articles by the authors.

Prof. (Dr.) V. C. Vivekanandan
Vice-Chancellor
HNLU, Raipur

Contents

Unveiling Transformation: A Comprehensive Look at the Changes in Investigation Procedure Under BNSS	Shruti Goyal	1-23
Religious Freedom: Individual Centric Approach with a Reference to the Australian Constitution	Atul Kumar Dubey & Shreya Matilal	24-40
Voices of Change: Women Leaders Transforming Indian Politics	Anju Harbansh	41-54
Law Relating to Arrest Vis-À-Vis Fundamental Freedom of Speech and Expression: A Critical Appraisal of Recent Constitutional Courts' Judgments	Gurneet Singh	55-67
The Evolution of Legal Recognition for Live-in-Relationships: Historical and Contemporary Perspectives	Paluck Sharma & Shreya Singh	68-83
Greenwashing: Deceptive Practices and the Need for Regulatory Measures in India And Beyond	Roshni Shrivastava	84-94
'Unpaid Care work' and the Indian Legal system: How much does the law care?	Sreeparvathy G	95-104
Breaking the Chains of Discrimination: An Assessment of India's Legal Framework and Rehabilitation Initiatives for Manual Scavengers	Shalini	105-122
Evolving Equality: Court's Role in Transgender's Rights and the Need for BNS Update	Sagar Chandrakar & Prerna Verma	123-133
Balancing Secularism and Religious Education, The Role and Regulation of Madrasa Boards	Amitabh Kumar Saxena & Sanika Lambate	134-143

Unraveling Juvenile Delinquency: Causes, Legal Frameworks, and Pathways to Rehabilitation	Aviral M Sao	144-154
Black & White Laws, Rainbow Realities: The Clash of Gender Identity and Legal Systems	Daksha Rawat	155-165
Emulsification of International Human Rights and Constitutional Rights: A New Order for Recognizing Affirmative Action	Jagrit Chandra	166-178
Navigating the Metaverse: Sociolegal Challenges and Frameworks for a Digital Frontier	Kartikey Mishra & Saumya Raj	179-194
Game over for Privacy?	Swantika Banerjee & Madhumita L	195-203
Balancing Digital Transformation: India's Telecommunications Act of 2023 and the Quest for Privacy and Security	Suhana Roy	204-212
The Uniform Civil Code: A path towards equality or erosion of traditions?	Shrestha Sengupta	213-227
The Ongoing Struggle for Transgender Rights in India: Gap Between Legal Protections and Lived Realities.	Shreem Thite & Kunwar Kushagra Srivastava	228-249
Commercial Surrogacy in India: Contemplating Prohibition versus Regulatory Frameworks	Sheeba Masoodi	250-258
Transformative Constitutionalism and the Evolution of Socio-Economic Rights in India: A Study through the Supreme Court Cases	Sagnika Das	259-270

Unravelling the Legal Implications of Group of Companies Doctrine in Alternative Dispute Resolution	Riya Goel	271-291
Examining Legal Barriers to Inmate Healthcare and Mental Health Services in Indian Prisons	Rana Navneet Roy & Prashant Kumar	292-304
Remission Jurisprudence in India: Tracing through Landmark Judgments	Anubhav Kumar Das & Rishi Raghavan	305-320
The Fate of Secularism in Indian Politics and the Role of The Constitution	Antabikhya Gogoi	321-335
Unveiling the Essence of the Mediation Act, 2023	Manika Baliyan & Mahendra Pratap Bharti	336-348
No Woman's Land: A Study of India's Apathy Towards Crimes Against Women	Ananya Sharma	349-355

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Unveiling Transformation: A Comprehensive Look at the Changes in Investigation Procedure Under BNSS

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Abstract

The criminal justice system of India has been recently overhauled by the passage of three new laws. This article examines the changes made in the investigation procedure under the Bharatiya Nagarik Suraksha Sanhita, 2023 offering a comprehensive look at the origin of these changes and their critical analysis. Identifying and outlining the salient features introduced in the Sanhita, the article explores the historical contexts that prompted these changes. Critically evaluating the practical implications and effectiveness of these changes, it offers an insight into the strengths and weaknesses of these changes and aims at contributing to the ongoing discussions on the procedural efficacy of reforms introduced under the new criminal regime.

Keywords

BNSS, Salient Features, Investigation Procedure, Changes

1. Introduction

The procedural criminal law in India has been recently revamped by the introduction of *Bharatiya Nagarik Suraksha Sanhita*, 2023 which has replaced the *Code of Criminal Procedure,* 1973. The *Sanhita* Bill was first introduced in the Parliament on August 11, 2023 from where it was referred for consideration to the Parliamentary Standing Committee. Thereafter, the initial Bill was withdrawn and a new Bill was introduced after incorporating the changes recommended by the Parliamentary Standing Committee on December 12, 2023. The Bill was passed by the Parliament in December 2023 and received Presidential assent on December 25, 2023. The Act known as *Bharatiya Nagarik Suraksha Sanhita*, 2023 (hereinafter '*BNSS*') has

come into force from July 1, 2024. The *BNSS* aims at making the criminal justice system accessible, transparent and accountable to the public.

A number of key changes like trial of proclaimed offender in absentia, recording of search and seizure proceedings, procedure for filing mercy petitions etc. has been introduced. The stage of investigation is one of the most crucial components of the criminal justice system. This stage starts when the information about commission of offence comes into the knowledge of the law enforcement agencies and evidence is collected by them in order to ensure the fair trial in Court. This is the point when the person initially interacts with the criminal justice system. The *BNSS* has introduced a number of changes in the stage of investigation. The author in this article shall discuss the salient features of *BNSS*, the changes made in the investigation procedure together with tracing the roots of such change and the critical analysis of the change introduced.

2. Objectives of the Study

The objectives of the study are:

- To identify the salient features of BNSS.
- To analyse the changes made in the investigation procedure.
- To trace the origin of such changes
- To critically evaluate the changes made in the investigation procedure.

3. Salient Features of the BNSS

Before delving into the topic, let us briefly discuss the salient features that have been added in the *BNSS.* The salient features are:

- Contemporary approach - The *BNSS* adopts a contemporary approach towards the criminal justice system. *Code of Criminal Procedure, 1973* had complex legal procedures which led to problems like low conviction rates, delay in disposal of cases, overcrowding of prisons and inadequate use of technology and forensics. The *BNSS* tries to address all these concerns by introducing key changes in the procedure. For example in order to ensure speedy trial, timelines have been introduced.[1] Similarly, in order to solve the problem of insufficiency of evidence resulting in low conviction rates mandatory use of forensics in heinous cases has been provided.[2]

[1] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), ss. 173(1)(ii), 184(6), 185(5), 193(9), 232, 250(1).
[2] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 176.

- Use of technology - The *BNSS* strongly supports the use of technology in legal procedures from investigation to trial. The *Sanhita* introduces the use of audio-video electronic means for conducting certain proceedings or for recording them. In order to lend credibility to the proceedings and ensure accountability in police investigation, *BNSS* mandates recording of certain proceedings. For example, test identification parade is to be recorded.[3] Similarly, search and seizure proceedings,[4] visit of forensic expert to the crime scene for the purpose of collecting forensic evidence[5] are to be recorded. The *BNSS* enables the Courts to use audio video electronic means for taking evidence of witnesses during trial,[6] examine the accused,[7] take evidence of experts and public servants in certain cases.[8] Further, *BNSS* allows all trials, inquiries and proceedings under the *Sanhita* to be held in electronic mode.[9]

- Use of electronic communication - In today's world the popular mode of communication is through electronic means like messaging, whatsapp, email, social media etc. This electronic communication is made through mobile phone, telephone, computer, camera or any other electronic device.[10] The *BNSS* authorises electronic communication as a valid means of communication. For example, electronic communication can be used to serve summons,[11] giving information to police about commission of cognizable offence,[12] f investigation completion report,[13] issuance of process[14] etc.

- Use of forensics- Under the old criminal regime, the investigating officer could take the help of forensic experts for conducting investigation in a case. It was the discretion of the investigating officer whether to seek the help of a forensic expert or not as there was no mandatory clause which compelled him to seek forensic advice. There are a number of judgments where the Court has lamented that forensic advice should have been sought while investigating the crime.[15] The police officer in charge of the police station (police station in-charge) is responsible under the *BNSS* to

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[3] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 54.
[4] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), ss. 105 and 185.
[5] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 176 (3).
[6] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), ss. 254, 265 and 266.
[7] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 316.
[8] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 336.
[9] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 530.
[10] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 2(i).
[11] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), ss. 63 and 94.
[12] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173.
[13] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 193.
[14] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 227.
[15] Prakash v. State of Karnataka, (2014) 12 SCC 133; Gujarat v. Kishanbhai, (2014) 5 SCC 108.

cause the forensic expert to visit the crime scene for collection of forensic evidence in offences which are punishable with more than seven years. He should also ensure the videography of forensic evidence collection on mobile or any other electronic device.[16]

- Victim centric - The criminal justice system has gradually developed in a manner where the rights of the victim have moved from centre stage to the periphery resulting in secondary victimisation. The *Code of Criminal Procedure, 1973* had granted certain rights to victims in 2009 like the victim was given a "right to engage an advocate of his choice with the permission of Court for assisting the Public Prosecutor in the case".[17] The victim was also given a "right to file an appeal".[18] However, these rights were not enough and the victim still felt alienated in the criminal justice system. In order to ensure victim centric law, the *BNSS* has given the victim the "right to know". The victim shall be given "a copy of FIR free of cost".[19] A duty has been casted on the police station in-charge to "inform the victim about the progress of investigation in the case within a period of ninety days".[20] Further, a duty has been put on the Magistrate to ensure that in cases instituted on police report, a copy of FIR and all other evidence collected by the police during investigation is furnished to the victim. The victim shall be provided with the statement of witnesses recorded by the police, confessions and statements recorded by the Magistrate during the stage of investigation and all other documents collected by the police within fourteen days of appearance of the accused after the Court has taken cognizance and issued process to him.[21] The *BNSS* has also given the victim a "right to be heard before the Court grants permission in those cases where the Public Prosecutor has applied for withdrawal of case".[22]

- Ease of Justice - The *BNSS* ensures ease of justice by giving statutory recognition to concepts like zero FIR,[23] e-FIR[24] and enabling trials, inquiries and proceedings to be held in electronic mode.[25]

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[16] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 176 (3).
[17] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 24(8) proviso.
[18] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 372 proviso.
[19] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(2).
[20] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(3)(ii).
[21] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 230.
[22] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 360 (proviso).
[23] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(1).
[24] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(1).
[25] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 530.

- Trial in absentia- The *BNSS* for the first time has introduced the concept of trial in absentia of proclaimed offenders.[26] Trial in absentia is seen as a mechanism to ensure speedy trial especially in cases where the accused has absconded or has evaded trial. The Supreme Court of India has been advocating the introduction of this concept in the Indian legal system since 2017.[27] The apex Court had asked the government to look into this concept and even the Delhi High Court[28] had demanded its inclusion in order to ensure fair trial to victims in those cases where the accused presence could not be procured. It is pertinent to note that the provisions regarding trial in absentia have been in existence in our neighbouring country Bangladesh also.[29]

- Procedure for filing of mercy petition in death sentence cases - The *BNSS* for the first time lays down statutory procedure for filling of mercy petitions in death sentence cases. It lays down the time period within which the petition is to be filed and also the time within which the Central Government is obligated to give its recommendation in the matter to the President. The *Sanhita* also casts a responsibility on the Superintendents of the Jail to inform the convicted person about the end of his legal proceedings pending in the court so that mercy petition can be timely filed by him and communicate to him the decision taken on mercy petition. In case of more than one convicts in a case, if one convict has filed the mercy petition, then the Jail Superintendent has to ensure that every convict files mercy petition in the stipulated time period and in case of non-filing of mercy petition by other convicts, the Jail Superintendent has to send the details of other convicts and their records to the Government for consideration.[30]

- Timelines - In order to curb delays in investigation, inquiry, trial and other proceedings under the criminal law, the *BNSS* has introduced specific timelines to be followed. For example, timeline has been added for conducting further investigation,[31] framing of charges,[32] committal of case to the Court of Sessions,[33] plea bargaining,[34] submission of medical report of rape victim by the

[26] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 356.
[27] Hussain v. UOI, (2017) 5 S.C.C. 702 (India).
[28] Sunil Tyagi v. Govt. of (NCT of Delhi), 2021 SCC Online Del. 3597 (India).
[29] The Code of Criminal Procedure, 1898, No. V, Acts of Parliament, 1898, (Bangladesh), s. 356.
[30] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 472(3).
[31] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 193(9) proviso.
[32] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 263(1).
[33] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 232.
[34] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 290 (1).

medical practitioner,[35] pronouncement of judgement after the termination of trial[36] etc.

These were some of the key changes made in the criminal procedural law. In the next part of the article, the author shall specifically deal with the changes introduced in the investigation process.

4. Changes introduced in Investigation Proceedings

4.1 Definition of Investigation

At the onset, an explanation clause has been added to the definition of investigation. Investigation includes "all proceedings for the collection of evidence by a police officer or any other person authorised by the Magistrate other than the Magistrate". The *BNSS* specifically codifies the legal maxim "*les specialis derogat legi generali*" by adding an explanation to the definition clause. The explanation says that the provisions of the Special Act shall prevail if they are inconsistent with *Sanhita*.[37]

4.2 Registration of FIR

In order to initiate criminal proceedings, information regarding cognizable offences is given to the police station in-charge who initiates investigation on the basis of that information. This is commonly known as registration of FIR. The *BNSS* has introduced certain changes in the registration of FIR in order to ensure easy accessibility of the criminal justice system. The changes are Zero FIR and E-FIR.

4.2.1 Zero FIR

One of the critical issues in the registration of FIR is jurisdictional limitation. The concept of Zero FIR allows police stations to register FIR as soon as information of cognizable offence is given to them irrespective of the place of occurrence where the crime has been committed. It is not necessary that the crime should have occurred within the local jurisdiction of that police station. Though the words "Zero FIR" is not mentioned in the *BNSS*, it provides that "every information relating to cognizable offence can be given to police station in-charge irrespective of the area".[38]

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[35] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 184 (6).
[36] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 392(1).
[37] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 2 (l) explanation.
[38] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(1).

It is pertinent to note that before giving statutory recognition to the concept of Zero FIR, there have been a number of judgments where the higher courts of the country have reportedly said that FIR should be registered irrespective of whether the officer had the local jurisdiction over that area or not. The Supreme Court in 1994 in *State of Andhra Pradesh v. Punati Ramulu*[39] said that "police cannot prevent registration of FIR on territorial plea".

One of the reasons why there is hesitation for conducting investigation where there is uncertainty in a territorial area is that police officers fear that the proceedings may be quashed by the High Court by exercising its inherent jurisdiction.[40] In *Satvinder Kaur v. Govt. of NCT of Delhi*,[41] the apex Court held that "the material collected by the investigating officer at the stage of investigation cannot be judicially scrutinised for arriving at a conclusion that the police station would have jurisdiction or not". Moreover, there is an embargo under the *Code* that "no proceedings of a police officer in a case to be challenged on the ground that the police officer was not empowered to investigate".[42] The same view has been reiterated in 2006 in *Ramesh Kumari v. Govt. of NCT of Delhi.*[43]

It is pertinent to note that the Ministry of Home Affairs has in 2013 issued an advisory regarding registration of FIR irrespective of jurisdiction.[44] Different states have also issued advisories to the police officers in their state to register FIR irrespective of the area. For example, an advisory was issued in the state of Punjab vide order dated 17.3.2020.[45] However, the reality is that there is hesitation in registering FIR for a crime which is outside the local jurisdiction of the police station.

4.2.2 Procedure for Recording Zero FIR

FIR shall be recorded in Zero FIR register when the Station House Officer (SHO) gets informed by the informant about cognizable offence outside his local jurisdiction. The FIR is prefixed with "0". The police station in-charge can conduct a preliminary inquiry with the prior permission of the officer not below the level of Deputy Superintendent of Police (DSP) , if the offence carries a punishment of imprisonment from 3-7 years. The aim is to determine whether there exists a prima

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[39] 1994 SCC (Cri) 734.
[40] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 528. The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 482.
[41] AIR 1999 SC 3596.
[42] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 156 (2).
[43] (2006) 2 SCC 677.
[44] Available at https://www.mha.gov.in/sites/default /files/2023-03/AdvisoryCompulsory RegistrationFIRs_141015 3%5B1%5D%5B1%5D.pdf.
[45] Available at https://punjabpolice.gov.in/News.aspx?Newsid=1248&NewsTitle=Reg.%20Registering%20Zero%20 FIR%20.

facie case for taking further action or not.[46] The victim or the informant shall receive a complimentary copy of the FIR right away.[47]

After registration of Zero FIR, primary investigation like giving medical help to the rape victim etc. may be done by investigating officer of same police station. Then the Zero FIR is forwarded to the police station having territorial jurisdiction and is re-registered as regular FIR by that police station.[48]

Under the CCTNS system, Zero FIR cannot be numbered as "0" because this facility is not available over there. Therefore, in CCTNS Zero FIR is to be registered as regular FIR and has to be given the next number to the regular FIR number which is ongoing. After following necessary steps (like protection and medical help to the victim and arrest in case required), the FIR is transferred to the jurisdictional police station in the form of DDR. After transferring, the FIR which was lodged in the original police station stands cancelled. The police station to which DDR is transferred, re-registers it in the form of FIR by giving it the next consecutive number in the CCTNS. The original police station where Zero FIR was registered does not have to show that FIR in its statistics of incidents reported.[49]

4.2.3 E-FIR

Many a times there is a hesitation to go to the police station for registration of FIR. Sometimes, infrastructural or security issues are also involved.[50] The *BNSS* enables online/electronic registration of FIR. It provides that "information regarding cognizable offence may be given to officer-in-charge of police station orally or through electronic communication".[51] Communication between individuals via electronic devices is referred to as electronic communication. The information may be given through the use of telephone, mobile, computer, camera, wireless telecommunication or through any other electronic device as may be specified by the Central Government.[52]

It is germane to note that even before the *BNSS* provided for e-FIR, the process of online filing of FIR had already begun under CCTNS in many states namely Gujarat, Karnataka, Madhya Pradesh, Odisha, Uttar Pradesh, Uttarakhand, Rajasthan and Delhi. These states allow registration of FIR online for limited purposes like vehicle theft, theft

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[46] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(3).

[47] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(2).

[48] SOP on Zero FIR issued by MHA. Available at https://bprd.nic.in/uploads/pdf/SOP_on_Zero_FIR%20&%20eFIR%20-%20NCL%202023.pdf.

[49]

[50] Awstika Das, *Law Commission Recommends Allowing E-FIR Registration in Certain Cases,* LIVELAW, September 29, 2023. Available at https://www.livelaw.in/top-stories/law-commission-e-fir-registration-cognizable-offence-239008.

[51] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(1)

[52] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 2 (i).

of important documents etc. Further, all the other states have also facilitated online registration of complaints which may be later on converted into FIR.[53]

The Law Commission of India in September 2023 had recommended that it is time to move towards e-FIR.[54] It recommended that e-FIR should be allowed in all cases where the accused is unknown in cognizable offences and in case the accused is known, e-FIR must be allowed in cognizable offences punishable up to three years of imprisonment.[55]

4.2.4 Procedure for Recording E-FIR

The complainant has to log into the official website of the police department/ e-FIR portal and has to fill in the required details which includes personal information/details of the incident and any supporting evidence or documents relating to the incident. The informant may also send the information to the police station through any electronic communication. This electronic information may be entered in the e-complaint/e-FIR register or as prescribed by the head of department.

For initial verification, the e-FIR is then forwarded to the investigation officer. To check whether a prima facie case exists or not, preliminary inquiry may be conducted if the punishment for the offence is three to seven years of imprisonment. Prior permission of an officer not below the rank of DSP is required before conducting this.[56]

If the informant signs the information sent through electronic communication within three days of sending it, then it shall be taken on record as FIR.[57] However, if the information's nature and gravity demand immediate response, then the investigating officer, after verifying the facts of the information, register the FIR himself on behalf of the complainant.

It is pertinent to note that there are a number of modes of electronic communication like messaging, whatsapp, online portal etc. Allowing any form of electronic communication to the police for FIR registration would create logistic and technical challenges as it will be very difficult for them to track all information received through different modes. Therefore, in order to ensure structural clarity in management of electronic communication, the Parliamentary Standing Committee had

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[53] The Law Commission of India, 282nd report on Amendment in Section 154 of The Code of Criminal Procedure, 1973 for Enabling Online Registration of FIR, 2023, p. 37.
[54] Law Commission of India, 282 report on Amendment in Section 154 of The Code of Criminal Procedure, 1973 for Enabling Online Registration of FIR, 2023, p. 55.
[55] R.K. Vij, *Move Towards e-FIR, But with Caution*, THE HINDU, November 9, 2023.
[56] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173 (3).
[57] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173 (1) (ii).

recommended that the appropriate government shall establish rules for governing the procedure for electronic communication of FIR. The *Sanhita* has empowered the Central Government to frame Rules.[58] The Ministry of Home Affairs has issued a Standing Operating Procedure on e-FIR. It says that e-FIR can be filed through e-FIR portal or police website or through any electronic communication.[59] It does not specify the modes as envisaged by the recommendations of the Parliamentary Standing Committee.

Further, there are a number of complexities involved in e-FIR as the number of false FIR's may go up and also it will cause heavy burden on the investigative agency. Keeping in mind these issues, the e-FIR process should involve verification of the complainant/informant before registration of FIR; conduct of preliminary inquiry (if required) and punishment for lodging false FIR.

4.3 Preliminary Inquiry Before Registration of FIR

The *BNSS* gives statutory recognition to the procedure of conducting preliminary inquiry before registration of FIR to ascertain "whether there exists a prima facie case or not".[60] The preliminary inquiry may be conducted only in those cognizable offences which are punishable from three to seven years of imprisonment. The police station in-charge in such cases keeping in mind the nature and gravity of the offence may conduct a preliminary inquiry with the prior permission of an officer not below the rank of DSP. 14 days time has been provided for the completion of inquiry.

It is pertinent to note that before giving statutory recognition to the concept of preliminary inquiry, the apex Court through a constitutional bench judgement had addressed this issue. In fact, there were concerns about preliminary inquiry as the police officer used to conduct it in certain cases before registration of FIR, though *Code of 1973* was silent on the issue. In *Lalita Kumari v. Govt. of U.P.,*[61] the Court held that "it is obligatory for the police to register FIR when information regarding cognizable offence is communicated to them. The reliability, genuineness and credibility of the information are not conditions precedent for registration of FIR. However, the Court in this case carved out certain exceptions where preliminary inquiry could be conducted before registration of FIR. The exceptions are firstly, where the information does not disclose commission of a cognizable offence and secondly the Court gave categories of cases where preliminary inquiry may be conducted before registering FIR. These are (i) commercial cases; (ii) matrimonial disputes or family disputes; (iii)

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[58] The Parliamentary Standing Committee on Home Affairs, 247th Report on Bharatiya Nagarik Suraksha Sanhita, 2023, 2023, p. 3.12.5.

[59] Available at https://bprd.nic.in/uploads/pdf/SOP_on_Zero_FIR%20&%20eFIR%20-%20NCL%202023.pdf.

[60] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173 (3).

[61] Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1.

corruption cases; (iv) medical negligence cases and (v) cases in which there is an abnormal delay in registration of FIR.[62] The list is illustrative. A time period of seven days was carved out for completion of preliminary inquiry and any delay in this should be reflected in the GDR register/DDR register/station house dairy along with the causes of delay".

Thus, there is a change in the law as the apex court highlighted certain categories of cases where inquiry could be held whereas under the *Sanhita* inquiry can be conducted for all offences punishable from 3-7 years. Secondly, the Court did not lay any condition of prior permission before conducting inquiry whereas under the *Sanhita* prior permission of the officer not below the rank of DSP is required. Thirdly, the time frame for conducting inquiry has been enhanced from seven to fourteen days.

Though the police have been authorised to conduct preliminary inquiry before registration of FIR, this provision may be abused as it may provide scope for corruption and parties approaching the police for favourable decisions in inquiry. In several cases, the police may delay the registration of FIR on the pretext of conducting preliminary inquiry. The section has engrafted a safeguard in the form of prior permission from DSP but still there is scope for misuse. Moreover, the rationale why preliminary inquiry cannot be conducted for offences punishable with less than 3 years of punishment is not clear.

4.4 Copy of FIR

The *Code of 1973* provided that the informant must be provided a copy of FIR free of cost. The *BNSS* specifically aims at making victim centric reforms. It is pertinent to note that "victim" and "informant" may be different persons. There are two different connotations in criminal jurisprudence and it is not always necessary that informant and victim are the same as informant may be a stranger to the crime.[63]

In order to empower the victim, the *Sanhita* provides that a copy of FIR shall be given to the informant or the victim.[64] It is important to note that the Supreme Court in *Youth Bar Association v. Union of India*,[65] held that "the accused has got a right to get a copy of the FIR at a stage earlier to filing of police report". The Parliamentary Standing Committee has also pointed out this and recommended its inclusion.[66] However, the provision regarding providing a copy of FIR to the accused is conspicuously missing in the section.

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[62] Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1.
[63] Jagjeet Singh v. Ashish Mishra alias Monu, AIR 2022 SC 1918.
[64] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173 (2).
[65] AIR 2016 SC 615.
[66] The Parliamentary Standing Committee on Home Affairs, 247th Report on Bharatiya Nagarik Suraksha Sanhita, 2023, 2023, p. 3.12.6.

4.5 Who can Investigate Cognizable Cases

Any police station in-charge may investigate any cognizable case in the local area jurisdiction of his police station without the orders of the Magistrate.[67] The *Sanhita* has added a new proviso to it by empowering the Superintendent of Police (SP) to require the DSP to investigate the case keeping in mind the "nature and gravity of the offence".[68]

4.6 Application to Magistrate Seeking Registration of FIR

In cases where the offence is cognizable and the police station in-charge who is approached for writing of FIR fails to register FIR, the aggrieved person may approach the SP. If the SP also fails to make the investigation or direct an investigation, then the aggrieved person may approach the Magistrate.[69] The Magistrate is empowered to order an investigation.[70]

The *Sanhita* specifically provides that when a Magistrate is approached, the application must be supported by an affidavit. There has been a great surge of frivolous applications filed before Magistrate merely to harass others. Therefore, the *Sanhita* incorporates two safeguards before the Magistrate who is empowered under section 210 may consider the application and order investigation. Firstly, the application must be supported by an affidavit and secondly the order can be made only after conducting such inquiry as the Magistrate thinks fit.[71] These safeguards were recommended by the Parliamentary Standing Committee.[72]

It is pertinent to note that the Supreme Court in 2015 in *Priyanka Srivastava v. State of U.P.,*[73] held that application filed before Magistrate seeking direction for registration of FIR must be accompanied by an affidavit so that in cases where the applicant instead of pursuing a remedy under a particular statute takes recourse under this provision and tries to prosecute a person is deterred. The applicant must clearly spell out in his affidavit that he had approached the police officer in-charge of the police station and senior officials of the police before approaching the Magistrate. The person would be deterred because filing a false affidavit is an offence.[74] The Court further held that the remedy available under this section is not of

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[67] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 175.
[68] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 175 proviso.
[69] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173(4).
[70] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 156 (3) r/w 190.
[71] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 175 (3).
[72] The Parliamentary Standing Committee on Home Affairs, 247th Report on Bharatiya Nagarik Suraksha Sanhita, 2023, 2023, p. 3.13.6.
[73] (2015) 6 SCC 287.
[74] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India) s, 193. The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), s. 229.

routine nature and the Magistrate shall apply his judicial mind by remaining vigilant to the nature of allegations made and then only pass orders.

The addition of procedural safeguards in the section can help deter false cases where direction for registration of FIR is seeked merely to harass other persons. It will make certain that only an aggrieved person approached the Court with clean hands. It will also ensure that the Magistrate remains vigilant while exercising this power.

4.7 Magistrate Ordering Investigation Against a Public Servant

A new provision has been added in *BNSS* which provides that "when a Magistrate receives a complaint against a public servant arising in the course of his official duty, then he may order investigation on fulfilment of two conditions". Firstly, the Magistrate shall receive a report from a superior officer about the facts and circumstances of the case and secondly, the Magistrate must consider the assertions made by the public servant as to the situation which led to such an incident.[75] The aim is to protect the public servants discharging their official duties against false and frivolous cases. The section is a welcome step towards ensuring that public servants can work without fear of being dragged in a false criminal case as there was no such provision in the *Code of 1973.*

There is another aspect. That is, when public servants are involved in the offence of corruption. In corruption cases, concerns were raised whether sanction is required before ordering investigation. The Supreme Court in *Manju Surana v. Sunil Arora,*[76] established law that "direction by Magistrate under section 156(3) does not amount to taking cognizance". However, the Supreme Court has divergent views on the applicability of this principle in corruption cases. Some decisions point out that prior sanction is required before Magistrate issues an investigation[77] where as some point out that as investigation does not amount to taking cognizance, no prior sanction is required. The Court in this case referred the matter to a larger bench. In 2018, amendments were made in the *Prevention of Corruption Act. 1988* and a new section was inserted.[78] It provides that "no police officer shall conduct enquiry or inquiry or investigation in case against a public servant in discharge of his official functions without prior approval of the central government or the state government as the case may be".[79] The constitutional validity of this section is being challenged before the apex court.[80]

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[75] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 175 (4).
[76] (2018) 5 SCC 557.
[77] Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668; Anil Kumar v. M.K. Aiyappa, (2013) 10 SCC 705.
[78] The Prevention of Corruption (Amendment) Act, 2018, No. 16, 2018 (India), s. 17A.
[79] The Prevention of Corruption (Amendment) Act, 2018, No. 16, 2018 (India), s. 17A.
[80] Centre for Public Interest Litigation v. Union of India, W.P. © No. 1373/2018 PIL-W.

The *BNSS* is silent on the question of sanction before ordering investigation in cases relating to public servants in discharge of their official duties and only talks about receiving a report from superior officers and considering the assertions made by the public servant.

4.8 Investigation in Non-Cognizable Cases

When the information regarding non-cognizable offences is given to the police station in-charge, the same is recorded in the DDR register kept in the police station. The *Sanhita* introduces a change in the provision. From now on, all DDR registers shall be fortnightly forwarded to the Magistrate.[81] This will increase the credibility of investigation and the accountability of police.

4.9 Attendance of Witnesses

The police officer while conducting investigation has the power to require attendance of witnesses who are acquainted with the facts of the case. However, the *Code of 1973* provided that "no male person below the age of fifteen and above sixty-five years or woman or physically or mentally disabled person shall be required to attend at any place other than residence".[82] The *BNSS* has introduced changes in this provision. Firstly, the age of senior persons have been reduced to sixty and persons with acute illness have also been added.[83] Secondly, these persons have been given the option to attend at the police station if they are willing to do so.[84] Under the *1973 Code* this option was not available and as a result it impeded the police officer's ability to conduct unbiased examination and at times led to potential complications.[85] Though the change has been made with a laudable purpose, the same is prone to misuse as the police may pressurise these vulnerable witnesses to come to the police station.

4.10 Recording of Statements by Magistrate

In cases of sexual assault, the Magistrate shall record the statement of the victim as soon as the offence is brought to the notice of police. The *BNSS* provides that as far as practicable these statements must be recorded by a women Magistrate and in her absence by a male Magistrate in presence of women.[86] This will bring transparency in investigation.

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[81] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 174 (1)(ii).
[82] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 160.
[83] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 179 proviso 1.
[84] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 179 proviso 2.
[85] The Parliamentary Standing Committee on Home Affairs, 247th Report on Bharatiya Nagarik Suraksha Sanhita, 2023, 2023, p. 3.14.2.
[86] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173 (6) proviso 1.

BNSS further provides that "if the offence is punishable with death, life imprisonment or imprisonment for more than 10 years then the Magistrate shall record the statement of the witness brought before him by the police".[87] This provision adds credibility to the criminal process.

4.11 Medical Examination

In order to collect evidence, medical examination of the accused can be conducted. Under *BNSS*, change has been made with regard to persons empowered to move an application for medical examination. Under the *Code of 1973* only a "police officer not below the rank of Sub Inspector", could move the application for medical examination of the accused.[88] Under *BNSS* any police officer can make an application.[89] The definition of "registered medical practitioner" has also been amended as earlier medical professionals were regulated by the *Indian Medical Council Act, 1956* and now that Act has been repealed and they are regulated by the *National Medical Commission Act, 2019.*

4.12 Medical Examination of Rape Victim

The medical examination report of rape victim has to be submitted by the registered medical practitioner within a period of seven days.[90] Earlier there was no time limit fixed and the *Code* provided that the report shall be submitted "without delay".[91]

4.13 Search and Seizure Proceedings

Search and seizure proceedings are conducted to collect evidence in the case. The *BNSS* has introduced significant changes in this procedure. Firstly, the *Sanhita* provides that "search and seizure proceedings shall be recorded through audio-video electronic means preferably by mobile".[92]

Audio video technology is a powerful medium through which first hand information of the crime scene can be obtained. It is used as a tool in other countries where "body women cameras" by the police officials act as a deterrent for anti-social behaviour and is also used to

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[87] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173 (6) proviso 2.
[88] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) ss. 53 and 53A.
[89] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), ss. 51 (1) and 52 (1).
[90] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 184 (6).
[91] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 164 (6).
[92] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), ss. 105 and 185.

collect evidence.[93] The reference to use of technology during search and seizure in NDPS cases has been made in *Karnail Singh v. State of Haryana.*[94] Narcotics Control Bureau in its Handbook to Field Officers has suggested that logistic support be provided during search and seizure.[95]

Interestingly, the Supreme Court in *Shafhi Mohammad v. State of H.P.*,[96] explored the question whether recovery should be photographed in every case where possession is an offence and also whether in other cases crime scenes should be videographed? The Court in this case was apprised of the fact that a Committee of Experts will be constituted by the Home Ministry to prepare a roadmap for videography of crime scene and Standing Operating Procedures would be issued. Suggestion was also given by the Government that still photography can be used on account of higher resolution. There was apprehension regarding funds and storage of data to which it was suggested that secured portals must be established to which the investigating officer can email the photographs and the same may be retained on the state's server.

Secondly, when a search is carried out without a warrant and the police station in-charge or any other police officer has reasonable grounds to believe that anything vital for the case's investigation might be found at a location within his local limits, they should carry out the search after documenting in writing in the case diary both the reason(s) for their belief and the item (to the greatest extent feasible) they are searching for.[97] The change that has been introduced is, that earlier also the police officer was to record reasons of belief and the thing searched for, but the question where it is to be recorded was not specifically mentioned.[98] The *BNSS* specifically mentions that it is to be recorded in the case diary.

Where to send recordings - Further, the police officer has been made accountable to send the copies of any record made in this regard within 48 hours to the nearest Magistrate empowered to take cognizance of the offence.[99]

The changes made in search and seizure proceedings are a welcome step. However, in order to ensure that they are followed in spirit the Government should issue SOP's on resolution of camera that is to be used, the angles at which cameras are to be placed, the number

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[93] National Institute of Justice, "Research on Body-Worn Cameras and Law Enforcement," January 7, 2022, nij.ojp.gov. Available at https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement

[94] (2009) 8 SCC 539.

[95] Available at https://narcoticsindia.nic.in/DLEA/1.pdf.

[96] (2018) 2 SCC 801.

[97] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 185 (1).

[98] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 165(1).

[99] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 185 (5).

of cameras to be used and arrangements should be made to ensure safe storage of recordings as these can be easily tampered with. The Government should ensure that funds and infrastructure is provided for these recordings. Otherwise, the provisions would remain only on paper.

4.14 Use of Forensic Science

Forensic science plays a very important role in the investigation of crime scenes, especially those cases which are based on circumstantial evidence. Many times, the oral witnesses do not come to the court for deposition and some of them turn hostile due to fear or other reasons. In such a scenario, establishing the element of crime, identifying the accused, relating him to the crime scene and ascertaining the innocence or guilt of the accused becomes a challenging task. Forensic science can play a pivotal role by collecting evidence scientifically thereby enhancing the quality of investigation.

Till now, the investigating agencies have been taking the help of forensic science for investigating the crime scene. However, there was no mandate to do the same and the same was dependent on the whims of the investigating officer. The Supreme Court in a number of judgments have highlighted the importance of use of forensic science in investigation of crime.[100] The Court has also expressed unhappiness over the inability of the investigating agency to use the same.[101] In *State of Gujarat v. Kishanbhai*,[102] the case was of rape and murder of a six year girl. The Court said that had the police used the DNA profiling technology the case would have been more clear to establish the link between the weapon and victim. In *Prakash v. State of Karnataka,*[103] which was a murder case the Court laid emphasis that scientific collection of evidence could have led to a better conclusion as in this case the accused was acquitted for want of evidence.

The *Sanhita* provides for mandatory use of forensic evidence in cases with more than seven years imprisonment. In order to collect forensic evidence, the police station in-charge shall cause the forensic expert to visit the crime scene for collection of evidence. The process is to be photographed on a mobile phone or any other electronic device.[104] The State Governments shall notify a date within a period of five years from which this mandatory use of forensics shall become operative. The states may utilise the forensic facility of another state till it is developed in their own state.[105]

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[100] Dharam Deo Yadav vs. State of U.P. (2014) 5 SCC 509; Pooja Pal vs. UOI (2016) 3 SCC 135.
[101] Prakash v. State of Karnataka, (2014) 12 SCC 133.
[102] (2014) 5 SCC 108.
[103] (2014) 12 SCC 133.
[104] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 176 (3).
[105] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 176 (3) proviso.

The use of forensics in investigation will render credible and verifiable evidence. However, the reality is that in India the forensic labs have inadequate infrastructure. As per a report published by Project 39A, part of National Law University, Delhi there is high vacancy rate in forensic labs, high pendency of cases coupled with budget underutilisation and bureaucratic delays. There are issues regarding maintenance of equipment, lack of safety procedures and need of additional space. The Government shall ensure that the existing problems of the forensic science labs are fixed so that they can help in timely investigation and completion of cases.[106]

4.15 Arrest

The *BNSS* has introduced a number of changes as far as arrest provisions are concerned. Firstly, in order to avoid unnecessary arrests, the *Sanhita* specifically provides that if the offence is punishable with less than 3 years of punishment and the person who is to be arrested is infirm or above 60 years of age, then arrest not to be made without prior permission of officer not below the rank of DSP. Secondly, in order to ensure accountability, the *Sanhita* provides that the State Government shall designate a person in every district and police station not below ASI rank who shall be responsible for maintaining the information regarding name, address, offence of the person arrested and displaying the same. Thirdly, is with regard to the power of handcuffing. The *Sanhita* provides that "police officer while arresting a person may use handcuff keeping in mind the nature and gravity of the offence or while producing the person before Court who is a habitual or repeated offender or who has escaped from custody or has committed offences like organised crime, terrorist attack, murder, rape, drug trafficking, human trafficking etc." It is noteworthy to see that when the Bill was first tabled in August 2023 handcuffing was also allowed for economic offences. However, the Parliament Standing Committee recommended that the term economic offences is very wide and includes petty to serious offences and should be removed. Hence, the clause allowing handcuffing for economic offences was removed when the second bill was tabled.

Importantly, the apex Court way back in 1980 in *Prem Shankar Shukla v. Delhi Administration*,[107] had declared the use of handcuffs violative of Article 21 of the Constitution. The Courts had elaborately laid down extreme situations in which police authorities could resort to handcuffing while writing reasons for the exercise of the power.[108]

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[106] Government, The Sciences, *What Really is Holding Back Forensic Science in India,* SCIENCE THE WIRE, 22/8/2023. Available at https://science.thewire.in/politics/government/india-forensic-science-shortcomings/.

[107] (1980) 3 SCC 526.

[108] Sunil Batra v. Delhi Administration, (1978) 4 SCC 494. Citizens for Democracy v. State of Assam, (1995) 3 SCC 743.

Allowing the use of handcuffs under *BNSS* without sufficient safeguards is being criticised as being too harsh and regressive.[109]

4.16 Remand

If the investigation is not completed within 24 hours, then the investigating agency has to take orders from the Magistrate for further detention.[110] The Magistrate may order police custody or judicial custody or bail may be granted. Under the *Code of 1973* police custody could be granted only during the first fifteen days of arrest. However, the *BNSS* has amended the provision. It provides that police custody should not exceed fifteen days in whole or in parts and these fifteen days can be during the initial 40/60 days of arrest.[111] Sixty days in the event that the offence carries a death, life, or more than ten-year jail sentence. Forty days in all other circumstances.[112] The section provides that "the police officer shall have such custody of an accused only if he is not on bail or if his bail has been cancelled".[113] The change aims to address the issue of accused persons avoiding police custody in the initial 15 days. Further, in order to ensure that the accused's right to get bail is not affected by this provision, *BNSS* specifically provides that "the accused being required for police custody beyond the first 15 days, will not be the sole ground for refusing grant of bail to the accused if he is otherwise entitled to bail".[114]

The main reason for allowing police custody beyond 15 days is that at times the accused misuse the provision. For example, in *Central Bureau of Investigation v. Vikas Mishra @Vikash Mishra,*[115] the question that arose before the Court was whether police custody can be granted after the lapse of the first 15 days of arrest? The facts of this case were that the accused was arrested by the CBI and remanded to CBI custody for 7 days. But during this period of seven days the accused could not be interrogated by CBI due to hospitalisation. Subsequently, he was enlarged on bail. Later on his bail was cancelled because he did not cooperate with the investigation agency nor did he appear in the Court. He was sent to judicial custody on cancellation of bail. When he was in judicial custody he was again admitted to hospital and was later on released on statutory/default bail. Appeal was filed to the Supreme Court where CBI demanded that the remaining seven days police custody be given. The Court held that "the settled position that there

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[109] Apoorva Mandhani, P*olice, judicial custody and use of handcuffs - how new bills may make criminal laws harsher,* THE PRINT, December 21. 2023.
[110] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 187.
[111] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 187 (2).
[112] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 187 (3)
[113] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 187 (2)
[114] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 480 (1) proviso 3.
[115] AIR 2023 SC 1808.

cannot be any police custody beyond 15 days must be read subject to the fact that in some cases the trial court may erroneously refuse police custody in the first 15 days of arrest and the investigating agency may challenge the order before the higher court". Secondly, in this case the accused had successfully avoided the police custody granted by the Court. The investigative agency's right to custodial questioning is a crucial one, and the accused cannot be allowed to tamper with the legal system. Hence the Supreme Court granted police custody of seven days keeping in mind the glaring facts of the case. The Supreme Court also recommended that the view taken earlier in *Central Bureau of Investigation v. Anupam J. Kulkarni*[116] that "there cannot be any police custody beyond 15 days from the date of arrest requires re-consideration".

It is pertinent to note that concerns are being raised that this police custody which may be spread over a period of 40/60 days may be misused by the police.[117] There are neither any safeguards mentioned in the section nor any grounds on which police custody may be given beyond 15 days. Guidelines should be set before exercising such powers, otherwise the possibility of police abuse cannot be ruled out.

4.17 Place of Detention

The *Sanhita* specifically provides that "when a person is in police custody then he shall be detained in a police station and when in judicial custody he shall be in prison or a place declared as prison by the Central government or state government and shall not be detained otherwise".[118] There was no such provision in the *Code.*

Intriguingly, the Supreme Court in *Gautam Navlakha v. NIA*,[119] expanded the scope of custody that can be ordered.[120] In this case, the accused was under house arrest owing to his age and medical condition. The question before the court was whether there can be custody other than judicial custody or police custody and whether the period of house arrest is to be taken into account by the Court while releasing a person on statutory bail.[121] The Court held that "owing to the problem of overcrowding in prisons, in appropriate cases the Court can order house arrest under section 167 of the *Code of 1973*". The new proviso added in *BNSS* aims to deprecate the practice of house arrest.

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[116] AIR 1992 SC 1768.
[117] R. Sivaraman, *Concerns Rise Over BNSS Provision on Police Custody,* THE HINDU, June 30, 2024.
[118] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 187 (5) proviso.
[119] (2022) 13 SCC 542.
[120] Anuj Berry, Anusha Ramesh, *Enlarging 'Custody' under section 167: An Analysis of the Concepts of 'House Arrest' and 'Transit Remand' in light of the Supreme Court's Judgment in Gautam Navlakha v. National Investigation Agency,* SCC TIMES, September 28, 2021.
[121] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 187 (3). The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 167(2).

4.18 Victim Rights

Victim is "a person who has suffered loss or injury because of the act or omission of the accused and includes his guardian or legal heir".[122] In ancient times victims played a central role in the criminal justice system but in the early 20th century there was a gradual transition from victim participation to public responsibility for criminal justice.[123] Thus, the victim's role was moved to the periphery and he felt totally alienated in the criminal justice system.

The concern for the rights of victims' world over began in the 1940s.[124] In India, different Law Commissions[125] and Committees[126] suggested that victims should be given the right to participate and compensation. A major breakthrough was achieved in 2009 when victim rights were penned in the *Code of Criminal Procedure, 1973.*[127] The victim was given the right to engage an advocate;[128] right to appeal,[129] right to compensation,[130] right to medical treatment.[131]

In *Jagjeet Singh v. Ashish Mishra alias Monu,*[132] the Court observed that "the victim has a right to participate in criminal proceedings prior to trial right from the stage of investigation". In order to empower the victims, the *Sanhita* has expanded the scope of victims rights. The victims in addition to the "right to participation" at the trial stage have also been given the "right to information" at the investigation stage. The right to information has been made effective by providing them copies of FIR,[133] police report and other statements recorded by the

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[122] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 2(y).
[123] Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, Vol. 14, No. 3, 1997, pp.840-881, at p. 841.
[124] William F. Mcdonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim,* AMERICAN CRIMINAL LAW REVIEW, Vol. 13, 1976, pp. 649-676, at p. 657.
[125] The Law Commission of India, 154th Report on The Code of Criminal Procedure, 1973, 1996, p. 64; The 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 Victims of Crime, 2008, p. 44.
[126] Justice V.S. Malimath,Committee on Reforms of Criminal Justice System, Government of Indian 2003. Justice J. S. Verma, Report of the Committee on Amendments to Criminal Law, 2013, p.333.
[127] The Code of Criminal Procedure, (Amendment) Act, 2008, No. 5, Acts of Parliament, 2009 (India).
[128] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 24 (8) proviso. The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 18 (8) proviso.
[129] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 372 proviso. The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 413 proviso.
[130] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 357 A and 357 B. The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 396.
[131] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 357 C. The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 397.
[132] AIR 2022 SC 1918.
[133] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 173 (2).

police during investigation, confessional statements and any other document.[134]

4.19 Right to Know about the Progress of Investigation

Investigation is the exclusive domain of police and the victim is involved in the process only if the police considers it necessary. Though there were administrative directions issued in certain states to inform the victim about the progress when asked for but there was no statutory provision for the same.[135] The *Sanhita* casts an obligation on the police officer to inform the progress of investigation to the informant or the victim. The information is to be given within a period of ninety days and may be given through electronic means.[136]

4.20 Accused not to be Arrested when Sufficient Evidence

When the investigation is complete and the police station in-charge is of the opinion that there is sufficient evidence in the case, then along with the police report the accused is forwarded before the Magistrate if under custody.[137] The *BNSS* has added a new provision which provides that "if the accused is not in custody and the evidence is sufficient in the case, then the police officer shall take security from the accused for appearance before the Magistrate". The Magistrate before whom the report is forwarded shall not insist that the accused be arrested. The *Code of 1973* was silent on the issue.[138] The provision has been introduced because in a number of cases the Magistrate refuses to accept the charge sheet and take cognizance till the accused is taken in custody. It is pertinent to note that at this stage an assurance that the accused would be present when required by the Magistrate is sufficient and insisting on taking him into custody does not serve any fruitful purpose.

4.21 Submission of Report on Completion of Investigation

Once the investigation is complete, the police submits its report. The *BNSS* authorises that "the report be forwarded to the Magistrate including through electronic means and the Magistrate is competent to take cognizance of offence upon receiving a police report electronically".[139] The *Code of 1973* did not talk about this means. Though the Sanhitya has introduced provision for electronic means, one of the drawbacks is that electronic devices are susceptible to

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134 The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 230.

135 Justice V.S. Malimath,Committee on Reforms of Criminal Justice System, Government of India, 2003, p.78.

136 The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 193 (3) (iii).

137 The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 190 (1). The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 (India) s. 170(1).

138 The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 190 (1) proviso.

139 The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 210 (1) (b).

tampering and altering. Therefore, the *Sanhita* specifically provides that when the police report is submitted, the police station in-charge has to state the sequence of custody in case of electronic device.[140]

5. Conclusion

To conclude, it can be said that the changes in the criminal justice system is a welcome step as the *BNSS* has emphasised the use of technology in the system by introducing changes like electronic communication, audio video recording etc. Speedy and timely completion of the proceedings have been aimed by introducing timelines in the criminal justice scenario. The changes made in the investigation procedure is a significant step as it aims at accessibility by introducing the concept of zero FIR and E-FIR; accountability by introducing provisions of timelines and affidavits and credibility by mandating video recording of certain proceedings. Tracing the roots of these changes show that there was historical context that prompted their inclusion.

However, while these reforms demonstrate promising advancements, the critical evaluation of certain provisions reveal that they may be prone to abuse and misuse by the investigation agency like extension of police remand, handcuffing to name a few. Addressing these unintended consequences and optimising procedural clarity coupled with adaptive strategies and guidelines by the Government can go a long way in strengthening public trust in the fundamental principle of justice envisaged under the *Sanhita.*

[140] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), s. 193 (3)(i) (i).

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Religious Freedom: Individual Centric Approach with a Reference to the Australian Constitution

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Abstract

The Supreme Court of India propounded the essential religious practices test in the Commissioner of Hindu Religious Endowment, Madras v. Shri Lakshmindra Tirtha Swamiyar of Shirur Mutt, (1954) SCR 1005 while interpreting what constitutes matters of religion, drawing strength from Section 116 of the Australian Constitution. Since then, the Indian judiciary has been engaged in religious hermeneutics to resolve the conflicting assertions of religious denominations vis-à-vis individual claims inherent in the Indian Constitution. In view of this interpretational synthesis, the present paper examines the scope of managing religious affairs through the lens of the equality code set out under the Indian Constitution. This paper strives to resolve the conflict, drawing strength from the comparative experience of these jurisdictions.

Keywords

Constitution of India, Australian Constitution, Matters of Religion, Right to Religion, Religious Affairs

1. Introduction: Religion, Law and Constitutional Migration of Interpretation

In the recent days, world is witnessing an unprecedented degree of religious discontent. Religions have become central focus of political, social and legal debates due to its pervasive grasp and reach and potential to indulge in legally impermissible irrational fanaticism.

Therefore, the legal order throughout the world is engaged in rationalising the religious practices within the four squares of permissible acts. However, religious leaders time and again attempted to justify their acts under the rubric of religious freedom guaranteed by most Constitutions including the Indian Constitution. This discourse of religious freedom is accepted as an indispensable condition for maintaining peace, harmony and coherence in society.[1] The interference of religion in the public sphere must be comprehended under the lens of multifaceted dimensions of three actors, i.e., the State, religious organisations, and individuals, asserting contending claims. Such claims may manifest as the assertion of rights by religious organisations against individuals and the State or an individual's rights claim against the religious organisation and the State's regulatory interest in non-religious activities. As society evolves and diversifies, the need to navigate the intersectionality of the three actors becomes increasingly paramount. These actors exert considerable influence, not merely within the confines of their sphere but also in the broader societal and political fabric. Their assertion of rights (individual or religious groups) and power (State) often give rise to potential conflicts that require delicate balancing of interest. Historically, the courts stepped in to settle the contending assertions and claims having far reaching implications in defining the limits of the three aforementioned actors. The views expressed by the courts form the jurisprudential bedrock of legally permissible religious affairs.

The discourse of law and religion transcends the traditional domain of formalistic legal interpretation and encompasses larger questions of societal cohesion. In navigating this complex terrain, the courts adopt a nuanced and principled approach to legitimise the claims made by the actors. This involvement pushed the courts into a labyrinth of complexity to lay down somewhat ambiguous but relevant boundaries of actions by these actors to maintain a stable social cohesion within the framework of constitutional order. It is no wonder that in doing so, the courts in India encountered unprecedented challenges in redefining the boundaries between the State power, individual freedoms, and religious practices. Since the early days of the working of the Indian Constitution, the courts adopted the celebrated essential religious practice test to carry out the balancing act in the muddied water of contending claims. Drawing insight from the Australian constitutional interpretations, the courts in India formulated the constituents of the essential religious practice test after delicately customising the same in tune with the special social, cultural and religious sentiments emanating

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[1] *See* WINNIFRED FALLERS SULLIVAN ET AL., POLITICS OF RELIGIOUS FREEDOM (University of Chicago Press 2015).

from the ground reality of Indian sub-continent. This balancing approach is complex, as it involves the courts navigating the rugged terrain of religious text interpretation and imposing an 'external point of view' upon whether a practice is religious or not. In imposing such a view, apparently the courts are not guided by any objective assessment. Initially in ***Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiyar of Shirur Mutt,***[2] the test adopted the 'internal point of view' of religion by holding that *"what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."* There has been a critical shift in the nature of the test from the community deciding their practices as religious and essential (internal point of view) to the court's deciding what practices are religious and essential (external point of view) in case of conflicting pieces of evidence.

This cross-jurisdictional approach, referred to as 'constitutional migration',[3] is the inspiration of the present work. Thus, the paper attempts to bring together the challenges faced by the courts in India through a comparative lens of Australian experience. The structure of the present work unfolds with Part II delving into the religious freedom and its scope within the Indian Constitution. Part III then extends the discussion to religious freedom under the Australian Constitution. Part IV is dedicated to a comprehensive analysis of interpreting religious freedom. Part V advocates for an individual-centric approach to engaging religious freedom, culminating in a possible solution in Part VI.

2. Managing Religious Affairs under the Indian Constitution

The scope of interpretation of Articles 25 and 26 for the first time was done by a 7-Judge bench of the Supreme Court in 1954. The Supreme Court in *Shirur Mutt Case* was hearing an appeal against the decision of the Madras High Court. The Madras High Court prevented the Religious Endowment Commissioner from proceeding with the scheme drawn for Shirur Mutt by exercising power under the Hindu Religion Endowment Act 1927. The High Court also struck down the 1927 Act as being violative of Articles 19(1)(f), 25, and 26. While deciding whether the Mutt falls under the scope of religious denomination, the Court delved into the scope of Article 26(b). The Court held that the phrase suggests that there may be other aspects of a religious denomination which are not matters of religion, and, thus, the protections provided by this clause may not extend to those

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[2] 1954 SCR 1005

[3] SUJIT CHOUDHARY, THE MIGRATION OF CONSTITUTIONAL IDEAS 2 (Cambridge University Press 2006).

aspects.[4] The Court, while answering the scope, differentiated the right of the religious denomination to manage its own affairs [Article 26(b)] vis-a-vis the right to own and acquire property [Article 26(c)] and the right to administer property in accordance with the law [Article 26(d)]. The distinctive trait is that Articles 26(b) and 26(c) are controlled by only the three factors stated in the Constitution such as public order, morality and health whereas Article 26(d) which deals with management of property is subject each and every law that are in force. The Court referred to the decision of the Australian High Court in ***Adelaide Company v. Commonwealth,***[5] to expound as to *"what are the matters related to religion."*[6] The Court, relying on the Australian understanding, held that religious freedom entails *"freedom of religious opinion"* and *"acts done in pursuance of a religion".* The Court, thus, developed the essential religious practice test as: *".... what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."*

Subsequently, the courts in India applied and explored the contours of essential religious practice test in many important occasions. In the same year occasions arose where the Supreme Court got the scope of testing the robustness of the essential religious practice test. In ***Mahant Jagannath Ramanuj Das v. State of Orissa***[7] the Supreme Court applied the test without much elaboration. However, in ***Ratilal Panachand Gandhi v. State of Bombay***[8] the Supreme Court applied and expounded the scope of the essential religious practice test in the context of a Bombay High Court decision, which upheld the constitutional validity of the Bombay Public Trusts Act 1950. Recognising that the determination of the issue requires the delicate drawing of fine line between what constitute matters of religion and what are not so, the Court adopted a *"common-sense view and actuated by considerations of practical necessity"* for making such distinction.[9] Accordingly, common-sense view and practical necessity were added as a new dimension to the essential religious practice test.

In ***Sri Venkataramana Devaru v. State of Mysore***,[10] the 5-Judge bench examined the vires of the Madras Temple Entry Authorization Act, 1947, which aimed to address and reform the practice of excluding Dalits from temples established by the Gowda Saraswat Brahmins. The question at hand was whether a law enacted under Article 25(2)(b) controls the right of a religious

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[4] *Supra* note 2 at ¶16.
[5] 67 CLR 116, 127.
[6] *Id.* ¶17.
[7] 1954 SCR 1046.
[8] 1954 SCR 1055.
[9] *Id.* ¶14.
[10] AIR 1958 SC 255.

denomination to manage its own affairs in matters of religion guaranteed under Article 26(b). It was held that the Gowda Saraswat Brahmins are entitled to exclude persons who are not entitled to participate in the worship, which falls within the scope of matters of religion under Article 26(b). The Court relied on the decision of ***Gopala Muppanar v. Subramania Aiyar***[11] in which it was held that, as per the Agamas, an image is considered defiled if there is any breach of the prescribed rules for worship and *Samprokshana*, a purificatory rites is required to be performed to restore the sanctity of the shrine, it is necessary to perform the ceremony. The Court held that the law permitting entry into the temple to all persons vis-à-vis the right of the denomination to exclude a certain class of person would be hit by Article 26(b). In addressing the issue of controlling Article 26 through Article 25, it was held that the right conferred to enter into the temple under Article 25(2)(b) cannot be absolute. Such a right is subject to limitations or regulations that arise in the process of harmonising the right conferred by Article 25(2)(b) with that protected by Article 26(b).

The next in the line of the case was the decision of the ***Durgah Committee, Ajmer v. Syed Hussain Ali***[12], in which the 5-Judge bench heard the appeal against the decision of the Rajasthan High Court which declared the Durgah Khwaja Saheb Act 1955 as unconstitutional. The primary challenge to the 1955 Act was that it violated Articles 26(b), 26(c), 26(d) and 19(1)(g). Regarding practices claimed to be essential to religion, the Court noted that *"purely secular practices"* and *"practices sprung from superstitious beliefs"* may be claimed to be treated as matters of religion within the meaning of Article 26. Thus, the Court added that the secular and superstitious practices that are part of religion cannot be protected as essential religious practices. In other words, the protection should be limited to religious practices, as these are fundamental and integral, rather than extending to practices rooted in superstition. This filtration made the Supreme Court enter into the problematic terrain of deciding what practices sprung from superstitious activities. The adventurous act to bestow on itself the power to act as a religious expert landed it with the complex problem of deciding the religious issues of different religions. Now, the Courts have a herculean task of separating the superstitious activities to accord constitutional protection to any activity claimed to be essential.

The next decision of ***Sardar Syedna Taher Saifuddin Saheb v. State of Bombay***[13] gave a different dimension to the scope of Articles 25 and 26 when the Court heard the challenge to the Bombay

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[11] (1914) 27 MLJ 253.
[12] AIR 1961 SC 1402.
[13] AIR 1962 SC 853.

Prevention of Ex-communication Act, 1949. The case brought the academic debate on the correctness of the test due to the dissenting opinion of CJ BP Sinha. The majority opinion was authored by Justice KC Das Gupta observing that protection of Articles 25 and 26 extends to both "doctrine" or "belief" and "acts done in pursuance of religion" and went a step ahead and held that *"what constitutes an essential part of a religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion."*[14] This interpretation was ignorant of the unanimous decision of the *Shirur Mutt Case* and turned the whole interpretation on its head. From referring to the religious tenets for deciding the essential religious practices, the test moved towards the Court deciding with reference to the religious doctrine.

The minority opined that the expression "matters of religion" in Article 26(b) and "activities associated with religious practice" under Article 25(2) (b) are distinct, and the State's power to interfere in the latter is broad. The power of Dia-ul-Mutlaq to excommunicate, which the Act cured, falls within the purview of activities associated with religious practices. The actions of Dia-ul-Mutlaq touching the civil rights of the persons within the community were the concern that the Legislature attempted to cure through the Act. The minority opinion noted that the result of ex-communication is the *outcast* or *pariah* of the person from the community and deprivation of civil rights.

Now, another 5-judge bench has doubted the correctness of the *Sardar Syedna Case* in the ***Central Board of Dawoodi Bohra Community v. State of Maharashtra***[15] and referred it to the 9-judge bench which is hearing a petition relating to the scope of the Articles 25 and 26 of the Constitution.[16] The correctness was doubted on the premises – *first,* the civil consequences of ex-communication deserve attention from the constitutional morality perspective; *second,* protection of Article 26(b) given to the practice of ex-communication must be assessed through the framework of constitutional morality, given that this right is subjected to morality, and *third,* the consideration to balance the rights under Article 26(b) with those enshrined in Part III, especially Article 21, was not performed.[17]

The following case in the line of the list of cases was the decision of the 5-judge bench in ***Seshammal v. State of Tamil Nadu***,[18] where the challenge to the Tamil Nadu Hindu Religious & Charitable Endowments (Amendment) Act 1970 was made. The 1970 Act

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[14] *Supra* note 13 at ¶33.
[15] (2023) 4 SCC 541.
[16] Kantaru Rajeevaru v. Indian Young Lawyers Association, (2022) 2 SCC 1.
[17] *Supra* note 15 at ¶41.
[18] (1972) 1 SCC 11.

consolidated the law relating to the administration and governance of Hindu Religious Charitable Institutions & Endowments. The Court cited the ceremonial law and the authority of the Agamas regarding temple construction, idol installation, and the conduct of deity worship.[19] By relying on the same, the Court ruled that the ceremonial laws related to temples – including issues such as who is permitted to enter the *Garbhagriha* or sanctum sanctorum, who may worship, and from which locations within the temple worship can occur – are all matters of religion. The Court arrived at this reasoning by relying on the decision of the *Devaru Case* in regard to the recognition of Agamas and the relevancy of minor details relating to the ceremonial law as recognised by the Privy Council in ***His Holiness Peria Kovil Kelvi Appan Thiruvenkata Ramanuja Pedda Jiyyangarlu Varlu v. Prathivathi Bhavankaram Venkatacharlu***.[20]

Supreme Court added a new dimension to the interpretation of the scope of Articles 25 and 26 in the case that travelled before it in ***Acharya Jagadishwarananda Avadhuta v. Commissioner of Police***.[21] The claim of Ananda Margis to carry out the Tandava dance in processions or at public places carrying lethal and human skulls was rejected as essential religious practices and matters of religion. It rejected the essential protection on the grounds that the Tandava dance is of recent origin, and the same has also been averted in the petition. Secondly, the Tandava dance to be performed in public did not pass the essentiality test due to its lack of reference to the writings of Shri Ananda Murthi. It has been noted that none of the writings justify the inclusion of the performance of the Tandava dance in public as an essential religious practice. The issue of Tandava resurfaced again in the case of ***Commissioner of Police, Kolkata v. Acharya Jagadishwarananda Avadhuta***.[22] Justice S Rajendra Babu authored the majority opinion, while Justice AR Lakshmanan dissented. The majority dwelled on the test to determine the scope of essential practices. In doing so, the majority held that the essential part of a religion means the core beliefs upon which a religion is founded and the practices that are fundamental to following religious beliefs. The test to determine the scope of essential religious practice depends on whether the religion's fundamental character or nature changes without practice while referring to the tenets, doctrine, practices and philosophy. Hence, the majority interpreted two criteria for the test: *firstly*, the practice must constitute a fundamental belief of the followers, and *secondly*, the absence of such practice would alter the fundamental character of

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[19] *Id.* at ¶11.
[20] 1946 SCC Online PC 19.
[21] (1983) 4 SCC 522.
[22] (2004) 12 SCC 770.

the religion. The dissenting opinion gave complete autonomy to the religious denomination in deciding the rites and ceremonies under Article 26(b), criticising the approach of the outside authority (Courts in this matter) to interfere in deciding the rites and rituals to be matters of religion. Subsequently, it formulated a test consisting of three prongs – *first,* the essential religious practice is to be determined with reference to the doctrine of the religion; *second,* the Courts cannot dictate what practices or beliefs are essential; and *third,* the community practising the particular religion regard the practice as an integral part of the religion. Evidently, the dissenting viewpoint harkened back to the precedent established in the *Shirur Mutt Case*. Concerning the protection of performing the Tandava dance that the majority rejected as not being part of essential religious practice, the dissent notes that while the explicit inclusion of the Tandava dance in public processions may have a recent origin, it does not diminish the integral nature of the Tandava dance within the Ananda Margis' religious beliefs. Within any religious framework, rituals and practices may be introduced based on the discernment of the spiritual leader. If the adherents embrace such practices to attain spiritual elevation, the recent introduction of such practices does not diminish their status as religious tenets. There comes another two-bench decision of ***Adi Saiva Sivachariyargal Nala Sanga v. Government of Tamil Nadu,***[23] where the Government Order relating to appointing a Hindu possessing requisite qualification as an Archakas was challenged. Referring to the judicial pronouncements, succinctly took notice of the *delicate* and *unenviable* task of identifying the essential religious practices sans lack of established work.[24] The Court reiterated the ratio *Seshammal Case* that the Agamas evince the true legal position relating to the appointment of the Archakas, i.e., the appointments must be made by following the principles as envisaged in the Agamas. Regarding the decision of the *N Adithayan Case,* the Court distinguished it from the *Seshammal Case* based on issues in the latter.

The convoluted evolution of Articles 25 and 26 has been characterised by the subjectivity inherent in the applied criteria, a facet notably exemplified in the case of ***Indian Young Lawyers Association v. State of Kerala,***[25] where the question on ban of entry of women into Sabarimala Temple saw a multitude of divergent constitutional responses by CJI Dipak Misra and Justices AM Khanwilkar along with Justice DY Chandrachud (as his Lordship was then) on one side of majority while Justice Indu Malhotra on the dissenting side. The collective majority perspective, and specifically the elucidation by Justice DY Chandrachud, introduced a fresh

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[23] (2016) 2 SCC 725.
[24] *Id.* at ¶40.
[25] (2019) 11 SCC 1.

dimension to the scope of religious freedom in the application of the essential religious practice test. Justice DY Chandrachud engaged the essential religious practice test with constitutional values. The opinion commences by acknowledging the imperative for the Courts to protect those practices that conform *"with fundamental constitutional values and guarantees and accords with constitutional morality."* It further expounds upon this argument, emphasising the intricate interplay of "*multiplicity of intersecting constitutional values* in discerning the *essentiality of religious practices."*[26] The judge documented various occurrences of women entering the Sabarimala Temple and remarked that withholding constitutional protection from an exclusionary practice would not precipitate a fundamental alteration in the essence of the religion as laid down by the decision of *Avadhuta II Case.* This approach also shifted the test from essential religious practice to essential to religion. The dissenting opinion of Justice Indu Malhotra at the threshold raised the pertinent question of the maintainability of public interest litigation to challenge the practices of any religious sect or denomination as not being mere technicality. The opinion also rejected the application of fundamental rights (as claimed by the Petitioners in the public interest) in matters of religion and the infusion of the *principle of rationality* in religious matters. The judge notes the problem lies in the Courts undertaking the judicial review of religious beliefs or practices, which would be *"outside the ken of the Courts except if the practices are pernicious, oppressive or a social evil."*[27] In the review of the judgment, the matter has been referred to the 9-judges bench in ***Kantaru Rajeevaru v. Indian Young Lawyers Association***.[28] One of the issues that have been framed relates to the interplay of Articles 25 and 26 and the scope and ambit of Article 26.

3. Managing Religious Affairs under the Australian Constitution

Australia features a landscape as varied as its populace, encompassing the arid outback, lush rainforests, and bustling metropolises such as Sydney and Melbourne. This multicultural dynamism reflects Australia's extensive history, characterised by its indigenous heritage, British colonisation, and successive waves of immigration from across the globe. Acknowledging this diversity, the Australian Constitution, under Section 116, enshrines the right to religious freedom. This provision ensures that the government cannot legislate to establish any religion, impose religious observances, prohibit the free exercise of any religion, or require a religious test as a qualification for public office. Notably, the Preamble includes phrases such as 'Almighty' or 'God', which is a *source of social*

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[26] *Id.* at ¶291.
[27] *Id.* at ¶453.
[28] (2020) 3 SCC 52.

cohesion.[29] The constitutional framework of Australia is completely different from India. Despite the multifaceted diversity, religious freedom has not emerged as a predominant aspect in the evolution of Australian society and its institutional frameworks.[30] This principle finds its reflection in Section 116 of the Constitution. The said provision contemplates: *first,* a bar on the Commonwealth to establish the religion, meaning thereby no State religion; *second,* a bar on imposing any religious observance; *third,* prohibiting the free exercise of religion; and *lastly*, no religious test can be mandated for any office or public trust. The provision applies to the Commonwealth but does not prohibit the States from enacting any law on the said four prohibitions or regulating religious freedom.[31] Dr Luke Beck argues on similar lines and describes the provision as a *'rough copy and paste'* from the US First Amendment.[32]

The Courts have narrowly interpreted the constitutional protection in Australia.[33] One such instance involves interpreting the Defence Act 1903 in ***Krygger v. Williams***,[34] which required men to attend military training compulsorily. The legislation had an exemption clause from bearing arms and undertaking non-combat roles on the grounds of conscientious decisions made on religious beliefs. The High Court noted the concession provided and held that a man required to do an act that his religion forbids is objectionable on moral grounds. Justice Higgins made a passing comment in ***Judd v. McKeon,***[35] where the electors choosing not to vote on religious beliefs is well protected under the religious freedom provisions of the Constitution. This passing note by the learned judge shows the gradual shift in the interpretational approach from the early precedent. The judge criticised the decision of the *Krygger Case* for construing the provision in *niggardly spirit*. This shift in the interpretation can be assessed in the decision of ***Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth,***[36] where the

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[29] Nicholas Arnoey, *God and Religion in the Australian Constitution*, BYU INTERNATIONAL CENTRE FOR LAW AND RELIGION STUDIES, https://talkabout.iclrs.org/2020/11/30/god-and-religion-in-the-australian-constitution/ (May 30, 2024, 10:00 AM).

[30] Parliament of the Commonwealth of Australia, *Chapter 4 Freedom of religion and belief in Australia* https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/religion/relchap4.pdf (last visited May 30, 2024).

[31] INTERIM REPORT ON LEGAL FOUNDATIONS OF RELIGIOUS FREEDOM IN AUSTRALIA, JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024110/toc_pdf/InterimReport.pdf;fileType=application%2Fpdf

[32] *Id.*

[33] *Supra* note 31.

[34] (1912) 18 ALR 518.

[35] (1926) 38 CLR 380.

[36] (1943) 67 CLR 116.

challenge was made to the National Security Act 1939 and the National Security (Subversive Associations) Regulations 1940. The Commonwealth has declared the Jehovah's Witness as a subversive association as they refused allegiance to the King on their religious views. The Court struck down the regulations as invalid lacking legislative competence. However, the observation of CJ Latham noted that Section 116 grants protection to *any religion, any religious observance, the free exercise of any religion, and any religious test*. The protection transcends religious opinion and *goes far beyond acts done in pursuance of religious belief as part of religion*.[37] The dilemma of the Courts in balancing the competing claims was noted by referring to the views of the US Supreme Court in ***Reynolds v. United States***[38]:

> *"…when the suggestion that religious beliefs should be superior to the law of the land is rejected as a matter of course, it may well be asked whether the very object of the constitutional protection of religious freedom is not to prevent the law of the land from interfering with either the holding of religious beliefs, or bona fide conduct in pursuance of such beliefs."*

After noting the problem, the judge attempted to provide a test to resolve the complexities a case may bring. The test to be adopted is to check whether the law amounts to undue infringement of freedom of religion. In ***Kruger v. Commonwealth,***[39] the test was evolved to determine the validity of the law by applying whether the purpose of the law is to achieve an object which Section 116 prohibits. The Federal Court of Australia applied the test in ***Cheedy v. Western Australia***[40] while deciding the constitutional validity of the Native Title Act 1992. The Act allowed the mining activity without the consent of the local natives and this provision was challenged as being violative of Section 116. The Trial Court rejected the argument on the premise that the statute's effect or result is not the test to determine the validity against Section 116. Instead, the purpose of the impugned law is the test as developed in the *Kruger Case.* The Federal Court agreed with the findings of the Trial Court on the scope and the interpretation of Section 116 of the Constitution. The initial approach was discarded, and the shift towards including the beliefs in pursuance of the religion was adopted.

Therefore, the Australian Constitution protects religious freedom under Section 116, prohibiting the establishment of a State religion,

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[37] *Id.*
[38] 98 US 145 (1879).
[39] (1997) 190 CLR 1.
[40] [2010] FCA 690.

imposition of religious practices, interference with free religious exercise, or religious tests for public office. The interpretations evolved from restrictive to inclusive, focusing on whether laws unduly infringe on religious freedoms, aiming to balance diverse societal claims while respecting individual beliefs.

4. Essential and Non-essential 'Matters of Religion': Distinction required?

Each jurisdiction – India and Australia provided religious freedom under their Constitution, with a varying degree of nature and scope. The nature and scope are profoundly shaped by the historical background in which each Constitution came into force. Significantly, courts in both jurisdictions find themselves confronted with a nuanced challenge in interpreting the nature and the scope of religious freedom. In doing so, the courts attempted a delicate balance between the religious freedom of individuals and religious denominations, juxtaposed against the State's intervention and regulatory powers. This regulatory power in India under Articles 25(2)(a) and 25(2)(b) is wide compared to Section 116 of the Australian Constitution.

Nevertheless, both the Constitutions converge through the expression 'practice of religion' in Article 25 and 'free exercise of religion' in Section 116. This convergence inspired the Indian Supreme Court in the *Shirur Mutt Case,* drawing upon the *Adelaide Company Case*, to formulate the essential religious practice test. Initially, the test in the *Shirur Mutt Case* allowed religious proponents to determine what constitutes their essential practices. However, this approach shifted in the *Sardar Syedna Case*, with the court itself deciding on essential religious practices. The reliance on the *Adelaide Company Case* to develop the test made the Supreme Court venture into the theologian terrain in subsequent cases it adjudicated. It further introduced judicial proclivity to religious freedom, which drew criticism of the test. Critics argue that secular courts acting as theologians and imposing an 'external point of view' on religious matters are *institutionally unsuited to undertake.*[41] Consequently, there has been significant controversy surrounding the test, with calls to discard it altogether. Therefore, this section attempts to circumvent the test by employing the principle of ejusdem generis and asserting that the Indian Constitution does not distinguish between 'essential' and 'non-essential' 'matters of religion'. The test can further be circumvented by employing the interpretation through the individualistic lens of Part III, keeping the background in which the fundamental rights were included in the Constitution.

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[41] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY OF NINE ACTS 171 (HarperCollins Publishers India 2019).

According to original formulation of the *Shirur Mutt* ratio, the religious denominations pose complete autonomy to decide the practices that are essential to the particular religion, but at the same time, the courts retain the power to scrutinise whether such practices are essential or not. This determination by the court, however, must be strictly confined to the four squares of the religious texts pertaining to religion in question. The decisions of the Supreme Court in *Durgah Committee* and *Sardar Syedna* added new dimensions to the original formulation. The Court stated that practices considered essential by the religious denominations but rooted in superstition cannot receive constitutional protection. In such a situation, the court is duty bound to differentiate between 'superstitious' and 'genuine' religious practices to determine which practices qualify as 'essential'. When broken down into constituent elements, the post-*Durgah Committee* and *Sardar Syedna,* legal position need the following: (1) religious determinations can claim any of their practices to be of essential nature; (2) the courts do have the power to determine as to whether such claim of essentiality is valid or not, but the analysis of the court must be confined to the religious texts; (3) after this, if the court finds that a practice claimed as essential is based on unfounded superstitious belief, the court can still reject the claim of essentiality. This necessitates the courts to distinguish between 'matters of religion' and 'practices associated with religion' through carefully examining theological interpretations. Thus, the tests revolve around this distinction, with the fundamental question concerning the necessity of such differentiation at the heart of this discourse. However, the distinction made by the test fails to withstand the constitutional interpretation for reasons that will be outlined below.

The first contention emerges as to whether constitutional provisions should be construed narrowly to confer protection solely upon practices deemed 'essentially religious' and excluding those merely associated with the religion. The task to delineate clear boundaries between matters of religion and associated practices is complex especially under the evolving landscape of religious pluralism. The dynamic nature of religious identity and expression further complicates this distinction. On one hand, there are practices, rituals, ceremonies, and observances deeply rooted in religious doctrine and central to the exercise of faith. On the other hand, there exist practices that are associated with a religion but may not necessarily constitute core religious tenets. These practices may encompass traditions, social customs, or community norms that have become intertwined with religious identity and belief. This expansive conception of religious identity blurs the boundaries between religious and non-religious spheres, making it challenging to establish clear demarcation. Thus, what may be considered as a central religious practice within one tradition may be perceived as

peripheral or incidental within another. However, to overcome this challenge, the courts have developed the test which can be traced on the reading together of *"…associated with religious practices"* under Article 25(2)(b) and *"manage its own affairs in matters of religion"* under Article 26(b). Article 25(2)(b) addresses the regulation of activities intertwined with religious practices, while Article 26(b) safeguards the autonomy of religious denominations in affairs pertaining to religion.

But the application of the rule of ejusdem generis wades out the need for application of the test as well as the distinction made by reading the aforesaid provisions. The application of this rule is based on the examination of words preceding specific terms to constitute a common genus or category, thereby circumscribing the scope of subsequent general terms. When a general term follows a list of specific terms, the general term should be interpreted to include only things of the same kind as those specifically mentioned.[42] Within the purview of Article 25(2)(b), the phrase *"other secular activity"* must be construed in alignment with the preceding specific terms – *"economic, financial, political…"* – as constituting a class or category of activities. This context is predicated upon the premise that the enumerated specific terms – *"economic, financial, political…"* – share a common characteristic that renders them amenable to classification under a broader genus of secular activities.

Thus, the term *"other secular activity"* ought to be construed narrowly and restrictively to encompass only those activities akin to the specific categories preceding the phrase in Article 25(2)(b). Once the construction of the word *"other secular activity"* associated with religious practices is interpreted narrowly, it negates the necessity of differentiating between the 'matters of religion' and 'practices associated with the religion' by applying the test. This approach accords a broader interpretation, requiring courts to determine if the activities fall within the scope of *"economic, financial, political and other secular activity"* preceding *"associated with religious practice."* Consequently, courts are relieved from the burden of scrutinising religious doctrines or beliefs, focusing instead on the identifiable characteristics of the activities in question. This interpretative framework aligns with the broader principle of judicial restraint in matters shedding light on religious affairs, safeguarding against judicial overreach and respecting the autonomy of religious denominations in defining their own religious affairs. Rather than embarking upon theological inquiries or assessing the centrality of practices of religious tenets, courts will be tasked with a more circumscribed inquiry. The narrow inquiry relates to whether the

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[42] Rajasthan State Electricity Board Jaipur v. Mohan Lal, AIR 1967 SC 1857.

activities share attributes with those explicitly listed in Article 25(2)(b). This interpretative approach negates the risk of subjectivity, avoids delving into the theological precepts for the courts and averts the dilemma highlighted in the *Reynolds Case.*

5. An 'Individual' at the core of Indian Constitution: Engaging Religious Freedom

The Constitution of India is delineated as a living and integrated organism[43] striving to give life and safeguard the individual's rights. It fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights. This guarantee of recognition of individuality is at the heart of constitutional discourse and runs through the entire length and breadth of Part III, enabling the individual to eliminate historical discriminations and hostilities.[44] The idea behind this framework is to transform a society where the focal point is always the individual. The explicit acknowledgement of the State's authority to enact social reform-oriented legislation underscores the fundamental principle of this engagement. This engagement serves a manifold purpose: First, It aligns with the Constitution's intent by prioritising the individual and acknowledging historical exclusions and marginalisation perpetuated by religious customs and practices. Second, it eliminates the 'external point of view', thereby upholding religious autonomy. Third, it gives due regard to the social reform under Article 25(2), accordingly removing the requirement of distinguishing 'matters of religion' and 'practices associated with the religion.' Thus, the 'reformist intentions' of the Constitution will be revered, ensuring remedy against the subordination in social life and preventing the judiciary from acting as theologians.

It is crucial to highlight the dissenting opinion of CJ BP Sinha in the *Sardar Syedna Case*, wherein the concept of religious freedom was examined from an individualistic perspective. The opinion articulated the effect of the ex-communication as a *"civil nature and not purely religious matters"*[45] and gave due regard to the social welfare legislation to give *"full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief".*[46] It leads to infer that CJ BP Sinha did not delve into the essentiality of ex-communication and instead prioritised individual rights over community interests through social welfare legislation. This approach was later advanced by the concurring opinion of

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[43] Chief Justice of Andhra Pradesh v LVA Dixitulu, (1979) 2 SCC 34.
[44] *Supra* note 25 at ¶289.
[45] *Supra* note 13 at ¶19.
[46] *Supra* note 13 at ¶11.

Justice DY Chandrachud (as he was then) in the *Sabarimala Case* by infusing the trinity of dignity, liberty and equality with religious freedom to legitimise the practices and beliefs. Thus, any claim at odds with these constitutional values alienates constitutional protection.[47]

Therefore, bringing individuals into the discourse of religious freedom breaks the social hierarchies based on the subordination of an individual. This approach also spares the court from acting as a theological authority, *"assuming power greater than that of a high priest, maulvi or dharmashshtri"*[48] and guaranteeing internal religious autonomy and the right of individuals against their groups for individual freedom.[49] It furthers the approach of internal autonomy by preventing the courts from determining the 'essential' practices as done in cases like the *Durgah Committee* and *Avadhuta*. Thus, individual freedom is facilitated by giving primacy to the individual over religious groups, thereby promoting social welfare and reform.

6. Conclusion

In examining the right to manage religious affairs under the Indian Constitution and comparing it with the Australian Constitution, it is evident that each jurisdiction presents a unique approach shaped by its historical and socio-political context. The degree of portion dedicated to religious freedom varies significantly. The Constitution of Australia gives less significance to religious freedom which has been crafted with the negative connotation to prevent the Commonwealth from enacting any law to prevent the free exercise of any religion. Further, the Indian Constitution provides detailed provisions for all the actors involved. These comparative insights reveal that while the Indian framework wrestles with the complexities of integrating religious practices within a constitutional framework, the Australian model minimises State involvement in religious affairs.

The issue is whether constitutional protections should extend only to practices deemed "essentially religious," excluding those merely associated with religion. This distinction is challenging due to the intertwined nature of cultural, social, and religious practices, making it difficult to draw clear lines between them. Applying the principle of ejusdem generis suggests a restrictive interpretation of what constitutes "secular activities" associated with religious practices, potentially simplifying judicial inquiries by focusing on

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[47] *Supra* note 25 at ¶300.
[48] Rajeev Dhavan & Fali Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, (Oxford University Press 2000).
[49] *Supra* note 41.

economic, financial, and political activities. The significance of the 'individual' within the constitutional framework aligns with the reformist intentions, emphasising engagement with religious freedom. The emphasis on individual rights and adopting a restrictive interpretation of "secular activities" solves the court's theological entanglements by subordinating the essential religious practices test within the broader and fundamental framework of individual freedom.

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Voices of Change: Women Leaders Transforming Indian Politics

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Abstract:

Gender equity is a critical issue deeply rooted in the sociopolitical fabric of nations, including India. As a vibrant democracy, India has made significant strides in promoting gender equality, with the inclusion of Sustainable Development Goal 5 under Agenda 2030. However, persistent gender disparities in political representation underscore the challenges that remain. Women constitute only 12.39% of India's parliamentary seats, a stark contrast to their population share of 48.5% (2011 Census), reflecting the pervasive influence of societal norms, patriarchal structures, and institutional barriers. This paper delves into gender inequality in Indian politics, exploring its causes, including cultural stereotypes, economic dependence, educational disparities, and gender bias in political parties. It highlights notable women leaders who have broken barriers and contributed significantly to the nation's political landscape. The chapter also examines legislative efforts such as the Women's Reservation Bill, which seeks to allocate 33% of seats in the Lok Sabha and state assemblies to women, as a step toward reducing gender disparities.

Keywords

Gender Equality, Parliament, Lok Sabha, Constitution of India

1. Introduction

Gender equity, a multidimensional and cross-national issue, lies at the heart of societal development. India, as one of the world's largest democracies, has made positive strides in fostering political participation among women and men. In 2015, the United Nations General Assembly recognized gender equality as a global priority by including it in the 17 Sustainable Development Goals (SDGs) under Agenda 2030, highlighting that gender discrimination transcends

national boundaries. Achieving gender equity is vital for a harmonious society, as men and women form its foundational pillars. The Indian Constitution enshrines the right to equality under Article 15, yet societal dynamics often marginalize not only women but also individuals of the third gender, namely transgender persons. This inclusion underscores the need to address the complexities of gender issues across all identities. Gender equity is not merely a national concern but a global imperative, demanding interdisciplinary approaches that address social, economic, and legal inequalities. The path toward equity necessitates the implementation of policies that empower all genders while fostering an inclusive environment for their participation in every societal domain, including politics, education, and employment.

Gender disparities hinder societal progress, and bridging these gaps is essential for achieving sustainable development and equity. In India, transgender individuals face significant societal challenges due to entrenched biases and limited understanding of their identity. A landmark decision by the Supreme Court on April 15, 2014, in the National Legal Services Authority case recognized transgender persons as a "third gender," granting them fundamental constitutional rights and setting a precedent for inclusion. Despite such progress, gender discrimination persists, particularly in Indian politics. Women, who constitute 48.5% of India's population (2011 Census), hold only 12.39% of parliamentary seats, a figure far below the global average of 24.5% (IPU, 2020). This underrepresentation highlights systemic barriers that restrict women's participation in governance and decision-making at the highest levels. This chapter examines gender inequities in political representation, focusing on the challenges faced by women and transgender individuals in India. It explores the societal, structural, and institutional factors contributing to these disparities and their implications for democratic governance. Additionally, it evaluates strategies to enhance representation and equity, including legislative measures, societal attitude shifts, and empowerment programs. By addressing these issues, the chapter aims to foster a more inclusive political framework where all genders can contribute equally to the nation's development.

2. Prominent Women Leaders

Indian women have made significant strides in politics, breaking barriers and paving the way for future generations. Here are some notable Indian women political leaders:

Indira Gandhi: The late Indira Gandhi, a member of the Indian National Congress party, served as the Prime Minister of India from 1966-1977 and 1980-1984. First and only female Prime Minister of India, known for her strong leadership during the Indo-Pakistani War

of 1971, and her controversial decision to impose the Emergency in 1975.

Sonia Gandhi: As the longest-serving President of the Indian National Congress, Sonia Gandhi has played a crucial role in shaping the party's direction and policies. Her leadership has been instrumental in forming key alliances and steering the party through challenging times.

Mamta Banerjee: The Chief Minister of West Bengal and founder of the All-India Trinamool Congress, Banerjee is known for her grassroots activism and tenacity. Her efforts in implementing social welfare programs and challenging the dominance of the Communist Party in West Bengal have been noteworthy.

Mayawati: As the leader of the Bahujan Samaj Party (BSP), Mayawati has been a strong advocate for the rights of Dalits and other marginalized communities. Her tenure as Chief Minister of Uttar Pradesh highlighted her focus on social justice and empowerment.

Sushma Swaraj: The late Sushma Swaraj, a member of the Bharatiya Janata Party (BJP), served as the Minister of External Affairs and was known for her effective diplomacy and accessibility to the public through social media.

Sheila Dikshit: A member of Indian National Congress, Served as the Chief Minister of Delhi for three consecutive terms, credited with transforming the infrastructure and governance of the capital city.

Jayalalithaa: A member of All India Anna Dravida Munnetra Kazhagam (AIADMK), Served as the Former Chief Minister of Tamil Nadu Known for her populist schemes and strong administrative skills, Jayalalithaa had a significant impact on the politics and development of Tamil Nadu.

Mehbooba Mufti: A member of Jammu and Kashmir Peoples Democratic Party (PDP), served as the Former Chief Minister of Jammu and Kashmir. The first woman to serve as the Chief Minister of Jammu and Kashmir, Mufti has been a key figure in regional politics, advocating for peace and development in the conflict-ridden state.

Priyanka Gandhi Vadra: A member of the Indian National Congress, served as the General Secretary. She Known for her charisma and campaigning skills, she is seen as a rising star within the Congress party, focusing on reviving its fortunes in key states.

Smriti Irani: A member of Bharatiya Janata Party (BJP), served as the Minister of Women and Child Development. A prominent figure in Indian politics, Irani has held various key portfolios and is known for her efforts to improve education and women's welfare.

Nirmala Sitharaman: A member of Bharatiya Janata Party (BJP), served as Minister of Finance and Corporate Affairs. The first full-time female Finance Minister of India, Sitharaman plays a crucial role in shaping the country's economic policies and managing its finances.

These women have significantly contributed to Indian politics, bringing attention to various social issues and ensuring diverse representation in governance. Their leadership continues to inspire and pave the way for more women to enter the political arena.

3. Nari Shakti Vandan Adhiniyam

The Constitution (One Hundred and Sixth Amendment) Act, popularly known as the Women's Reservation Bill, 2023, was introduced in Lok Sabha on 19 September 2023 during the special session of Parliament.[1] This legislation seeks to allocate 33 percent of the seats in the directly elected Lok Sabha and state legislative assemblies for women.[2]

The bill is the possible culmination of a legislative debate that had been ongoing for 27 years, including the lapsed Women's Reservation Bill (2010), due to the lack of consensus among political parties. The bill was the first that was considered in the new parliament building.[3] On 20 September 2023, Lok Sabha passed the bill with 454 votes in favour and two against.[4] The Rajya Sabha passed the bill unanimously with 214 votes in favour and none against, on 21 September 2023.[5] President Murmu signed the bill on 28 September 2023, and the gazette notification was also published the same day, which made it clear that the reservation will come into force soon after the first delimitation (frozen until 2026).

The reservation of seats exclusively for women would primarily favor educated and urban women, consequently neglecting the underprivileged rural women belonging to marginalized castes. Conversely, proponents of this bill assert that the opposition from leaders of these political parties stems from patriarchal tendencies, as they apprehend a potential loss of power to women if a significant portion of seats is allocated to them.[6]

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[1] Women's reservation Bill – imperfect but important

[2] God has given me the opportunity, says PM Modi as women quota bill tabled in LS. Hindustan Times. 19 September 2023.

[3] Parliament special session: Govt introduces women's reservation bill in LS. Business Standard. Retrieved 19 September 2023.

[4] India's lower house votes to reserve a third of seats for women. Al Jazeera English. 20 September 2023. Wikidata Q122735230. Archived from the original on 20 September 2023.

[5] "Women Reservation Bill: In 20 States & UTs less than 10% MLAs are female".

[6] Indian gov't presents bill to reserve a third of parliament seats for women". aljazeera.com. Retrieved 22 September 2023.

Political parties; Congress, Samajwadi Party, and Rashtriya Janata Dal have criticized the bill as it does not have provision for reserved seats for OBC and Minorities women, which seeks to ensure equal representation for OBC and Minorities women. As the absence of quota for OBC and minorities would make it more difficult for the marginalised women to raise their voices in the Parliament.[7]

4. Gender Inequality in Parliament- Global Perspective

Women, who are considered to be the cornerstone of society, women in the modern era are representing the politics of most countries around the world. Seeing history, you find that women are playing an important role in creating society. It is known that the role of women in society and their nature is philosophical, religious and political views. Communal structure and women politics were given a place in the discussion on the situation so that they could come to politics themselves.

Table 1: Women in parliaments in 2017- World average

Single House or Lower house		**Upper house or Senate**	
Total MPs	39,013	Total MPs	39,013
Men	29,423	Men	29,423
Women	9,590	Women	9,590
Percentage of women	24.6%	Percentage of women	24.6%

Source: http://archive.ipu.org/wmn-e/world.htm (Jan 2020)

According to data of IPU 2020 (table no 1), we can see that in the single house, 9,590 seats of women out of the total 39,093 seats in the world have received 24.6 per cent . In the same way, in the upper house, they got 1,750 seats, which is 24.3 per cent.

5. Gender Inequality in Politics: South Asian Perspective

Gender inequality has been a major issue in all countries in every field such as sports, politics, corporate, etc. Women have always been given less importance than men. In modern India, women have held positions in politics such as President, Prime Minister, President of Opposition, Leader of Opposition, Defense Minister and Foreign Minister, etc and put yourself in active participation in decision-making in politics. Kumar, D. P. (2017) observed that there are still many countries in which the representation of women is negligible, such as Arab countries, Yemen, Kuwait, etc. India is far behind the representation of women in the smallest country in Pakistan,

[7] https://www.tribuneindia.com/news/india/why-obc-quota-in-womens-bill-is-a-problem-546212

Bangladesh, and Nepal because women are undermined here compared to men.

Table 1A: Status of Women in South Asia in 2020

Rank	South Asia country	Total seats (Both Houses)	Seats held by women	% of women	% of men
143	India	543	78	12.39	87.61
106	Pakistan	342	69	19.70	80.3
98	Bangladesh	349	73	20.92	79.08
182	Sri Lanka	225	12	12	88
43	Nepal	275	90	35.01	64.99
138	Bhutan	47	7	15.43	84.57
184	Maldives	87	4	4.6	95.4

Source: http://archive.ipu.org/wmn-e/world.htm (January 2020)

According to a report of the Inter-Parliamentary Union (IPU, 2020), India ranks 143th globally in terms of representation of women in Parliament. India is a large country in South Asia. Let us look at our South Asian neighboring country, India (12.39 percent) is far behind Pakistan (19.70 percent) in terms of representation of women in Parliament.

6. Participation Of Both Genders in Indian Politics

Gender inequality is seen in Indian politics. Some so-called parties' invite-only males in politics and due to some family reasons women do not get a chance to enter politics. In the table 2, it is seen that due to gender discrimination in the 1st Lok Sabha election of Indian politics, women had to remain satisfied in only 4.5 percent of the seats, while males dominated 96.5 percent of the seats. By far the highest inequality in Indian political history was seen in 1977, Lok Sabha elections when the gender inequality between both genders in total seats was 3.49 and 96.51 percent respectively. In 1914, the 16th Lok Sabha Elections, women accounted for 11.8 percent, which shows that there is a positive effort to gradually reduce gender differences in Indian politics. In a country where the gender-to-sex ratio is low, there are many positive results, in India's politics, women are trying to get out of gender discrimination, but the journey is long and full of struggle. In Indian politics, in addition to both genders, transgender have also seen an eagerness to enter politics. In the 2019 Indian Politics Lok Sabha elections, the ratio of women to men has been 14.36 and 85.64 respectively, so that it shows that even after the right to equality in the Indian Constitution, gender discrimination is not decreasing in our society today.

Table 2: Women in Lok-Sabha (Lower chamber of India's Parliament), 1952-2019

Year	Total No. of seats	No. of Women Members Selected	Percent of women
1952	489	22	4.5
1957	494	27	5.47
1962	494	34	6.88
1967	523	31	5.93
1971	521	22	4.22
1977	544	19	3.49
1980	544	28	5.15
1984	544	44	8.09
1989	529	28	5.29
1991	509	36	7.07
1996	541	40	7.39
1998	545	44	8.07
1999	543	48	8.84
2004	543	45	8.29
2009	543	43	10.87
2014	542	64	11.8
2019	543	78	14.36
2023	543	78	15.2

Source: Election Commission of India, 2023

7. Reasons For Gender Discrimination in Indian Politics

In Indian culture, women are seen with respect and respect but still, there is a difference between a woman and man due to physical reasons which is natural and it can also be called a natural gender distinction, but by society women and The gap in gender differences between men is very deep and weakening the society. It is equally important for men to win the structure of a society, as same for women. But it is due to some so-called people of the society that men are more dominant in society considering women as second class citizens.

Gender discrimination plays a huge role in pushing back in society so that it is maintained in different ways.[8]

There are some other reasons which promote gender discrimination in politics like:-

[8] Agnihotri, Indu, and Vina Mazumdar, "*Changing Terms of Political Discourse: Women's Movement in India",* 1970s-1990s, Stree, 1995.

Religious reason: India is a country equipped with many religions. Every religion has it's own different beliefs. Religious is the main reason for gender discrimination. Because of the patriarchal system in the society, the gap of gender discrimination between women and men has arisen. Women are underestimated. Men believe that women should stay within the boundary of the house, due to religious reasons, women have to face gender discrimination and they are unable to enter politics.[9]

Social reason: The famous philosopher Aristotle says that a man who is a social animal and who does not live according to the rules of society is either a deity or an animal.[10] The society has been trying to impose various types of restrictions on women such as practice, child marriage, widow life, maid service, dynasty tradition, estranged wealth, and illiteracy are some of the important factors that prevent the participation of women in politics and promote gender discrimination.

Commercial reason: It is no wonder that the work of women and men has been different since ancient times due to the gender differences prevalent in society. Women have to depend on a man of the family for financial help, due to which they are dissatisfied in taking decisions of every kind, big and small. Women from the family have to face gender discrimination. Due to being economically weak, even today women are not allowed to enter politics, whereas men are able to take decisions on their own, due to which men are more and women less in Indian politics.[11]

Political reasons: The Indian constitution has given constitutionally many rights to a woman considered weak in the court. According to which women will not be discriminated on the basis of caste, religion, descent, place of birth, and will be considered equal. But some parties of Indian politics do not invite women to enter politics because male- dominated society and politics view women with gender discrimination and on the other hand men believe that if women enter politics then they should abdicate, therefore, due to Indian politics being male-dominated, there is a gender bias in politics.[12]

Other reason: It is often seen that women are looked down upon due to gender differences, female feticide after sex test, beaten up in the family, they are deprived of education by understanding the money which is due to them mentally. Weak and afraid of doing risky work,

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[9] Forbes, Geraldine, "*Women in Modern India",* Cambridge University Press, 1996.
[10] Banerjee, Mukulika, "*Why India Votes?",* Routledge India, 2014.
[11] Kishwar, Madhu, "*Off the Beaten Track: Rethinking Gender Justice for Indian Women,"* Oxford University Press, 1999.
[12] Rai, Shirin M, "Gender and the Political Economy of Development: From Nationalism to Globalization" Polity Press, 2002

while men are not afraid to take the risk. This can also be a reason for gender discrimination in Indian politics.[13]

8. Challenges Faced by Women in Indian Politics

Despite the notable achievements and contributions of women leaders in Indian politics, several significant challenges persist that hinder their full participation and representation. These challenges stem from deep-rooted societal norms, gender biases, and a pervasive patriarchal mindset. Understanding these obstacles is crucial to devising strategies to overcome them and ensure a more inclusive political environment.

8.1 Societal Norms and Gender Bias

1. Patriarchal Mindset: - The patriarchal structure of Indian society often dictates traditional gender roles, limiting women's opportunities and aspirations. Women are frequently expected to prioritize family responsibilities over professional or political ambitions. Women are often expected to shoulder the primary responsibility for household chores and caregiving roles, such as raising children and caring for elderly family members. These duties are culturally ingrained and are seen as women's primary roles. In many cases, women are expected to put their careers on hold or forgo professional opportunities to fulfill family obligations. This expectation is more pronounced in conservative and rural settings but persists across all strata of society.[14]

2. *Cultural Stereotypes:-* Persistent cultural stereotypes portray women as less capable leaders compared to men. These stereotypes undermine women's credibility and leadership potential, affecting their chances of being elected or appointed to significant political positions. Early marriage remains common in many parts of India, which can interrupt or completely halt a woman's education and career progression. The arrival of children often sees women taking a break from their careers. The societal expectation is that women should be the primary caregivers, which can delay or end their professional and political pursuits. Managing family responsibilities leaves women with limited time to engage in political activities, which often require significant time commitment. Women's mobility is frequently restricted by family norms, limiting their ability to travel for political campaigns, attend meetings, or participate in political events. Many women lack the support systems necessary to balance

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[13] Banerjee, Sikata, *"Gender and Nationalism: The Masculinization of Hinduism and Female Political Participation in India"* Women's Studies International Forum, vol. 26, no. 2, 2003, pp. 167-179.

[14] Thomas, Maria, *"Women are Winning More Seats in Indian Politics—But There's Still a Long Way to go."* Quartz India, 24 May 2019.

family and political careers. Support from spouses, extended family, or community is crucial but not always available.[15]

3. *Gender Bias in Political Parties:* - Political parties in India often exhibit gender bias in candidate selection and leadership roles. Women are underrepresented in party hierarchies, and their political careers are sometimes overshadowed by male counterparts. This bias manifests in the selection of candidates for elections and the distribution of leadership roles within party hierarchies. As a result, women are underrepresented and their political careers are frequently overshadowed by their male counterparts. Women are often selected as candidates to fulfill party quotas or to project an image of inclusivity, rather than being chosen based on merit or political acumen. Parties sometimes allocate less significant constituencies to women, where the chances of winning are minimal, thereby ensuring their symbolic presence without real power. Parties prefer fielding experienced male candidates, considering them more likely to win. Women, especially those new to politics, struggle to get nominations in winnable constituencies. Women often do not receive the same level of grooming and mentorship as male candidates, affecting their political readiness and electoral prospects.[16]

8.2 Socio-Economic Factors

1. Economic Dependence:- Economic dependence on male family members can restrict women's political participation.[17] Financial autonomy is crucial for women to engage in politics independently and assertively. Running for political office involves substantial expenses, including campaign materials, travel, advertising, and staff salaries. Without financial resources, women find it challenging to compete on an equal footing with male counterparts. Women often have less access to fundraising networks compared to men. This limits their ability to gather necessary funds for campaigning, thereby reducing their competitiveness. Women who are financially dependent on male family members have limited personal financial stability. This dependency restricts their freedom to make independent political decisions and pursue a career in politics. Engaging in politics often means giving up or reducing time spent on paid employment. For women without financial security, this opportunity cost is particularly high.[18]

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[15] Dhillon, Amrit *"India's Women Politicians are Breaking the Mould"* The Guardian, 15 June 2020.

[16] Singh, Bhavna "*The Rise of Women Politicians in India: From Sarpanch to Chief Minister"* BBC News, 8 March 2019.

[17] Election Commission of India "*Statistical Reports on General Elections" Election Commission of India*," www.eci.gov.in.

[18] International Institute for Democracy and Electoral Assistance, "*Women in Politics in South Asia"* IDEA, 2014

2. *Educational Disparities*: - Although progress has been made in female education, disparities still exist, particularly in rural areas. Limited educational opportunities restrict women's awareness and involvement in political processes. There has been a notable increase in female enrollment in primary and secondary education across India.[19] Various government initiatives, such as the Sarva Shiksha Abhiyan and Beti Bachao Beti Padhao, have contributed to this progress. More women are now pursuing higher education, with increasing enrollment in colleges and universities. Scholarships and reservation policies have played a crucial role in this growth. Educational opportunities in rural areas lag behind those in urban centers. Rural schools often lack basic infrastructure, qualified teachers, and learning materials, leading to lower quality education for girls Higher dropout rates among girls in rural areas are driven by factors such as early marriage, household responsibilities, and economic constraints.[20]

8.3 Institutional Barriers

1. *Political Representation:-* Despite legal provisions for women's representation in local governance, their presence in higher political offices remains limited.[21] The representation of women in Parliament and state legislatures is significantly lower than their male counterparts.

73rd and 74th Amendments these amendments, enacted in 1993, mandated the reservation of one-third of seats for women in Panchayats (village councils) and Municipalities, respectively. These provisions have successfully increased women's participation at the grassroots level. The reservation policies have led to millions of women holding positions in local governance, thereby gaining political experience and contributing to community development. As of recent elections, women constitute only about 14% of the Members of Parliament (MPs) in the Lok Sabha (the lower house) and around 11% in the Rajya Sabha (the upper house). This is significantly lower than the global average of around 25% for national parliaments. The limited representation of women in higher political offices in India underscores the need for targeted interventions and systemic changes. While legal provisions have increased women's participation in local governance, similar measures are required to ensure their presence in Parliament and state legislatures. By addressing societal norms, providing financial support, and implementing quotas, India

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[19] Banerjee, Sikata, *"Gender and Nationalism: The Masculinization of Hinduism and Female Political Participation in India"* Women's Studies International Forum, vol. 26, no. 2, 2003, pp. 167-179.

[20] Center for Social Research, *"Women's Political Participation in India,"* CSR, 2012.

[21] UN Women *"Women in Politics"* UN Women, www.unwomen.org.

can move towards achieving greater gender parity in political representation.[22]

2. *Policy Implementation:-* Gender-sensitive policies and initiatives often face challenges in implementation due to bureaucratic inertia and lack of political will. This results in the slow progress of programs aimed at empowering women and addressing gender disparities. Gender-sensitive programs frequently suffer from insufficient funding and budgetary allocations, limiting their scope and effectiveness. Many initiatives lack the necessary human resources for effective implementation, with insufficient staffing and expertise to carry out the programs. Political leaders often prioritize other issues over gender-sensitive policies, viewing them as less critical. This prioritization can result in limited political support and resources for these programs. Politicians may focus on short-term gains and visible outcomes to secure electoral support, neglecting the long-term commitment required for effective implementation of gender-sensitive policies.[23]

8.4 Strategies for Overcoming Challenges

To address these challenges and foster greater gender equality in Indian politics, several strategies can be employed:

1. Education and Awareness:- Promoting education and political awareness among women can empower them to participate actively in politics. Educational programs should focus on leadership skills, political processes, and rights awareness.[24]

2. Legal Reforms:- Enforcing and expanding legal provisions for women's political representation at all levels of governance can help ensure their participation. Gender quotas and reservation policies can be instrumental in this regard.

3. Supportive Networks:- Establishing mentorship programs, support networks, and women's political forums can provide guidance and resources to aspiring women politicians. These networks can also offer a platform for sharing experiences and strategies.[25]

4. Addressing Violence and Intimidation:- Implementing strict measures to address violence and harassment against women in

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[22] National Commission for Women, *Empowerment of Women in Political Participation in India*, NCW, 2015.

[23] Mukherjee, Nirmalangshu.,"*Women in Indian Politics"* Economic and Political Weekly, vol. 33, no. 44, 1998, pp. 2815-2819.

[24] Inter-Parliamentary Union *"Women in National Parliaments"* IPU, www.ipu.org.

[25] Devika, J., and Binitha V. Thampi, *"Mobility towards Work and Politics for Women in Kerala State, India: A View from the Histories of Gender and Space"* Modern Asian Studies, vol. 41, no. 4, 2007, pp. 775-811.

politics is essential. Providing a safe and secure environment will encourage more women to participate and remain active in politics.

5. Economic Empowerment:- Initiatives aimed at economic empowerment, such as access to credit, entrepreneurship opportunities, and vocational training, can enhance women's financial independence, enabling them to pursue political careers without economic constraints.

6. Changing Societal Attitudes:- Public awareness campaigns and media representation can play a significant role in changing societal attitudes towards women in politics. Highlighting the achievements and capabilities of women leaders can challenge stereotypes and inspire broader acceptance of women in leadership roles.[26]

While women in Indian politics have made significant strides, the path to gender equality remains fraught with challenges. Overcoming these obstacles requires concerted efforts from all sectors of society, including government, political parties, civil society, and the media. By addressing the structural, societal, and economic barriers, India can create a more inclusive and equitable political environment where women leaders can thrive and contribute to the nation's progress.

9. Conclusion

Now, with gender discrimination in place, women have a strong desire to move forward with confidence while remaining active in the field of work. Now women are demanding their rights in power, do not want to give up the right to empower women. This can be changed only after the constitutional right to equal status in politics which has been going on for centuries. It is known that women in India are quoted in lower-level politics (local politics), but women are discriminated against in high-level politics (parliament). The purpose of this chapter is to know the difficulties faced by the politics of discrimination. Men should promote womens representation in their political parties. In terms of the representation of women in India's Parliament, far behind developed countries, India should learn from developed countries that women can be good politicians in politics as well as men without discrimination.

To overcome gender differences one has to understand that there are two aspects of the same indicator. As much as men contribute to the rise of download, so do women. In this regard, we can learn from Mizoram and Meghalaya, where women are given equal work without discrimination.] Several positive steps have been taken by the Indian

[26] Desai, Manisha, *"From Autonomy to Solidarities: Transnational Feminist Political Strategies"* Canadian Woman Studies, vol. 22, no. 3/4, 2003, pp. 9-15.

Constitution to remove gender inequality; The Preamble of the Constitution aims to provide every Indian with a level of equality and opportunity with the goals of achieving social, economic and political justice. In our country, women have the right to political and economic equality in the Constitution of India. They should try not to take this paper, but to take it to the ground. According to the 2011 census, the number of girls in the country is 940 per one thousand boys. For gender equality, first of all, society needs to change the social attitude towards women. Apart from this, concrete and effective steps need to be taken in relation to women's education, training, employment and welfare, and political participation. At the same time, the prejudice prevailing in society also has to be overcome that women are physically weak and intellectually underdeveloped. This chapter finds that women need political empowerment to remove gender discrimination so that they can get out of the house and discharge their Slavs towards their society and country. Women can gain political participation by ending gender discrimination with women. As women have been given reservation in local politics, to promote political participation, the reservation system should be implemented for women in women's politics so that women get political rights.

Education should be given for illiterate women and political awareness campaigns. “Educating women means educating society”. The establishment of a progressive society free of gender discrimination is possible only with the honor and total opportunity of women.

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Law Relating to Arrest vis-à-vis Fundamental Freedom of Speech and Expression: A Critical Appraisal of Recent Constitutional Courts' Judgments

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Abstract

This article explores the relationship between arrest laws and the fundamental right to freedom of speech under Article 19(1)(a) of the Indian Constitution, emphasizing the need to balance individual freedoms with reasonable restrictions under Article 19(2). Recent judicial pronouncements underscore the principle of 'bail over jail' to prevent unnecessary arrests. In Satender Kumar Antil v. CBI (2021), the Supreme Court issued guidelines to limit unwarranted detentions, while in Sidharath v. State of U.P. (2021), it ruled that arrests are not mandatory for non-bailable offenses if the accused cooperates with the investigation. Similarly, in Sudheer Rikhari v. State of Goa (2021), the Bombay High Court quashed an FIR under Section 295-A IPC, stressing arrests should not be routine. The article also highlights cases like Indibly Creative Pvt. Ltd. v. Government of West Bengal, where the Court protected freedom of expression from state overreach, and the G.N. Saibaba case, which exposed procedural lapses under UAPA. Finally, the article emphasizes the need for law enforcement sensitization to uphold constitutional freedoms as highlighted in Javed Ahmed Hajam v. State of Maharashtra, where misuse of Section 153-A IPC was addressed to protect criticism and peaceful protests, vital for democracy.

Keywords

Freedom of Speech, Constitutional Rights, Reasonable Restrictions, Arrest Laws, Supreme Court Judgments, Judicial Discretion, Fundamental Rights

1. Introduction

Article 19 (1) (a) talks about freedom of speech and expression. Going by the language of Article 19, the freedoms are available to the citizens of India. Article 19(2) talks about reasonable restrictions on the enjoyment of these fundamental freedoms granted by the Constitution. The Supreme Court of India has through its various judgments expressed its concern to provide more balanced freedoms and rights to citizens. Some of the Rights (like Article 21) are available to all whether citizens and non-citizens as referred in the very wording of the provision.

The fundamental freedoms are granted only to citizens under Article 19 of the Constitution of India, 1950. Freedoms are required to celebrate "life" within the meaning of Article 21 of the Constitution. They are interrelated. When there are unreasonable restrictions on the freedoms it will be resultant in negation of the most cherished right i.e. Article 21 of the Constitution as well.

2. Arrest Cases

2.1 Satender Kumar Antil v. CBI

In *Satender Kumar Antil* v. *CBI* (2021) 10 SCC 773 the Supreme Court of India has stressed the importance of 'bail over jail' and issued necessary directions to prevent unnecessary arrest and remand. Through the latest order of 2024, the Court though referred this case to the registry of all the High Courts to be taught in Judicial Academies across the country and through the High Courts for further reference to the lower judiciary but not been ordered to be taught to police officials. This case is equally important for the police machinery concerning whenever they arrest a person accused of an offence.

The following offences have been categorized and guidelines are forwarded by the Supreme Court of India:

Category	**Nature of Offences**	**Conditions**	**Conditions to be Adopted by Courts**
Category A	Offences punishable with imprisonment of 7 years or less not falling in Category B & D (Deals with both police cases &	(1.) Accused not arrested during investigation. (2.) Accused Cooperated throughout the investigation including	1. Ordinary Summons at the first instance (including appearance through lawyer permissible) 2. If such accused does not appear dispite service of summons then Bailable Warrant may be issued for

	complaint cases)	appearance before Investigating Officer whenever called.	physical appearance. 3. if the accused still not appear then NBW (Non-bailable warrant): on failure to appear dispite Bailable Warrant. • **Appearance of accused not necessary for cancellation of warrant.** • **No need to forward such an accused along with the charge sheet (Sidharath v. State of U.P., (2021) 1 SCC 676).** • **Bail application of accused arrested in Non-bailable Warrant to be decided without taking him into physical custody.**
Category B	Offences punishable with death, imprisonment for life or Imprisonment for more than seven years	On appearance of the accused in court pursuant to process issued	Bail application to be decided on merits.
Category C	Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Sec. 37), PMLA (Sec. 45), UAPA (Sec.	On appearance of the accused in court	1. Bail application to be decided on merits. 2. Additional Conditions of compliance of the provisions of Bail under Special Acts.

	43D (5), Companies Act, (Sec. 212(6) etc.		
Category D	Economic Offences not covered by Special Acts.	On appearance of the accused in court pursuant to process issued	Bail application to be decided on merits. **Sanjay Chandra v. CBI,** (2012) 1 SCC 40 held that in determining whether to grant bail or not, two aspects have to be taken into consideration: (1) Seriousnes of the Charge and (2) severity of the punishment.

Note: According to the Supreme Court these guidelines are not to be considered as fetters on the powers of the Courts.

The Apex Court observed that the Trial Courts and the High Courts have to keep in mind the aforesaid guidelines while considering bail application of the accused. But the Supreme Court has observed that where the accused has not appeared before the Investigating Officer or has not cooperated in the Investigation or has not appeared before the Investigating Officer or where court feels that judicial custody of the accused is necessary for the completion of trial or where further investigation including a possible recovery is needed, the aforesaid approach cannot give any benefit to accused.

The SLP was disposed of by the Apex Court in this case and directed that a copy of this order to be circulated to the Registrars of different High Courts. Through the High Courts the Judgment be circulated to trial courts so that the unnecessary bail matters do not come to the Apex Court.

2. 2 Sidharath v. State of U.P.

Another case which was referred to the Judicial Academies by the Supreme Court is a case decided by Division Bench of the Supreme Court comprising Justice Sanjay Kishan Kaul and Hrishikesh Roy in *Sidharath* v. *State of U.P.,* (2021) 1 SCC 676. In this case, the Court has ruled that if the police or Investigating Officer believes that in a given case the accused has cooperated in investigation and it is unnecessary to place him in custody, then the investigation can be completed without the accused being taken into custody and the Investigating Officer is not required to arrest the accused. at the trial stage, the learned special judge believed that an arrest by the police was necessary for every non-bailable & cognizable offence. Rather if it is possible for the police to wrap up the investigation without the

arrest of the accused and if he offers any kind of cooperation to the Investigating Officer, then the officers should always refrain from making the arrest and sending him to jail. The arrest of an accused is necessary in the direst circumstances when the investigation is supposed to be completed. The court has given reference of Section 170, 41, 41A, 41B, 41C, 41D, 42, 438 & 468 of the *Code of Criminal Procedure*, 1973.

The Hon'ble Supreme Court observed that the lower courts/trial courts are allegedly insisting on the arrest of an accused as a necessary requirement and sine qua non to take the charge sheet on record in reference to the provisions of Section 170 of the Code of Criminal Procedure, 1973. Now this practice is inappropriate and contrary to the compliances in *Joginder Kumar* v. *State of U.P.*[1] & Ors.

2.3 Bombay High Court*: Sudheer Rikhari* v. *State of Goa*

Similarly in one of the case of Bombay High Court i.e. *Sudheer Rikhari* v. *State of Goa* (Criminal Writ Petition No. 71 of 2020, along with criminal writ petitions Nos. 72, 73, 74, 75, 76, 77, 78 & 79 of 2020, Date of Judgment: 9th April, 2021), the Division Bench of the High Court of Bombay at Goa comprising Justice M.S. Sonak (author of the Judgment) and Justice Smt. M.S. Jawalkar held that no arrest can be made routinely on mere allegation of commission of an offence.

The High Court in this case ordered to quash the FIR No. 268/2019 which was registered hurriedly. The police action was held to be contrary to the judicial authorities and precedents in matters relating to arrest under Section 295-A of the *Indian Penal Code*, 1860. Further FIR was registered without any perusal of the complaint under Section 295-B of the *Indian Penal Code*, 1860. When there were no allegations in the complaint about any deliberate acts of the petitioners whether done maliciously with the intention of outraging religious feelings of any community or any class, there was no case of registering the FIR and to start investigation in the matter concerned.

The respondent in this case has chosen to take a sentence from here another sentence from other part or rather one word from one part, another from other part. According to the Court the Police has totally ignored the dictum of the Apex Court[2], which suggests that the effect of the words must be judged from the standard of reasonable, strong-minded, firm and courageous men and not those of weak and vacillating minds or of those who scent danger in every hostile point of view. All this has resultant in the filing of a vague

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[1] (1994) 4 SCC 260.

[2] *Manzar Sayeed Khan* v. *State of Maharashtra & Anr.*, (2007) 5 SCC 1

complaint, which even did not disclose the basic and essential elements of section 295-A of the Indian Penal Code, 1860.

2.4 Supreme Court Judgments: *Indibly Creative Private Limited and Ors.* v. *Government of West Bengal and Ors.*, *Mahendra Singh Dhoni* v. *Yerraguntla Shyamsundar* and Ors., *Ramji Lal Modi* v. *the State of U.P.*, *Maqbool Fida Husain* v. *Rajkumar Pandey, G.N. Saibaba case*

In *Indibly Creative Private Limited and Ors.* v. *Government of West Bengal and Ors.*[3], the Petitioner grievance was that State of West Bengal caused an obstruction against the public exhibition of the Petitioner's Bengali feature film 'Bhobishyoter Bhoot'. The petitioner concern was that the State was using its police force for violating the petitioner's Fundamental rights guaranteed under Article 14, 19(1)(a), 19(1)(g) and 21 of the *Constitution of India,* 1950. According to him the State was acting as 'Super censor' sitting atop the CBFC. The Hon'ble Supreme Court allowed the petitions under Article 32 of the Constitution of India, 1950 with Costs quantified at Rs. 20 Lakhs[4].

In *Mahendra Singh Dhoni* v. *Yerraguntla Shyamsundar* and Ors.[5], the allegation was against the cricketer that he posed for a magazine photograph/painting with the caption "God of Big Deals". The police in this case refused to register FIR. Then the complainant filed a complaint under Section 200 of the *Code of Criminal Procedure*, 1973 before the Magistrate and he issued process to the Cricketer. However the Supreme Court quashed the process by referring to the decision of the Constitutional Bench in *Ramji Lal Modi* v. *the State of U.P.*[6] the Constitutional Bench held that the said provision only punishes the aggravated form of religious insult. And that the offence is made out only when it is perpetrated with the malicious intention deliberately made with the intention of outraging the religious feeling of that class.

The Supreme court of India has sounded a word of caution that the Magistrates who are required to carefully scrutinize the allegations made in the complaint proceeding meet the basic ingredients of the offense, territorial jurisdiction, whether the accused is really required to be summoned or not.

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[3] (2020) 12 SCC 436

[4] Reference to para 46, 47 and 48 of the Judgment.

[5] AIR 2017 SC 2392

[6] AIR 1957 SC 620 (reference to para 7): Section 295A does not stipulate everything to be penalized and any and every act would tantamount to insult or attempt to insult the religion or the religious beliefs of the class of citizens. It penalize only those acts of insults to or those varieties of attempts to insult the religion or religious belief of a class of citizens which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class of critizens…

An FIR can be quashed if it does not disclose an offense and in that case there is no need for any sought of investigation or recording of any statement[7].

Justice Sanjay Kishan Kaul, in *Maqbool Fida Husain* v. *Rajkumar Pandey,* 2008 SCC OnLine Del. 562 while considering a petition against a painter/petitioner for hurting religious sentiments, protected the petitioner artist who was charged with obscenity and hurting religious sentiments. The petitioner made a painting, whereby India was represented as a nude woman with her hair flowing in the form of Himalayas. Justice Sanjay Kishan Kaul in para 112 of the judgment upheld the freedom of the painter by observing that *pluralism is the soul of democracy*[8].

3. G. N. Saibaba Case

The Learned Session Judge gave the finding that the commission of offense punishable under Section 13 of the UAPA is proved. The learned Session Judge rejected the submission of the accused that even if the alleged incriminating material (documents seized from the possession of accused 1-Mahesh Tirki, the digital data retrieved from the 16 G.B. memory card seized from accused 3- Hem Mishra during his personal search, and the documents, photograph, video clips retrived from gadgets seized from the house search of accused 6-G.N. Saibaba) is assumed to have been proved in accordance with the requirements of the Indian Evidence Act, the penal provisions of sections 18 and 20 of UAPA do not come into play.

Against the order of the Session Court, the appeal was before the High Court. The High Court was confronted with the questions like: in absence of sanction, order made by the session judge against accused 6 is void. Next question was concerning the order dated 15/02/2014 regarding accused 1-5 is defective. The High Court was also seized of the question whether the defects in the sanction order are curable.

In 2022 a Bench of the Bombay High Court had set aside the conviction of G.N. Saibaba and four other co-accused. The Bench consisted of Justices Rohit Deo and Anil Pansare after considering the procedural aspects held the trial to be void due to absence of a valid sanction under Section 45(1) of the UAPA. The Bench has considered the procedural necessity and compliance of procedure in serious matters concerning cases involving terrorism. It was held by

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[7] State of Haryana v. Brij Lal Mittal & Ors. AIR 1992 SC 604

[8] Mr. Justice Kaul in the said para observed: *"The right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his unconventional or critical views. There should be freedom of thought we hate. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends."*

the bench that the departure form due process could foster an environment conducive to terrorism.

More controversial, after the urgent mentioning by the Maharashtra Government, the Supreme Court of India in a Special Saturday sitting, stayed the High Court order. Later in a plea filed by Maharashtra Government challenging the acquittal, the Supreme court overturned this decision and directed the Bombay High Court to consider the case fresh before a new Bench.

In, the State of Maharashtra v. Mahesh Kariman Tirki & Ors. 2023 livelaw (SC) 48 Criminal Appellate Jurisdiction (Date of Judgment April 19, 2022, Division Bench Justice M.R. Shah and C.T. Ravikumar Criminal Appeal Nos. 1184-1185 of 2023 (Arising out of SLP (Crl.) Nos. 11072-11073/2022), the Supreme Court of India set aside a Bombay High Court order of acquitting former Delhi University Professor and activist G.N. Saibaba as well as others over their alleged Maoist links and remanded the matter back to the High Court to be considered afresh by a different bench.

The State preferred an appeal after aggrieved and dissatisfied with the common judgment and order dated 14/10/2022 whereby the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Criminal Appeal Nos. 136 & 137 of 2017 by which the High Court has discharged/acquitted the accused solely on the ground of invalid sanction. The Supreme Court held that the High Court has not decided the Appeals on merits. The Supreme Court set aside the common judgment and order passed by the High Court.

According to the Supreme Court learned ASG, Shri S.V. Raju's observations are very suitable and that it is open for the State to contend before the High Court that once the trial court convicts the accused, and then the question regarding sanction is irrelevant. The Supreme Court in para 5 of the judgment has suggested that the High Court may accept this supposed reasoning. Thereby making the High Court to believe the observations suggested by the ASG. Now this seems to be surprising.

The High Court was ordered by the Supreme Court to decide and dispose of the appeals on merits of the present order. In the para 7 of the order, the Supreme Court ordered that on remand, the appeals would be placed before another Bench so as to avoid any further apprehensions.

On 5 March 2024 a Devision Bench of Justice Vinay Joshi and Justice Valmiki SA Menezes pronounced the judgment in the case of Mahesh Kariman Tirki v. State of Maharastra (APPEAL/137/2017) whereby the Nagpur Bench of the Bombay High Court set aside the conviction of G.N. Saibaba (former Delhi University Professor) and

five others in a case which involved Maosist-link. This case was under the Unlawful Activities Prevention Act.

G.N. Saibaba (on Wheelchair) and his co-accused are in custody since their arrest in 2014 for charges like waging war against India. He lost the power of lower limbs owing to post-polio paralysis when he was 4 years old and has been confined to a wheelchair since. He was suspended from his position at Delhi University. One of the accused Hem Mishra, a student at JNU revealed during interrogation that he acted as a courier between the professor and Maoist leaders. The Maharashtra Government has filed an appeal in the Supreme Court in March 2024. The Bombay High Court calls it a failure of justice. And slams the trial court (Session Court – 827 page Judgment)

The Maharashtra Government moved a plea seeking a stay (i.e. stay on the judgment for six weeks) of release of G.N. Saibaba and five others in an alleged Maoist links case. But the Bombay High Court refused to stay its decision concerning the order of acquittal of the professor and other five accused.

The Bombay High Court has held that even though the charges were serious, it was not inclined to "make any adventures" to stay the verdict. Commenting on the right of personal liberty the court rejected the application of stay.

4. Case Comments and Observations in Javed Ahmed Hajam v. the State of Maharashtra and others (the Bombay High Court Judgment)

The Bombay High Court in Javed Ahmed Hajam v. the State of Maharahtra and others, (Criminal Appellate Jurisdiction, Criminal Writ Petition No. 94 of 2023) held that the petitioner, a professor in Sanjay Ghodavat Collage liable under Section 153-A of the Indian Penal Code, 1860.

The petitioner was a member of a whatsapp group of parents and teachers. On 13 August 2022 and 15 August 2022, the petitioner created whatsapp status giving two messages namely (1) Title – **"August 5 - Black Day - Jammu & Kashmir"**. The wording of the text is as next mentioned – "Article 370 was abrogated, we are not happy" and (2) Title - 14th August Happy Independence Day Pakistan.

On the basis of these two status reflected at the social site group/whatsapp and other allegations, an offence was registered under Section 153–A of the *Indian Penal Code*, 1860.

The counsel for the petitioner submitted before the Bombay High Court that there was no circulation of any message with the intent to promote enmity or hatred between different groups on the basis of caste, community, religion, race, place of birth, residence or any

other ground whatsoever. Further there was no intention of the petitioner to bring about ill will or disharmony between religious, rational, language or racial groups or communities. There was no intention and no act committed by the petitioner that could be prejudicial to the maintenance of peace and harmony between different groups as above mentioned.

However, the Assistant Public Prosecutor for the State submitted that the question concerning whether there is a breach of public tranquility is to be decided on the merits of the matter. The APP went to the extend of suggesting that the status on whatsapp group had the tendency to promote disharmony on the basis of religion. The action of the petitioner was therefore prejudicial to the maintenance of harmony and had the tendency to disturb public peace. It was further forwarded by the APP that the professor had shown his likes and dislikes in casual manner without any justification for them. Moreover, there was a target audience of parents and teachers of an educational institution. The Bombay High Court held and observed that there is substance in APP's arguments and no merit in the submissions of petitioner's counsel.

Further the High Court referred to and considered the case of *Manzar Sayeed Khan* v. *State of Maharashtra*[9], that merely inciting the feeling of one group without any reference to any other community cannot attract either of the two sections i.e. Section 153 and 153-A of the *Indian Penal Code*, 1860 and that the words and their effect must be judged not from the standard of weak and vacillating minds who scent danger in every hostile point of view but from the standards of strong-minded, reasonable, firm and courageous men. In other words, the words must be evaluated and understood by applying effect of those words on reasonable man with strong and firm mind.

The Bombay High Court found that the petitioner by the very words on whatsapp status, acted in a casual manner. The court held that the first message was forwarded as whatsapp status without following a critical appraisal/analysis of the step taken by the Central Government regarding abrogation of Article 370. And this message had the tendency to play with the emotions of different groups in India. According to the Court, one must act cautiously otherwise the emotions may rise to such a level as to bring hatred as referred in Section 153-A of the *Indian Penal Code*, 1860. The Court observed that if any criticism was to be made, it could be done by power of reasoning with proper evaluating all pros and cons of the situation only. There has to be an in-depth analysis of the situation accompanied by reasons so that it could appeal to logic and rationale of different groups and not to play with emotions.

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[9] (2007) 5 SCC 1

According to the Bombay High Court, whenever appeal is to reason, there is least possibility of stirring up emotions and whenever appeal is to the emotions, the reason is the casualty. So the High Court held that this was not a fit case for quasing of the FIR.

4.1 Appeal Before the Supreme Court against Conviction

In Javed Ahmad Hajam v. State of Maharashtra (in the Supreme Court of India Criminal Appellate Jurisdiction, Criminal Appeal No. 886 of 2024, Arising out of Special Leave Petition (Crl.) No. 11122 of 2023; Date of Judgment: 7th March 2024)

The Apex Court observed that the police machinery must be enlightened and educated concerning the concept of Freedoms as suggested in Article 19(1)(a) of the Constitution of India, 1950. The Court held that it be gross abuse of the process of law if the prosecution under Section 153-A of the Indian Penal Code, 1860 is continued against the appellant. The Supreme Court in this case:

a) Set aside the judgment of the Bombay High Court.

b) Quash the impugned FIR bearing no. 295 of 2022 and

c) Quash the proceedings based on the FIR.

4.2 The Supreme Court Bench and the Reasoning in the Case

In an earlier case of Balwant Singh v. State of Punjab, (1995) 3 SCC 214, the Apex Court held that the intention to incite people to violence and to cause disorder is the sine qua non of the offence under Section 153-A of the Indian Penal Code, 1860. In that case the prosecution is duty bound to prove the guilty mind i.e. mens rea of accused.

Justice Abhay S. Oka has held that the essential element of the offence under Section 153-A of the Indian Penal Code, 1860 is the intention to promote hatred or feelings of enmity between different groups or classes of people. And the intention has to be primarily judged by considering the language of the writing. Circumstances under which it was written or published are also relevant. The whole of the writing has to be read as a whole. The related facts and circumstances of the matter are supposed to be studied. It is not open to take one sentence from here and another from other place and then connect them by meticulous inferential reading of the isolated passages.

In this case the first Whatsapp status of the appellant i.e. "AUGUST 5 – BLACK DAY – JAMMU & KASHMIR" is an expression of his personal and individual view and his reaction to the abrogation of the related Article in the Constitution of India, 1950 i.e. Article 370. The Court held that the intention is not been reflected in these words

that can incite people to violence or can generate a feeling of enmity in any group of individuals.

According to the Supreme Court it can be a protest but within the freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution of India, 1950. Justice Oka observed that every citizen of India has a right to be critical of the action of the Central Government concerning the abrogation of Article 370 and the change of status of Jammu and Kashmir. It was an expression of protest and anguish. If every criticism/protest of the state action is held to be violative of related Section of the Indian Penal Code then democracy, which is the basic structure of the Constitution of India will not survive.

Protest in rightful, lawful and legitimate manner is an integral part of the freedom of speech and expression within the ambit of Article 19 (1)(a). An opportunity to protest peacefully of the Government policy or action concerning the abrogation is an essential part of democracy.

The Supreme Court goes an extent further when it suggested that the right to lawful dissent must be treated as a part of dignified life ensured within the ambit of Article 21 of the Constitution of India, 1950.

For availing any benefit, protest must be lawful and must be within permissible democratic modes. Definitely it is subject to reasonable limits/restriction as referred in Article 19(2). However, in the present case, the appellant (as held by the Bench) has not crossed the line that will limit or restrict the free flow of his fundamental freedom of speech and expression within the language of Article 19(1)(a) and held him liable under Section 153-A of the Indian Penal Code, 1860.

4.3 Standards of Reasonable Strong Women and Men of India

Viewing the Whatsapp status from the standards of reasonable strong women and men of India who gained the democratic republic status for the last 75 years. They know the democratic principles and values. Therefore, it is not possible to generalize that the words will promote hatred and will excite people to violence.

The test is not to see the effect of the words in writing on some weak minds who see danger in every hostile point of view. The test has to be on a significant number of reasonable people concerning the general impact of the words in writing or other publication.

Concerning the second Whatsapp Status, the Court held that every citizen of India has a right to extend good wishes to the citizens of other countries on their respective days of Independence. There is nothing wrong in it, as it is a gesture of goodwill. Further in that

cases, it cannot be generalized that mere good wishes will tend to generate hatred, enmity and will lead towards disharmony. If one belongs to a particular religious group, that does not mean he is having a motive to generate a hostile feeling against the State.

5. Conclusion and Observations

The Supreme Court of India has expressed its views regarding the sensitizing of the police officers on the concept of freedom of speech and expression guaranteed and secured under Article 19(1)(a) of the *Constitution of India*, 1950. According to the Court that the police machinery must be sensitized about the democratic values enshrined in the Constitution and the extent of reasonable restraint on the free speech and expression.

These days we can find that the Supreme Court is working on the democratic perspectives enshrined in the Grundnorm i.e. the *Constitution of India*, 1950. We know the fact that India is a Democratic and Secular (till date as per the Constitution of India, 1950) Nation. And Democracy is the Government of the people, by the people and for the people. Even the Preamble to the Constitution of India starts with the words we, the people of India. The strength/force/power come directly from the people of India. The Constitutional Courts (i.e. the Supreme Court of India and various High Courts) have time and again protected the Basic Structure of the Constitution rather strengthened it. But we know that the agencies of State/Government Department/Police etc. are not performing what is mandated on their part as primary duty/constitutional duty/mandate. And that is why the Supreme Court in 2024 has held that the police must be informed about freedoms of individuals, their fundamental rights and the extent of the limitations/restrictions on fundamental rights especially freedom of speech and expression emanating from Article 19(1)(a) of the Constitution of India, 1950 and even other rights emanating from the fundamental freedoms like Right of people to know, freedom of press etc.

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The Evolution of Legal Recognition for Live-in-Relationships: Historical and Contemporary Perspectives

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Abstract

The husband and wife in a marriage, which we might consider to be a partnership for life, have authority over one another on all matters of law, morality, emotion, and money. If viewed literally, marriage is nothing more than two individuals choosing to live together willingly sanctioned by the laws they both agree to abide by or by formally registering it. Things take an unexpected turn when this cohabiting, which is now known as a live-in relationship, is neither sanctioned by any religious organisation nor by national law. To comprehend one another, it is ideally understood as sharing a means of support. Marriage and live-in relationships have different origins; one is a lifelong compromise, while the other is a freedom and compromise to get to know one another and decide whether or not to stay together. India, a nation famous for its strong traditions and rich culture, is still not ready to accept the theory and reality of live-in relationships. This paper focuses on the legal status of live-in partnerships along with the legal position of such relationships in other nations with a view to comprehend the dos and don'ts of this type of relationship.

Keywords

Cohabiting, Marriage, Live-in Relationship, Traditions

1. Introduction

Marriage is still seen as a sacred and permanent relationship in Indian culture. Marriage is considered as a pure union of two souls who choose to live their lives together on an equal footing. It serves as the foundation of family life. In essence, a successful marriage has

the capacity to create a pleasant human life by fostering morality and love. Marriage settlement and maintenance require a lot of work, but what if the couple that has settled together is pessimistic? A valiant effort can be made to make the marriage work, but if it fails totally then instead of extending, one must set up a stop sign, or turn their side toward divorce. A dull marriage will never give rise to a contented household. However, as times change, Indian society is progressively becoming more receptive to western lifestyles and culture, with the concept of a live-in relationship being one of the most significant examples. Couples, especially those in urban regions, have a tendency to live together and share this characteristic feature and way of life. Unmarried couples are living together in increasing numbers as each day goes by. Despite not being against the law, cohabitation and live-in relationships are frowned upon in India as being immoral and immoral. What constitutes a live-in relationship, then, is the matter at hand. A live-in relationship is defined by law as "a living arrangement in which unmarried partners live together to maintain a long-term relationship in a manner akin to that of marriage." It's a common misconception that living together prior to marriage is similar to test driving a car. However, there is no specific legislation in India on this subject, and the laws are instead found in court judgements, which vary from case to case and have a very ambiguous definition and scope.

2. Denotation of Live-In Relationships

Despite its ambiguity, the term "live-in relationship" refers to the home cohabitation of two unmarried individuals. Live-in relationships are more and more common among couples. However, it might be argued that the incidence is higher in urban regions and tier-1 cities, especially among young people with high aspirations. Before deciding to get married, many couples would live together to see if they were compatible. They are better able to understand one another and make wise decisions about significant commitments like marriage as a result.

Live-in relationships enable separation without the involvement of the government, which is crucial in nations like India where divorce is stigmatised and frowned upon.

On the other side, pre-marital sex is taboo in Indian culture. Living together prior to marriage is so generally seen as culturally inappropriate, unethical, and contrary to social norms. Because of this, even if some people have openly accepted the idea of live-in relationships, it nevertheless encounters social rejection based on conventional beliefs.

There were certain ground rules which were established by the Supreme Court in Indra Sarma v. VKV Sarma[1] in regard with when to treat live-in relationship in the nature of marriage are as follows:

- The phrase "at any point in time" in Section 2(f) of the Domestic Violence Act[2] denotes that a relationship must be established and maintained for a substantial amount of time, which may vary based on the conditions from situation to situation.
- The Domestic Violence Act defines the phrase "shared household" under Section 2(s), thus further explanation is not necessary.
- Financial support for each other or any of them, joint bank accounts, the purchase of real estate in the woman's name or in their joint names, long-term investment in businesses, and joint ownership of stock could all be deciding factors in determining whether a relationship is strong.
- In essence, the nature of a relationship is defined by the partners' shared goals for their partnerships, as well as their unique responsibilities.
- A marriage-like relationship is demonstrated by the delegation of responsibility for managing the home and taking care of household duties, especially to women.
- To maintain the connection in the nature of marriage, it is important to hang out in society and communicate with friends, family, and other people as though they are a married pair.

3. Genres of Live-In Relationships

Three fundamental categories can roughly classify live-in relationships. This division into categories makes it easier to determine if these groups fall within the wide definition of the phrase "relationship in the form of marriage."

- *Domestic cohabitation of two single heterosexual individuals.*
- Adulterous interracial partnerships.
- Domestic partnerships between same-sex couples are the last category.

The first type of live-in relationship, which involves two single heterosexual persons purposefully residing together, is the most well-

[1]2014 (1). RCR (Crl). 179. (SC) (India).
[2]The Protection of Women from Domestic Violence Act, 2005 Act No. 43 of 2005; Sec 2(f): "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family

known, common, and acknowledged. But the second and third cases mentioned above are where the majority of public animosity and legal issues come from.

It's quite strange that even after the Supreme Court's decision on Navtej Singh Johar v. Union of India[3], we as a society are still not ready to accept relationship between homosexuals.

Marriage is a bond which if goes wrong can ruin two peoples' entire life. Marriage is combination of two bodies which transforms into one soul and when we talk about souls it can be the combination of two heterosexuals or homosexuals. To decide with whom to share one's whole life, it is important that before we decide to share and love the person one is supposed to marry, we need to understand who the other person is.[4]

4. History of Live –In – Relationship

The variety of relationships that exist in the world inspires us to investigate various ideas, such as the idea of extramarital affairs or live-in relationships. In order to properly comprehend the causes and circumstances that led to the development of this new type of relationship, it is also required given the rise in non-marital partnerships in both developed and the majority of developing nations. The following are some historical perspectives on the origins of non-marital relationships from various nations and regions:

- The Common Law Doctrine Marriage: The common-law concept assumes that a couple is already married and does not call for solemnization or registration. Instead, any unmarried man and woman who consent to cohabit as husband and wife and do so, as well as present themselves to the community as spouses, are regarded as married for all intents and purposes.

- The Rise of Common Law Marriage: With Chancellor Kent's 1809 opinion in Fenton v. Reed[5], New York became a common law marriage state, recognising relationships that were not solemnised in front of a licenced officiant or publicly celebrated, but rather followed the pattern of a legally married couple.

- The Social Context of the Common Law Marriage: The documentation of common law marriage cases from the eighteenth century demonstrates the historical present of the amount of heterosexual couples who are in relationships that are not recognised as marriages. However, few of these extramarital partnerships still survive within the social norms of marriage, and

[3]AIR 2018 SC 4321 (India).
[4] Ghosh., V. Perception of Youth towards Live-In Relationships in India. The International Journal of Indian Psychology, 9(2), 2118-2125 (2021).
[5] Fenton v Reed, 4 Johns. 52, 52 (N.Y.Sup.Ct. 1809) (India).

some others, though, did not adhere to either the legal or social norms.

5. Historical Context in Relation To India

Indian society has undergone a revolution, moving from planned marriages to live-in relationships and now back to love marriages. These interactions can be seen in big cities, and business process outsourcing workers are willing to make themselves vulnerable to them. The concept of non-marital live-in cohabitation, or live-in partnerships, is one of the most important events among the western concepts and lifestyles that are currently being accepted in India.

Manu asserts that although premarital unions existed in the Vedic era and thereafter, they were uncommon. As a result, the idea of living together before marriage is not a novel one in India; live-in relationships have long been there. Eight different forms of weddings—Brahma marriages, Daiva marriages, Arsha marriages, Prajapatya marriages, Asura marriages, Gandharva marriages, Rakshasa marriages, and Paisacha marriages—are acknowledged in the Vedas. One of the eight types of Hindu marriages, Gandharva marriage, involves events that are strikingly comparable to those in a live-in relationship. Eight different forms of weddings—Brahma marriages, Daiva marriages, Arsha marriages, Prajapatya marriages, Asura marriages, Gandharva marriages, Rakshasa marriages, and Paisacha marriages—are acknowledged in the Vedas. One of the eight types of Hindu marriages, Gandharva marriage, involves events that are strikingly comparable to those in a live-in relationship.

The drive to end evil practises was started in contemporary India with the entrance of social reformers and British Indian Laws, which led to a decline in the relations of concubinage and other evil practises in Indian society. Even after India gained its freedom, the custom of having concubines persisted. A friendship contract (maitray karaars), entered into voluntarily between a man and a woman in Gujarat for a long time, and stated that the woman would have no rights against the man other than those of a friend. These partnerships are described as socially ambiguous and sexually exploitative relationships, and they are stigmatised as such. In such situations, the lady was always unmarried and also supported her parent's family while the male was always married.

6. Jurisprudence and Live-In Relationship

Equality requires uniqueness. The importance of individuality for humans, and by humans we include both men and women, has been acknowledged by numerous jurists at various points of their lives. The relationship between society and law is explained by the Sociological School of Jurisprudence. It teaches how the law affects society and how it works as a tool to advance society. In accordance

with the Sociological School of Jurisprudence, law is connected to all facets of life and society, including psychology, philosophy, economics, social science, and political science. Law analyses societal and individual issues and then moves toward finding solutions. It has also placed a high value on judges' active involvement in the drafting of laws. It establishes harmony amongst various society interests. It makes sure that the interests of society as a whole are protected. This institution placed a strong emphasis on the growth of individualism for reaching lofty social goals. Live-In Relationship which establishes freedom of Individual where both man and woman live together just like a married couple but they in reality are not. For the attainment of societal peace it is important that an individual is satisfied because a group of individuals together comprise a society. Disregard of Live-In relationship in reality is snatching one's individual freedom to choose and select one's own life partner. Unhappiness of individuals will organically lead to the establishment of an unhappy society. Freedom to choose one's own life partner is an individual choice where in order to understand an individual for life if one wants to understand the other by living together then such activities must be allowed for the attainment of individual satisfaction.

The idea of live-in is to realize that whether one can spend one's life with person we have met for marriage and this kind of decision must be respected for attainment of societal satisfaction through individual well-being. Ehrlich emphasized on the 'Living Law', where law works according to the present circumstances of the society. Ehrlich's notions are very practical in nature which is backed by popular acceptance of the people of the society. Live-In Relationship is still not backed by the society due to orthodoxically cultural and religious notions. Individuals cohabiting together before marriage raises questions on the chastity of individuals specifically that on girls and if we go through the idea of Ehlrich then Live-In Relationship presently is not accepted in the society. According to Duguit, achieving socio-economic justice can be accomplished by adhering to "interdependence of men," or by "Social Solidarity," which is defined as the sovereignty of the people rather than the state. The fundamental motivation behind this was to fulfil fully-fledged commitments to the social development of the society. Different individuals' different opinions are seemed to be a great theory for the smooth functioning of a democratic society, but when we talk about a group of individuals together, we aim to satisfy the general needs of it as a whole.

Sovereignty denotes supremacy and when we talk about sovereignty of individuals it is the supremacy of individuals that one must take into consideration and not decisions of a society as a whole. Live-In Relationship is decision taken by two individuals where we see free flow of consent. If two people together decide to live

together and understand the situation of marriage before actually entering into it is seen to be committing no wrong. The same aspect can be understood through Roscoe Pound's theory of Social Engineering i.e., maximum satisfaction with minimum friction. This idea strives to achieve the practical application of law in the existing realities of society. Currently, Live-In Relationship is one of the most debated topics where the stigma of two people living together before marriage is seen by todays' youth unnecessary and the pressure of choosing a life partner of parent's choice is against the idea of individuality.

The left side of the functional school, the realist school of law places a strong focus on judge-made law. Cardozo believed that the current social environment must be taken into account when studying the law. It was thought to be a division of the Sociological School of Jurisprudence. Cardozo and Justice Holmes supported this school as well because they believed that law must be understood in the context of everyday life and that, before law is applied, all factors in life, including moral, economic, social, and temporal considerations, must be taken into account. Live-In Relationship is still not legally acceptable and the reason for it is religious and cultural norms which in reality is in coexistence with the law of the country. Sociological School of Jurisprudence took a very pragmatic approach to this, its theory was very clear that judicial activism should be given due consideration, and it was grounded in the social realities of life where law must function in tandem with society. In Payal Katara v. Director Nari Niketan Kandri Vihar Agra and Others[6], where Court was the opinion that an adult has a right to decide to go to any place of their choice and can chose to live with anyone, they want to without even getting married to that person one is living with. Realists School of Jurisprudence was summarized with notions of Scandavian which was re - iterated by Friedmann, his expression on realist school was simple that assessment of law must be done according to the changing social wants and needs of the society, which is comprised of changing times, ideas and circumstances for meeting the necessary social end and ideally when we talk about right to choose[7]and decide whoever one wants to marry which is one of the fundamental rights envisaged under Article 21[8] of the Constitution of India.

Law as it should be is described by the Philosophical or Ethical School of Jurisprudence, which also promotes individual freedom. As they strive to achieve human perfection through the freedom of the

[6](2006) 8 SCC 726

[7]Sana Rashid alias Pammi v. The State of Jharkhand and Others, [Writ Petition No. 482 of 2022] (India).

[8]INDIA CONST. art. 21 Protection of Life and Personal Liberty: No person shall be deprived of his life and personal liberty except according to the procedure established by law.

individual will, they have a tendency to reconcile the individual will with the collective will. Immanuel Kant defined law as the synthesis of one's personal desires with those of others in order to satisfy the fundamental law of freedom. Achieving ethical advancements depends heavily on an individual's ability to determine their own worth; this is known as the categorical imperative. He said that a legislation is only effective when all people support it. In today's scenario we have two groups one which backs the religious and cultural ideas where two individuals living together without even getting married is considered to be one going against the order of nature, where questions on one's character is raised and then there is another group which believes completely on the theory of exercising one's idea of individuality rather than being a puppet to the societal norms.

Currently, live-in relationships are divided and we are more inclined towards the societal norms of cohabitation and marriage which predominantly negates the idea of freedom of individuals for the attainment of societal satisfaction. Jeremy Bentham too endorsed the individualist approach, emphasizing that the primary goal of legislation is to acknowledge the usefulness it brings, while focusing on the satisfying of fundamental wants. He supported the principle of individualism, according to which the law ensures each person's freedom from pointless constraints that interfere with their ability to live happy and prosperous lives. His conception of justice was the upholding of the reciprocal relationships among those who secure social happiness through social order, and this could only be done by gratifying each person's demands or needs. Bentham's theory of individualism and live-in relationships very well gel together because the latter aims in providing individual satisfaction where one can decide to choose whom to marry and whom not to by cohabiting with that person without entering into any marital tie with the person one is cohabiting with, but as we strive to achieve social happiness we ought to look at the fact that if there is a section who believes in individual freedom more than social happiness then there is another section which completely believes on the notions of firstly going through the societal norms on which we are functioning on. So, we cannot tend to ignore both the aspects of Individualism and Socialism.

Again, going through the Individual rights which were considered to be unalienable under natural law, which is how mankind functions today, Natural law was based on moral principles that assist a human society in achieving both individual and collective happiness. This school's main objective was to recognize and advance fundamental human rights. The establishment of this theory on numerous conceptions, but primarily it is based on morality, which was the result of Natural Law School's evolution and passage through various stages. Live-In Relationships, from the very start was

considered to be immoral where society exclusively related it with nothing but relationships that are sexual in nature. Ancient Era of Natural Law School correctly noted that law carries a substance of divinity that is supported by divine order and reason; it brings with it the principles of morality where it was believed that good deeds of individuals governed the functioning of society. One of the most prominent proponents of this school, which placed a premium on the morals, laws, and principles that God created and which each person must uphold, was Aristotle. He asserted that the effectiveness and efficiency of society depend on the reformation of laws but also opined the fact that people should not engage in unfair or unjust practices but rather act morally upright and wisely. Reformation in the marital laws of this country must not lead to something that is considered immoral by the society and certainly, live-in relationships are still considered to be immoral and a culture bad in law to promote. Cicero was one of the early jurists whose conception of the law was developed in line with Aristotle's. The collective well-being of humankind was the sole aspect of Cicero's conception of law that differed from Aristotle's. Saint Thomas Acquinas, the supremacy of law, where both human-made and supernatural rules are regarded as necessary for the efficient operation of society. For society to advance on humanitarian grounds, it was thought necessary to combine divine and human-made laws. This school was represented by Saint Thomas Aquinas, who believed that good and evil cannot coexist and that thinking about the good must result in the elimination of evil. He proved that people are entitled to self-preservation. In a society where he valued distributive justice, which is defined as the sharing of justice, respecting other people's freedoms and rights is essential. Even the jurists are segregated on the notions of individuality and morality where during the ancient era different jurists have different opinions and so is the case with live-in relationships, the Indian society is divided the pragmatic thinkers believe in it but the orthodoxically the other section is totally and completely against this idea of cohabitation. Indian society is still on conflicting terms when it comes to live-in relationships.

Period of Renaissance was a period of classic modernity when judges embraced a more practical and logical philosophy. The social contract idea was likewise more in-depth than the others. The notion of individual and collective will was backed by a select few exponents, including John Locke, Jean Jacques Rousseau, and Thomas Hobbes. John Locke established the centrality of individuality and the primacy of life, liberty, and property. He believed that rather than giving up all of their rights, people entered into a social compact by renouncing only a portion of them. The general will be more important to Jean Jacques Rousseau; he supported popular sovereignty. Where the fusion of various individual wills creates the societal general will. As stated by Ulpian, the principle of equality is of utmost importance because in order to achieve individuality we

need to recognize every individual. When we tend to establish the idea of judicial activism, right to life and liberty; live-in relationships is all about individual freedom to decide with whom to proceed in life. This era of the Natural Law School of Jurisprudence aimed to establish and maintain the idea of an individual freedom and this can be done exclusively by the judiciary of today but application of law specifically with the changing needs of the society is the need of the hour. Through various stages or eras, Natural Law School established that for efficient working of the society it is necessary that we recognize individuality of every individual, be it through the rule of reason, the idea of sharing of justice, or through necessary and timely reformation of laws.

In a society, various people with various viewpoints are combined. Different Jurists active engagements aided in the advancement of society, and people's active participation can only occur when they are free to speak and act as they like. The creation of numerous individual wills aids in the development of the society's overall collective will. The main idea of the aforementioned element is that acknowledging individual will is crucial for the right advancement of society on moral and financial grounds. When it comes to such delicate subjects, the general public anticipates legal consistency. The judiciary in todays' time is expected to be more thoughtful than pretentious while handling such matters. In light of the requirement for reality, we have come to the conclusion that it is inappropriate to approve any type of live-in relationship because even through the notions of law it is expected that one must go according to what the society actually is and not what we can make it. It was discussed above that reformation of laws is necessary but when it comes to making of laws, we need to understand what society as a collection of individuals needs now and not what we need in the near future and currently we are still not ready to accept the practicality of live-in relationships even though if it establishes the very notion of individual freedom which eventually will lead to societal satisfaction.

7. Indian Judiciary and Live-In Relationships

Live-In Relationships is one of the most debated and controversial topics to discuss in. The Indian legal system, particularly the judiciary, has taken the initiative to show how to develop couples who are in a live-in relationship in the right way. This article examines how the Indian judiciary operates in relation to cohabitation. The Indian Constitution states that everyone must abide by the Apex Court's ruling; hence, decisions must be made in light of it. In India, the judiciary does not expressly support or forbid this type of intimate connection. In a particular situation, the judiciary is merely applying equity in accordance with the law. The judiciary's main concern is maintaining the artificial birth cycle of equity that is justice administration. The legal implications of live-in

relationships have recently been a topic of great discussion. In a recent precedent-setting decision, the Supreme Court determined that a woman who had never been officially married to a man might now inherit his property, a right that had previously solely been reserved for wives who were lawfully wedded. Social ideals and individual liberty are protected by the state in socialist nations. The ongoing discussion of live-in relationships will likely never have a settled position because it changes over time and raises new difficulties. It causes turmoil and clashes with social ethics, religion, and the law's lax enforcement.

The fundamental rights to life and personal liberty are protected by Article 21 of the Indian Constitution, and the Supreme Court has ruled in several cases, including S. Khushboo v. Kanniammal and Anr.[9], that these rights include the freedom to cohabit without restriction. A connection "in the nature of marriage" between two people residing in a shared house is referred to as a domestic relationship under Section 2(f) of the Domestic Violence Act, 2005. In order to qualify as being in a domestic relationship, two people must be related through consanguinity, marriage, or a relationship that has the same meaning as marriage, adoption, or they must be friends and family who live together as a family. Long-term cohabitation and appearing as husband and wife offer live-in relationships characteristics of marriage, because they are covered by the Domestic Violence Act of 2005's provisions, women who are living together can request for protection and maintenance under that law. As a result, this Act permits relationships that aren't marriages. In addition to a marriage, a relationship "in the nature of marriage" is included in the definition of a domestic relationship.

The Supreme Court ruled in another important case, Koppisetti Subbharao Subramaniam v. State of Andhra Pradesh[10], that the term "dowry" had no special powers. It alludes to a demand for money in regard to a romantic relationship. The Court has rejected the defendant's argument that because he was not legally married to the complainant, Section 498A did not apply to him in protecting the woman from being harassed for dowry while they were living together. Section 125 of the Criminal Procedure Code allows a wife to ask her husband for maintenance if he won't support her. If a woman can prove that she and the man have a connection that resembles marriage, the court will assume that they are married and will consider the woman as a wife, entitling her to maintenance payments from the guy. Its main goals are to safeguard women from domestic violence and to elevate live-in partners' legal standing to that of married couples by putting them inside Section 125's purview. The Supreme Court drew on this precedent by implementing the

[9](2010) 5 SCC 600 (India).
[10]AIR 2009 SC 2684 (India).

recommendations of the Malimath committee, which was established by the Home Ministry. Justice Malimath served as the committee's chairman, and its task was to provide recommendations about the aforementioned proposition. In 2009, the Committee submitted its recommendations, recommending that Section 125's definition of alimony/maintenance be changed to include women as eligible recipients. The Supreme Court decided in the 2009 case of Abhijit Bhikaseth Auti v. State of Maharashtra and Anr[11] that a woman is not necessary to show marriage in order to request maintenance under Section 125 of the CrPC, implying that a woman in a live-in relationship is also entitled to support. This verdict exemplifies the liberal, modern posture of our judicial system.

In India, live-in relationships are not governed by any formal laws or traditions. As a result, the Supreme Court has developed guidelines for dealing with live-in partnerships and enlarged the idea of them through judgements. Live-in relationships were first deemed to be acceptable by the Supreme Court in the case of Badri Prasad v. Dy. Director of Consolidation[12]. The court held that as long as all requirements for marriage, such as the legal marriageable age, consent, and soundness of mind are satisfied, a live-in relationship between consenting adults is legal under Indian law. These connections are neither permitted nor prohibited by law.

Live-in relationships are improper but not illegal, the Supreme Court ruled in Lata Singh v. State of U.P.[13]Living together is not illegal, although being viewed as immoral by society, according to the Supreme Court's 2010 decision in the well-known case of S. Khushboo v. Kanniammal and Anr.[14]

The Supreme Court ruled in Indra Sarma v. VKV Sarma[15] that it is not illegal for two people who are not already married to be in a relationship together. According to the following, the SC court encountered five different types of live-in relationships in the Indra Sharma case:

- An adult male and adult female, both single, are in a domestic relationship in the first instance. The easiest kind of relationships are those like these.
- The second involves a married guy and an adult, unmarried woman who got into a domestic relationship voluntarily. According to the Indian Penal Code, adultery, this one is punishable by conviction.

[11]2009 Cri. L.J. 889 (India).
[12]AIR 1978 SC 1557 (India).
[13](2006) 5 SCC 475 (India).
[14](2010) 5 SCC 600 (India).
[15]AIR 2014 SC 309 (India).

- The third involves an adult, unmarried male and a married lady who entered into a domestic relationship on intent and with knowledge. A dangerous grey area also exists in this situation.
- The fourth is a secret domestic partnership between an adult female who is single and a married man.
- Two gay or lesbian partners living together domestically makes up the fifth.

The Court has clarified that the examples above are merely illustrative and not exhaustive. The Supreme Court ruled in a landmark decision on April 13, 2015, that people living together would be regarded as legally married. Justices M.Y. Eqbal and Amitava Roy were on the bench. The SC court also ruled that the man's accomplice will inherit his property in the event of his passing. Since 2010, the Supreme Court has ruled in favor of women, declaring that, in the case of live-in relationships, women should be granted the same rights as those of a spouse.[16]

Both the Badri Prasad v. Deputy Director Consolidation[17] decision from and the SPS Balasubramanian v. Suruttayan[18] decision from made the same type of observation: if a man and a woman live together for a significant amount of time, the law presumes that they are legally married unless the contrary can be shown. Although there is a significant presumption in favor of marriage, this presumption is arbitrable, and the burden of proof rests with the person who disagrees. Furthermore, children from such a union would be entitled to inherit the parent's property.[19]

In Tulsa v. Durghatiya[20], the identical allegation was upheld. The law does not, however, mandate compliance with every part of this strategy. Alok Kumar v. State[21], a recent case, resulted in the Delhi High Court's issuance of this decision. According to the Delhi High Court, a live-in relationship is demonstrated by a walk-in/walk-out agreement. Even though live-in relationships have generally been ruled legally by courts, this is an exception to the rule. A woman of roughly 21 years old who is a major is free to go anywhere and can live with anyone without getting married if the woman desires to, according to the Allahabad High Court's ruling in Payal Katara v. Director Nari Niketan Kandri Vihar Agra and Others[22].

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[16] Dave., R. M. Legal Status Of Live In Relationship In India. Indian Journal of Applied Research, 9(12), 17-18.
[17] AIR 1978 SC 1557 (2019) (India).
[18] 1994 1 SCC 460 (India).
[19] Chatterjee., S. Legal Recognition of Live-In Relationship: An Emerging Trend of Social Transformation in India. Indian Journal of Law & Justice, 11(1), 1-16.
[20] 2008 4 SCC 520 (India).
[21] Crl M.C. No. 299/2009 (India).
[22] AIR 2001 All 254 (India).

In another case involving Patel and others, the Supreme Court ruled that living together as adults without being married is not illegal. Live-in relationships have been deemed legal by the Supreme Court in a number of instances, but in Gulza Kumari, the Court disregarded the precedent, which is the law as it was established by the nation's highest court. The Gulza Kumari v. State of Punjab[23]decision has drawn heavy criticism, and for the right reasons. After this judgement, the High Court of Punjab and Haryana quickly made another announcement, but the outcome was completely different. The petitioners in Pushpa Devi v. State of Punjab[24], a male and female couple between the ages of 21 and 19, pleaded with the court to protect their live-in relationship from their families, who were willing to kill them for the sake of family reputation. They couldn't get married because one of the applicants, a male, wasn't old enough to legally marry (21 years old). The Punjab and Haryana High Court has directed the Union Government to clarify its strategy for handling live-in relationships in Rohit Kumar v. State of U.T. Chandigarh[25] and others. Noting that there is no law governing these relationships and that it would be difficult for a court to rule against the legality of a live-in relationship once a person has reached majority under the Majority Act of 1875, the Bench of Justice Amol Rattan Singh attempted to elicit a response from the center by stating, "what is recommended is to make sure that too many young people with developing minds would not start living together and end up regretting such choices in life".[26] The Madhya Pradesh High Court determined that live-in relationships encourage obscene behavior, which results in sexual offences, in Abhishek Chouhan v. State of Madhya Pradesh[27], and it classed them as a byproduct of the constitutional protection provided by Article 21 of the Constitution. With a few notable exceptions, the Court came to the conclusion that India is a conservative country and has not yet reached the point where unmarried girls, regardless of their religion, engage in lewd behavior with boys solely for amusement unless it is supported by a specific future promise of marriage. The court decided that, unlike in this case, a victim shouldn't have to rely on suicide to support their claim.

Before the United States gained its independence, the Privy Council established a general rule stating that "where a man and a woman are proved to have lived together as a man and wife, the law will presume, unless the contrary is clearly proved, that they were

[23]2021 SCC OnLine P&H 896 (India).
[24]CRWP-8809 of 2021 (India).
[25]CRWP-8809 of 2021 (India).
[26] Aakanksha, Marwaha, K., & Rathore., D. S. Whether Live-In Relationships Need To Be Regulated a Study, From A Feminist Perspective. International Journal of Law and Legal Jurisprudence Studies, Universal Multidisciplinary Research Institute Pvt Ltd, 2(3), 1-22.
[27]M.Cr.C.No.29708 of 2021 (India).

living together in consequences of a valid marriage." This rule was applied in cases like A Dinohamy v. WLBlahamy[28]. The Mohabhat Ali v. Mohammad Ibrahim Khan[29], case reinforced the same idea.In the D. Velusamy v. D. Patchaiammal[30] case, the Supreme Court ruled unequivocally that "if a man lives with a woman just for sexual purposes, neither partner may claim benefits of a valid marriage." A relationship must meet specific criteria in order to qualify for palimony. The pair must meet the following requirements in order to engage into a legal marriage: they must be of legal marriageable age; they must meet all other requirements, including being unmarried; and they must have freely cohabited for a significant amount of time.

Non-marital relationships cannot be justified on the basis of culture or morality, according to Justice H.S. Madaan in Gulza Kumari v. State of Punjab[31]. The petition was consequently turned down.

Section 16 of the Hindu Marriage Act of 1955 and Section 26 of the Special Marriage Act of 1954 both grant legal status to children born from null and voidable marriages. Such kids can only inherit their parents' possessions, not other property. These kids are not granted coparcenary rights to the Hindu undivided family's property; hence they are not entitled to their parents' ancestors' assets. S.P.S. Balasubramanyam v. Suruttayan[32] established the legitimacy of children born to live-in partnerships. The Supreme Court determined that Section 114 of the Indian Evidence Act, 1872 creates a presumption of marriage if a man and a woman live in the same home and cohabit for a long amount of time. Because of this, their offspring will be accepted as genuine and qualified to inherit a piece of the family assets.The Supreme Court granted a portion of the property to children born from live-in partnerships in BharathaMatha v. Vijaya Renganathan[33]. The Court decided that if a live-in relationship lasts long enough, any children born to it are not necessarily illegal.

8. Conclusion

A live-in relationship represents a pact or convenience between two people who, despite originating from different cultural backgrounds, intend to live together and cohabit. This could be because of their compatibility, mutual understanding, or abiding conviction that they were destined to be together. The idea of cohabiting without getting married is not only highly contentious but also gaining popularity among educated, independent, and professionally employed young

[28](1928) 1 MLJ 388 (PC) (India); AIR 1927 PC 185 (India).
[29]AIR1929 PC 135 (India).
[30]AIR 2011 SC 479 (India).
[31]2021 SCC OnLine P&H 896 (India).
[32]1994 1 SCC 460 (India).
[33]AIR 2010 SC 2685 (India).

people who are aware of the consequences of their actions and plan to live together rather than get married in order to avoid liabilities and maintain their single status and financial independence. Law must adapt to the shifting societal needs, but it must also strike a balance to accord equal rights to both sexes, those who accept the traditional concept of marriage, and those who want to disobey those social conventions out of necessity or preference. Making relationships legitimate, tenable, and subsequently respected is the main goal. The law must preserve both live-in partners' rights and manage the protective sanction that might lead to live-in partnerships being subject to the same restrictions and structures as marriage.

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Greenwashing: Deceptive Practices and the Need for Regulatory Measures in India and Beyond

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Abstract

This paper examines the critical issue of Greenwashing, where companies deceptively present themselves as environmentally friendly for profit, undermining public trust and moral values. Despite the growing awareness of environmental responsibility, the absence of explicit legislation against Greenwashing exacerbates the problem. The paper defines Greenwashing, discusses notable incidents, and analyses a Harvard Business Review study highlighting its prevalence and impact. It further explores existing legal frameworks that indirectly address Greenwashing and examines global approaches to tackling this issue. By assessing various jurisdictions, the paper provides a comprehensive view of the legal and social landscape surrounding corporate environmental deceit. To combat Greenwashing, the paper recommends fostering awareness, enforcing stricter regulations, and ensuring corporate accountability. These measures aim to protect the environment and preserve the integrity of individuals striving for sustainability. Through collective action, a more transparent and eco-friendly future can be achieved, benefiting current and future generations.

Keywords

Environment, Corporate Houses, Defraud

1. Introduction

Environment plays a major role in the life of an individual. As a result of this, from very childhood days, an individual is taught to safeguard the same not only for his own development and sustenance but for its future generations as well. This moral policing has more binding effect on oneself than any environment law in place in any jurisdiction.

However, when a person is defrauded merely on account of these moral standards, that s/he has been inculcated since his/her childhood days, by some corporate houses vouching for their interest like vultures; it leaves a deep impact on such person making him completely anti to what he was prior to the incident.

The said statements can be corroborated in light of a major issue that we would be dealing in this paper – Greenwashing. The Cambridge Dictionary defines the said phenomenon as "*behaviour or activities that make people believe that a company is doing more to protect the environment than it really is.*"[1] The Multi-National Companies and other such big Corporate Houses picturise themselves in front of the masses as environment friendly as working with reusable plastics, non-pollutants, etc. for the benefit of environment. However, they hardly do so and the environment conscious people fell prey to these fake depictions and start using their products. Later when they (consumers) come to know about this strategy and realise that it all was fake, they feel even distrust towards genuine companies working for environment sustenance and employing adequate methods to fulfil the same with regards to their own products.

Moreover, there is no legislation or provision/s prohibiting such practice of Greenwashing employed by the companies fooling the consumers. To analyse the said aspects, this paper first delves into the definition of Greenwashing and past incidents. It also mentions a study concluded by the Harvard Business Review with respect to Greenwashing. The paper further provides what are the legal framework that exist and that can be employed indirectly against such companies for indulging in Greenwashing. Various jurisdictions' frameworks are also taken into account by the paper to provide a comprehensive analysis. Towards the end, the paper attempts to put forth a few recommendations and suggestion for a healthier environment and its impeccable continuing betterment.

2. Greenwashing & Recent Trends

The act of a firm expending extra effort and money to communicate it is green than it truly is called "greenwashing." This is a deceiving marketing strategy used by organizations with an aim of exaggerating the environmental benefits of a firm. This is specifically targeted at cheating its customers who prefer to associating themselves with companies that obey the environmental laws.[2]

The phrase greenwashing was started in 1986 after the author and environmentalist Jay Westerveld wanted to express his

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[1] *Greenwashing*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/greenwashing (last visited October 13, 2023).

[2] Carlyann Edwards, *What is Greenwashing*, BUSINESS NEWS DAILY (September 01, 2023), https://www.businessnewsdaily.com/10946-greenwashing.html.

disappointment with the baptizing of the "save the towel" campaigns in hotels which only saved money for the hotels while washing less.[3] The idea came at a time that most clients depended on the newspapers, radio, or the television to enrich them with news, and they had no option but to believe as they do today.[4]

Large corporations, that practiced greenwashing in the recent past got media coverage as follows: For example, in the middle of the 1980s, the oil firm Chevron was using a number of expensive prints and television commercials to spread the company's environmentalism message. But, in fact, Chevron continuously violated the Clean Air Act, Clean Water Act and was spilling oil into wildlife refuges all through the slogan 'People Do'.[5] Chevron was not the only corporation that made gross exaggerations, but unfortunately, it was the case. DuPont launched double-hulled oil tankers through ads by primordial marine creatures dancing to Beethoven's cry, 'Ode to Joy,' From it, everybody learned it was the worst polluter in the United States in 1991.[6]

Unfortunately, not just Chevron, but other companies also made absurd assertions. In 1991, DuPont, a chemical company, used aquatic animals dancing to Beethoven's "Ode to Joy" to promote its double-hulled oil tankers. The company ended up overtaking all other US corporations in pollution that year.[7]

Moreover, Recently, there has been a rise in Environmental, Social, and Governance awareness in India. As a means of raising capital for investments in non-convertible securities, such as wind, solar, and bioenergy, as specified by SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021, businesses have begun issuing green debt securities (referred to as "GDS").[8] To establish themselves as ethical and sustainable companies, they make investments in sustainable waste management, public transportation, and energy-efficient structures.

However, as Environmental, Social, and Governance awareness grows in India, there is a growing concern over greenwashing, and the

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[3] Jane Courtnell, *Greenwashing: What it is and How to Stop it*, PROCESS.ST (March 09, 2020), https://www.process.st/greenwashing/.

[4] Zara Ali, *What is Greenwashing? Top Examples you need to know*, KNOWESG (March 24, 2023), https://www.knowesg.com/featured-article/what-is-greenwashing-top-examples-you-need-to-know.

[5] *Why we're holding Chevron accountable for its greenwashing campaigns*, EARTHWORKS (March 22, 2021), https://earthworks.org/blog/why-were-holding-chevron-accountable-for-its-greenwashing-campaigns/.

[6] Anna Solomon, *Greenwashing: The truth behind the fashion industry's sustainability claims*, LUXURY LONDON (May 04, 2023), https://luxurylondon.co.uk/style/hers/what-is-greenwashing-and-how-can-we-spot-it-eco-friendly-environment-sustainability-fashion-industry/.

[7] Miriam A. Cherry and Judd F. Sneirson, *Chevron, Greenwashing, and the Myth of "Green Oil Companies"*, 3 Wash. & Lee J. Energy, Climate & Env't. 133 (2012).

[8] Securities and Exchange Board of India (Issue And Listing Of Non-Convertible Securities) Regulations, 2021, No. SEBI/LAD-NRO/GN/2021/39.

absence of a strong regulatory framework in India is a key contributing factor. To stop Greenwashing in India, the Securities and Exchange Board of India issued "*Circular No. SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2023/023*," on 6th February, 2023 improving the disclosures that the corporation must make when it issues the GDS.[9]

A study that examined the extent to which greenwashing has a negative influence on customer sentiment was published in the Harvard Business Review in July 2022.[10] Specifically, the study mentioned above with 202 big U. S. organisations listed on the public stock exchange showed that consumers are likely to be informed of the spread between the stated goals and actions and the dissatisfaction grows as more goals are declared than actions are implemented. Because of this disparity, there is a perception of corporate dishonesty in the eyes of the customer and consequently their view on the product.[11]

Based on the conducted survey it is evident that organisations with perceived greenwashing practices have an average of 1. 37% drop in the ACSI customer satisfaction rating down to their home territory. A 1. 34% counts because firms act competitively, and the ACSI values are dispersed only slightly. Apart from that, the research also highlighted the economic perspective of this blow to the aspect of customer happiness citing that a little change in any company's customer satisfaction index may greatly influence a business's performance. As per the figures, the movement of one point on the ACSI index implies a change of one unit in customer satisfaction. 032 units impact on net earning per share and a 0. That is, there is an impact of 40 units in the return on Investment.[12]

The study did accept nevertheless that per the estimations, the business organisations which were identified to bear high capability reputation— that implies, excellent product quality or innovativeness—was able to maintain their customer satisfaction index despite they being involved in greenwashing. On the other hand, poor customer satisfaction is realized when a company is accused of green washing, whereby, it reduces customer satisfaction for firms with low capability reputation by 2. 40%. This suggests that once a product has attained a level of quality (or innovativeness), then launching a green image does not have the propensity to reduce clients' satisfaction derived out of using this particular product.[13]

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[9] Master Circular for issue and listing of Non-convertible Securities, Securitised Debt Instruments, Security Receipts, Municipal Debt Securities and Commercial Paper, SEBI/HO/DDHS/PoD1/P/CIR/2023/119.

[10] Ioannis Ioannou, George Kassinis and Giorgos Papagiannakis, *How Greenwashing Affects the Bottom Line*, Harvard Business Review (July 21, 2022), https://hbr.org/2022/07/how-greenwashing-affects-the-bottom-line.

[11] *Id.*

[12] *Id.*

[13] *Id.*

3. Regulation of Greenwashing in India

This paper attributes the high levels of greenwashing found in India to the freeness of practicing it, as there are no laws regulating it. Currently, there is no law in India that governs how companies issue environmental claims and as such, the companies are at free to provide misleading information with no implications extended to them. This is because consumers cannot easily distinguish between the real and fake investigation of environmental issues due to lack of proper regulation, hence this leads to increased instance of green washing. The green bond securities of India is governed by the Securities and Exchange Board of India (SEBI). According to the Regulation 2(1)(q) of "*SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021*" also known as "*NCS Regulations*," "green debt security" means "debt securities for the purpose of fund raising for renewable energy, clean transportation, sustainable water management, climate change adaptation, energy efficiency, sustainable waste management and biodiversity conservation projects."[14] The guideline has failed to provide its view on the issue of 'greenwashing' whereby an organization provide an impression that is different from the real image of their company hence may affect investor confidence and does not conform to the green economy policy of the current government. But now to frame the rules regarding Green securities, SEBI in a circular dated 3rd February 2023 has cleared doubts regarding green washing and has pointed out certain general guiding points for the issuers of bonds to be followed in issuing the "Green securities" so that there is no question of Green washing. They include – "*among other directions that the issuer of the green debt securities shall not; use misleading labels; hide trade-offs or cherry pick data from research; make untrue claims that give a false impression of certification by third party entity and the issuer would at all times maintain the highest standard associated with issue of green debt security while observing the rating assigned to it.*" The circular also recommends that the green operation being conducted by the issuer ought to be disclosed and monitoring continuously and whether or not they proved practical in minimizing the adverse impact of the environment and assist in tackling the issue of sustainable economy.[15] SEBI has even instructed issuers to notify investors and permit early redemptions if the majority of investors request it in the event, they discover that the money earned from green bonds is being invested outside of the aforementioned asset classes. *Kapila Hingorani vs State Of Bihar*,[16] a Supreme Court judgment also mentions the perils of sustainable development and how development becomes a sustainable tool of policy for the introduction and support of corporate governance practices of 'green washing.' Advertising in India comes under Advertising Standards Council of India (ASCI)

[14] Supra note 08, Reg. 2(1)(q).
[15] Sipra note 09.
[16] Kapila Hingorani v. State of Bihar (2003) 6 SCC 1.

which enforces moral and ethical standards and can also be said to be having some jurisdiction over green washing claims. It has also developed an ASCI code In the medical word, H1N1 also known as swine flu is an example of a new term that people have come to know due Asia. The organization continues to ensure that the given advertisements portray decency, truth, and non-safety but exercises fairness and equity in competition; nonetheless, the current body has not passed judgment on greenwashing cases.

Even though the Indian regulators haven't provided a formal meaning to the term 'greenwashing', it is understood to refer to a deceptive technique that firms use to deceive the public regarding the environmental sustainability and positive impact of their practices and products. It hurts those customers who require accurate information to make sound decisions; it erodes the general public's trust on the market; it provides overbearing edges to companies that opt for manipulating the market.

There are presently no standardised criteria available to analyse and compare the efficacy of such policies, making it difficult to monitor and quantify the effects of climate initiatives. There is a lot of space for manipulation due to this lack of standards. Additionally, the lack of regulatory rules in India makes the problem worse. The sharing of information on climate efforts within businesses is voluntary, thus management is allowed to choose what information to release and how much information to disclose.

4. Ad Regulations to Prevent Misleading Consumers

Greenwashing is not specifically prohibited in Indian advertising laws.[17] However, its advertising laws are sufficiently broad in their construction to forbid the practise of making deceptive or fraudulent statements in ads.

The Consumer Protection Act 2019 is the main piece of law in India that regulates deceptive and fraudulent advertising.[18] It defends customers against deceptive advertising and other unfair business practises. Additionally, the Advertising Standards Council of India, a self-regulatory organisation that serves as the de facto authority on advertising in India, has released a voluntary code that establishes standards for advertising in a variety of industries. Ads must be accurate and devoid of any exaggerated claims. According to the Indian

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[17] Kalindhi Bhatia and Pratik Bakshi, *Spotting greenwashing con artists: liability of greenwashing under Indian advertising regulations*, LEXOLOGY (June 02, 2023), https://www.lexology.com/commentary/tech-data-telecoms-media/india/btg-legal/spotting-greenwashing-con-artists-liability-of-greenwashing-under-indian-advertising-regulations.

[18] The Consumer Protection Act, 2019, No. 35, Acts of Parliament, 2019 (India).

Penal Code of 1860,[19] which among other things punishes dishonesty, there could also be repercussions for illicit advertisements.

While current laws and rules do not specifically reference "greenwashing," they do forbid making false or deceptive representations in advertisements. As a result, it is likely that an advertiser who engages in "greenwashing," such as by making false or exaggerated claims about its environmental impact, will be held in contempt of the law. If consumers think an advertisement is deceptive or uses "greenwashing," they can protest to the relevant authorities. Aside from additional penalties, posting an illegal ad puts you at risk for fines, jail time, and ad removal. Additionally, it significantly harms the company's reputation.

5. Curb Greenwashing Is Targeted with Regulatory Measures

5.1 Designation of a Third-Party Independent Reviewer/Certifier

The firms were required to reveal the names of any independent third-party reviewers or certifiers they had hired at the time the Green Debt Securities was issued, and an external auditor was required to confirm how the Green Debt Securities revenues were used. The monies had been properly assigned to the designated projects and assets, according to the verification process.

However, the SEBI has mandated via Circular that Green Debt Securities issuers employ an impartial third-party reviewer/certifier and declare the appointment in the offer document in order to increase transparency.[20]

There are two major uses for the independent third party reviewer/certifier – pre-issue support and post-issue support:

a) "Pre-issue support: The reviewer/certifier will determine which project categories are eligible for GDS financing and examine and verify the procedures for project selection criteria.

b) Post-issue support: The reviewer/certifier will oversee how GDS revenues are used and will validate *internal tracking and impact reporting.*"[21]

The Operational Circular does not specify any particular requirements that an independent third party reviewer must satisfy in order to be selected; rather, a reviewer is regarded competent if they

[19] The Indian Penal Code, 1860.
[20] Supra note 09.
[21] Greenwashing in India: under the guise of Green Debt Securities, AMLEGALS (April 14, 2023), https://amlegals.com/greenwashing-in-india-under-the-guise-of-green-debt-securities/.

have the appropriate technical skills and experience to carry out the relevant responsibilities.[22]

The optional Guidelines for External Reviewers are listed on the ICMA website, although the organisation does not support any of the external reviewers on this list. A list of verification organisations has also been authorised by the Climate Bonds Standards Board and is available on their website.[23]

5.2 Extending the Mandatory Disclosures

Due to the special features of Green Debt Securities, the issuer must include extra disclosures in the offer document than are generally needed for conventional debt instruments. Furthermore, the issuer has an ongoing duty to disclose the use of proceeds in accordance with the conditions of the offer instrument because public monies are involved.

According to Chapter IX of the Operational Circular, the issuer's annual report and/or financial statements must incorporate certain continuous disclosures. As suggested in the Consultation Paper, the disclosure standards have been updated to comply with the Green Bond Principles.

The following is a list of the updated disclosures:

a) "Details about the decision-making procedure used to decide if the project(s) was/were eligible.

b) Specifics about the alleged social and environmental hazards and the suggested plan for mitigating them in relation to the project(s) that are planned to be funded or refinanced using GDS profits.

c) Reporting on Impact.

d) Major BRSR component disclosures."[24]

5.3. Greenwashing regulations

Greenwashing is the practise of using money from green bonds for projects that either don't significantly improve the environment or even have detrimental effects. This may be inflating a product or service's environmental advantages, giving only good information while omitting negative information, or using ambiguous or unproven terminology to infer environmental benefits.

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[22] Supra note 09.

[23] *External Reviews*, THE INTERNATIONAL CAPITAL MARKET ASSOCIATION, https://www.icmagroup.org/sustainable-finance/external-reviews/ (last visited October 13, 2023).

[24] Supra note 09.

When customers and investors believe they are supporting ecologically beneficial practises when they are not, greenwashing may be damaging. To minimise the harmful impacts of "greenwashing," it is crucial for businesses to present honest and accurate information about their environmental practises.

In its Consultation Paper, the SEBI voiced concerns regarding issuers' exploitation of green bonds. Investors that are interested in socially conscious investments that concentrate on Environmental, Social, and Governance (ESG) practises may also face a major reputational risk as a result of such efforts.[25]

The SEBI has published Dos and Don'ts linked to GDS that must be followed by the firm at the time of issuing of GDS in order to stop the practise of "greenwashing" in India. The purpose of the aforementioned circular is to ensure that such actions are not taken.[26] The following conditions must be met by the GDS issuer as a result:

a) As stated in the offer document, the ***first condition*** is to regularly assess whether the steps taken to establish a more sustainable form of operations are successfully decreasing the adverse environmental impact and fostering a sustainable economy.

b) The ***second criteria*** forbid the temporary placement of the revenues or any other use of GDS money that does not comply with the definition of a Green Debt Security.

c) The ***third condition*** forbids using deceptive labelling, concealing unfavourable trade-offs, or presenting data in a biased manner to showcase green practises while suppressing unfavourable facts.

d) The preservation of the highest standards for GDS issuance while sticking to the given rating is required by the ***fourth requirement***.

e) The quantification of the harmful externalities related to the usage of GDS revenues is the ***fifth condition***.

f) The ***sixth criteria*** forbid making misleading statements and creating the appearance that anything has been certified by a third party.

6. Greenwashing & International Regulation

To date, the country that has gone further in protecting the consumer's interest on this front is Australia where for the last ten years, the Competition and Consumer Commission has provided a green marketing guide that effectively warns those firms making

[25] *Consultation Paper on Green and Blue Bonds as a mode of Sustainable Finance*, SEBI (August 04, 2022), https://www.sebi.gov.in/reports-and-statistics/reports/aug-2022/consultation-paper-on-green-and-blue-bonds-as-a-mode-of-sustainable-finance_61636.html.

[26] Supra note 09.

environmental or 'green' claims that they must be able to support these claims scientifically.[27] The Federal Trade Commission or FTC in the United States focuses on protecting consumers through enforcing rules that should ensure fair and competitive market.[28] The US's Securities and Exchange Commission also has a Climate and ESG Enforcement Task Force to deal with misconduct connected to ESG and there is also the FTC's guidance on how to tell genuine green products from the merely greenwashed.[29] US regulations are more general than Indian regulations since the latter is run by a task force and guidelines depending on the type of product or service are very specific, from investment to consumer products. As for today there is no specific anti-greenwashing law in Britain. Nevertheless, companies, which label their products as 'green' or 'sustainable,' can still be prosecuted based on the existing legal acts, for instance, the acts on deception or consumer protection. The more legal governance comes in the form of specific regulation by the Competition and Markets Authority (CMA) has released a Green Claims Code, while another authority under this regulation is the Advertising Standards Agency (ASA) but with rights to give fines to companies. The European Union is at the moment developing a checklist for the existing legislative draft which would regulate the demand that every company has to provide proofs for the 'Environment' statements concerning the company's product which states that the environmental claims made by the companies should be supported by scientifically grounded facts which are to be proved by the member states of EU.[30] Globally speaking, it is clear that India has a real possibility to pioneer Greenwashing legislation and establish itself as a leader in ESG compliance. The SEBI circular is undoubtedly being viewed as a welcome move towards green investment regulation, but it is unclear what effect it will have on stopping such questionable practises.

7. Suggestions And Recommendations

There is a need for more regulation and inspection of environmental claims made by businesses in India in order to prevent "greenwashing." To establish and enforce strong criteria for environmental claims and to make sure that businesses are held accountable for their activities, governments and non-profit organisations should collaborate. There have been ESG lawsuits where Client Earth, a Shell shareholder, made a historic claim against the board of the energy business in March

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[27] Adam Haigh, Greenwashing Scrutiny Grows in Australia as Rules Set to Tighten, Bloomberg (July 14, 2023, 05:48 GMT), https://www.bloomberg.com/news/articles/2023-07-14/greenwashing-scrutiny-grows-in-australia-as-rules-set-to-tighten#xj4y7vzkg.

[28] The Federal Trade Commission Act, 1914, § 5(a).

[29] *Enforcement Task Force Focused on Climate and ESG Issues*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/securities-topics/enforcement-task-force-focused-climate-esg-issues (last visited October 13, 2023).

[30] *Questions and Answers on European Green Claims*, EUROPEAN COMMISSION (March 22, 2023), https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_1693.

2022, accusing them of failing to adequately prepare the corporation for the move to net zero and manage climate risk. The SEC assessed a $4 million fine on Goldman Sachs Asset Management last year for violating its ESG investment policy and procedures.[31] The New Zealand ASA Complaints Board looked into a complaint involving Firstgas Group advertisement that stated that their petrol "is going zero carbon" despite the absence of any details on the timeline or strategies that would be employed to achieve this.[32] The board decided that this amounted to an unsubstantiated environmental claim and ordered the removal of the advertisement. More lawsuits of this nature are likely to arise, thus India must be ready with a strong framework and close any regulatory loopholes. ESG-related funds and assets have seen tremendous development in value in recent years, and it is anticipated that they will be worth over $53 trillion by the year 2025,[33] indicating the need for further regulation and specific laws. Customers may help stop greenwashing by acting as consumers. Consumers may make better decisions and support businesses that are sincere about sustainability by learning more about the environmental effect of products. Additionally, customers may check for certificates from organisations like the Forest Stewardship Council (FSC) or the Rainforest Alliance, which guarantee that a product was made in an ecologically friendly way.

8. Conclusion

In India, greenwashing is a severe issue since it erodes customer confidence in real ecologically friendly goods and services. Greater control, legislation, and consumer education are required to tackle this problem because it would be challenging to bring legal action against businesses that engage in "greenwashing." Governments, nonprofits, and consumers may work together to safeguard the environment through clean investments and ensuring that businesses are held responsible for their deeds.

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[31] Jamie Gordon, *Goldman Sachs AM fined $4m by SEC over three-year lapse in ESG standards*, ETF STREAM (November 24, 2022), https://www.etfstream.com/articles/goldman-sachs-am-fined-4m-by-sec-over-three-year-lapse-in-esg-standards.

[32] Nicolas Kreibich, Victoria Brandemann and Franziska Jüde, *Governing Corporate Claims: Increasing transparency of climate-related claims*, CARBON MECHANISM RESEARCH, Policy Paper No. 03/2022, https://www.carbon-mechanisms.de/fileadmin/media/dokumente/Publikationen/Policy_Paper_03_2022_Claims.pdf.

[33] *ESG-related funds and assets have seen tremendous development in value in recent years, and it is anticipated that they will be worth over $53 trillion by the year 2025*, THE ECONOMIC TIMES (October 30, 2022), https://economictimes.indiatimes.com/markets/stocks/news/investment-avenues-that-will-be-game-changers-by-2025/articleshow/95177523.cms?from=mdr.

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'Unpaid Care Work' and the Indian Legal System: How Much does the Law Care?

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Abstract

The responsibility to care for the family and perform household chores is socially and culturally designated to be the responsibility of women. According to estimates women worldwide spend four times more time on unpaid care responsibilities than men. This acts as a major barrier for women to participate in paid employment and lead a healthy life. The Tripple R approach is widely recognized as a means to address the gender disparity in the distribution of unpaid care work. The framework proposes to take measures to "recognize, reduce and redistribute", care work in order to make it equitable to men and women. The paper attempts to explore how the question of inequitable distribution of unpaid care work of women is addressed in the Indian legal and policy landscape. The triple R framework is taken as a reference to evaluate the country's efforts towards equitable distribution of unpaid care work. The paper finds that, while the country has made some progress in recognizing the unpaid care burden of women, the efforts towards its reduction and redistribution require more focus and attention.

Keywords

Unpaid Care Work, Paid Employment, Tripple R, Inequitable Distribution of Unpaid Care Work, Legal and Policy Landscape

1. Introduction

The need for care is central to human existence. Every human being assumes the role of a care giver or care receiver at some point in their lives. Most of these care requirements are met within the family. Beyond care needs necessitated by specific conditions such as childhood, disability, disease, or old age, daily life requires a number of care provisions that often go unaccounted for. Examples of such care include cooking food, cleaning and washing clothes. These tasks,

however insignificant it may sound, are essential for daily functioning of a human being. The term unpaid care work is used to refer to such household work including responsibilities of child rearing, and caring for sick or old members of the family. These tasks are, in the most majority of cases, regarded as the responsibility of women. In other words, care giving is often constructed, socially and culturally, as a feminine task, that comes naturally to women. This is evidenced by statistics as well. According to the International Labour Organisation, 76% of unpaid care work worldwide is done by women, which is stated to be four times more than the unpaid work done by men.[1] Things are worse in India where women perform 90.5% of unpaid care work whereas men's contribution is a meagre 9.5%[2]

This undue burden has serious repercussions on a woman's health and well-being. In addition to the physical and mental stress, and the resultant 'time poverty', unpaid care work acts as a barrier for women to participate in paid labour force and hence, affects their economic independence. The ILO identifies unpaid care work as the main barrier 'preventing women from getting in to, remaining and progressing in labour force.'[3] Despite the economic progress, female labour force participation in India remains at 27% in comparison to the global average of 49%.[4] Disproportionate burden of unpaid work is reported to be one of the reasons for the less impressive record of India's female labour force participation.[5] Things are worse for working women as they often end up doing 'double shift', as paid job participation has not transformed household care arrangements.[6] This creates considerable hurdles in achieving the expectations of their work life. Recognition of family responsibilities and its potential conflict with work have found recognition in international law, yet it is doubtful whether its disproportionate share is adequately addressed.[7] Women, despite having a longer work day, are only able to spend less time in paid work in comparison to their male counterparts which significantly reduces their chances of survival and progression in the

[1] LAURA ADDATI ET AL., CARE WORK AND CARE JOBS FOR THE FUTURE OF DECENT WORK 2.1.3 (2018).
[2] *Id.* at 2.7.
[3] *Id.* at 58.
[4] "ILO Modelled Estimates and Projections database (ILOEST)" ILOSTAT., https://ilostat.ilo.org/data/.
[5] VIDISHA MISHRA TERRI CHAPMAN, *Rewriting the Rules: Women and Work in India*, (2019).
[6] Namita N. Manohar, *Families in India*, *in* ENCYCLOPEDIA OF FAMILY STUDIES 1 (Constance L. Shehan ed., 1 ed. 2016), https://onlinelibrary.wiley.com/doi/10.1002/9781119085621.wbefs334 (last visited Jun 29, 2024).
[7] For instance, Workers with Family Responsibilities Convention, 1981 provide necessary policy guidance to address the issue of work-life conflict for workers with family responsibilities such as child care or care of other immediate memebers of the family. In addition to prohiition of discrimination and termination on account of family respobnibilites, the convention directs members to take measures that support the workers with family responsibilities. India has not ratified the convention. .

competitive labour market.[8] Motherhood responsibilities are yet another factor that add on to woman's unpaid care work. Studies report that there is a "motherhood employment penalty" present worldwide affecting the labour participation of women with young children.[9] Changes in the family structure, in the form of nuclear families or single headed families in urban and semi-urban areas have also created 'care-deficit' world-wide putting women in situations of conflict between paid work and unpaid work. Thus, it can be seen that inequitable distribution of unpaid care work, is a burden on the time and labour of women affecting the enjoyment of basic human rights to the fullest. Unpaid care work of women has gained attention of the world community in the context of Sustainable Development Goal (SDG) 5, which strive to achieve gender equality and empowerment of women and girls. SDG 5.4 specifically address the issue of unpaid work of women. According to the SDG target mentioned above, the states must take measures to recognise and value the unpaid care contribution of women, specifically through measures such as provision the provision of public services, infrastructure and social protection policies. It also urges the states to adopt nationally appropriate policies to make unpaid care a shared responsibility within the family. The UN and other world organisations have been advocating a 'Tripple R' approach to address the issue of gender disparity in unpaid care work. According to the triple R approach, the burden of unpaid work of women can be effectively addressed by recognizing its value, reducing it by building care infrastructure and finally redistributing it among all the stakeholders.

In the above context, this paper attempts to see how the question of inequitable distribution of unpaid care work of women is reflected in the Indian legal and policy landscape. The triple R framework which aims at recognising, reducing and redistributing unpaid care work, is taken as a reference to evaluate the country's efforts towards equitable distribution of unpaid care work. Part II of the paper conceptually elaborates the meaning of unpaid care work and triple R framework. Part III, IV and V, looks at the questions of recognition, reduction and re-distribution vis-à-vis Indian legal and policy initiatives. Part VI is the conclusion.

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[8] In terms of time use surveys, the average time spent by women in paid work is 152 minutes whereas men's share is 266 minutes per day. The trend is reversed in case of unpaid care work where time spent by women is 276 minutes per day whereas for men it is 152 minutes. This makes the working day of a woman in paid workforce longer than a man who is similarly placed. While men have a total 375 minutes of working day, women work a total 425 minutes a day primarily owing to the unequal distribution of unpaid care work. JACQUES CHARMES, *The Unpaid Care Work and the Labour Market. An Analysis of Time Use Data Based on the Latest World Compilation of Time-Use Surveys*, Table 2, 42 (2019).

[9] ADDATI ET AL., *supra* note 1 at 87.

2. Unpaid Care work and the Tripple 'R' Framework

Before going on to analyse the Indian legal and policy framework *vis-a vis* unpaid care work, it is pertinent to explore the meaning of unpaid care work and the triple R framework in some detail. Unpaid care work can be defined as the work of catering to the physical, psychological, emotional and developmental needs of one or more people.[10] When care for people is done voluntarily or without monetary compensation, it is designated as unpaid care work. Thus, term unpaid care work is used to refer to all services rendered by a person within a household for its members and also include voluntary community work.[11] Within a household, it typically includes household services such as cooking, cleaning, collecting fuel and water, as well as caring for children, aged and disabled. Unpaid care work can be identified to have three features *viz.* the person rendering the services is not remunerated, the services rendered are 'care' as it is necessary for the heath, protection and maintenance of someone or something and it can be considered to be 'work' as it involves physical and mental efforts, time and resources.[12] ILO classifies care activities in to two broad categories- 1) direct face to face personal care activities, and 2) indirect care activities. Direct care activities are personal in nature, and examples include feeding a baby, and helping an old person to take bath. Indirect care activities are non-relational and act as pre-condition for personal care giving. Examples are cleaning, and cooking.[13]

Despite care being an essential pre-requisite for social and economic well-being of the communities, it is relatively ignored in public policy discussions and largely remain an onerous responsibility of women. In addition to gender, factors such as race, class, age, marital status, disability and migration status is found to have an impact on a person's care responsibility.[14] One of the reasons for its non-recognition is its altruistic nature i.e conception of care as something performed out of love or concern, thus falling short to be recognised as 'work' which is often associated with economic gains. Moreover, the private nature of the services rendered often outshines the greater public good involved. For instance, caring for one's child might look like a personal work involving only a sense of love or duty,

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[10] European Institute for Gender Equality EIGE's Gender Equality Glossary & Thesaurus, https://eige.europa.eu/thesaurus/terms/1059.
[11] ELSON D, *Progress of the World's Women 2000*.
[12] LUCA MARIA, AND KEIKO NOWACKA, & PESANDO GAËLLE FERRANT, *Unpaid Care Work: The Missing Link in the Analysis of Gender Gaps in Labour Outcomes*, 3 (2014), https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf.
[13] ADDATI ET AL., *supra* note 1 at 6.
[14] A TOOLKIT ON PAID AND UNPAID CARE WORK: FROM 3Rs TO 5Rs, 5 (2022), https://www.unwomen.org/sites/default/files/2022-06/A-toolkit-on-paid-and-unpaid-care-work-en.pdf.

most often ignoring the relevance of reproductive labour in future social and economic life of the nation.[15]

Tripple R approach or 3R strategy is now widely recognised as a mechanism to address the gender disparity in unpaid care work, particularly by United Nations. The approach was first suggested by feminist economist Professor Diane Elson, which has three prongs *viz.* recognition, reduction and redistribution of unpaid care responsibilities.[16] Recognising the value of unpaid care would require acknowledging its significance to wider social and economic life of the society, rather than considering it as a private choice of the individual concerned. This would make unpaid care work visible in the legal and policy formulations. In order to do so, value of unpaid care must be evaluated in economic terms, though it may not completely represent its social value. Thus, measures such as such as inclusion of unpaid care in the national statistics, provision for paid child care leave, and wages for home makers can be adopted.[17] Second measure pertains to reduction of unpaid care work through creation of physical infrastructure such as provision for clean water, energy resources, sanitation facilities, public transport and public care facilities, which would reduce the time and effort needed for unpaid care services. Third, is the redistribution of the burden which would require efforts to change the gender stereotypes that create the uneven burden such as paternity leaves, flexible work timings for parents and accommodating care responsibilities of the workers irrespective of their gender. The next three sections of this paper discuss the three Rs with reference to the Indian legal system.

3. The Question of Recognition

Recognition of gender inequality in unpaid care work in India can be said to have been made more through judicial pronouncements, rather than by legislative enactments. Maternity benefits legislation can probably be cited as an exception. Law mandating maternity benefits in India is one of the oldest pieces of legislations that recognised the need for special treatment of mothers in workplaces. Indian law has been progressively increasing paid maternity leave which now stands at 26 weeks.[18] Adopting mothers and commissioning mothers (in case of surrogacy) are also entitled to maternity benefit of twelve weeks, provided the child is below the age of three months when he/she is

[15] Paula England, *Emerging Theories of Care Work 2005. 31:381-99, p.382*, 31 ANNU. REV. SOCIOL. 381 (2005).
[16] Quick Guide to What and How: Unpaid Care Work – Entry Points to Recognise, Reduce and Redistribute, https://www.oecd.org/dac/gender-development/47565971.pdf.
[17] Diane Elson, *Recognize, Reduce, and Redistribute Unpaid Care Work: How to Close the Gender Gap*, 26 NEW LABOR FORUM 52 (2017).
[18] Sec. 5 (3) The Maternity Benefit Act, 1961.

handed over to them.[19] Judicial interpretation has also been playing a vital role in giving effect to the purpose of the enactment. For instance, in *Deepika Singh* v. *Central Administrative Tribunal and Others*,[20] the appellant, who had two children born out of the first marriage of her spouse, was denied maternity leave when she gave birth to her first biological child. According to the government, her absence could only be accounted as earned leave, half pay leave or extraordinary leave, of which extraordinary leave would not be counted towards increments in the scale. Allowing the appeal, the court held that, the case warrants a purposive interpretation which would give effect to the objects of the Act, that is to promote the continuance of women in the workplace. Recognizing the unpaid care burden of Indian women, court observed that,

"gendered roles assigned to women and societal expectations mean that women are always pressed upon to take disproportionate burden of child care work.... The support of care work through benefits such as maternity leave, paternity leave, or child care leave (availed by both parents) by the state and other employer is essential. Although certain provisions of the rules of 1972 have enabled the women to enter the paid work force, women continue to bear the primary responsibility of child care. The grant of child care leave to the appellant cannot be used to disentitle her to maternity leave under Rule 43 of the Rules of 1972."

Unlike maternity benefits, there is no legislative provision providing for child care leave in all employments. The central government employees are entitled to child care leave up to the maximum of 730 days restricted to two eldest children. [21] However, such provision is not made applicable to many state government employees and private sector employees. In a significant ruling, the apex court, observed that absence of child care leave would force a mother to leave the workforce which would be a violation of her rightful entitlement guaranteed under articles 14,15, 19(1)(g) and 21of the Constitution.[22] Thus, the court directed the state of Himachal Pradesh to synchronise its policy with constitutional mandate and incorporate provision for child care leave in its service rules. Highlighting the relevance of child care leave for working women, the court cautioned that, in absence of child care leave a mother may be constrained to leave the workforce. This would violate their right to due participation in paid work which is constitutionally guaranteed.

Tortious liability in cases of motor accidents involving home makers is an area where the Indian judiciary has done commendable

[19] Sec. 5 (4) *Id.*
[20] 2022 INSC 834.
[21] 43-C DOPT Notification No. 13018/4/2011-Estt. (L), dated 27.08.2011, Central Civil Service (leave) rules, 1972.
[22] Shalini Dharmani v. The State of Himachal Pradesh and Ors, MANU/SCOR/58584/2024.

contribution towards recognising the unpaid care work of women. The High courts of the country have through a series of decisions developed a robust jurisprudence compensating victim housewives, through novel mechanisms such as loss of service to the family, replacement costs etc. A study of the judicial pronouncements between 1968 and 2019 found that the Indian courts have become more sensitive towards unpaid care work, awarding adequate compensation recognising the its value as 'labour', rather than on altruistic considerations.[23] The apex court while reiterating that the contribution made by wife is invaluable and cannot be computed in terms of money, pointed out the need to have some pecuniary estimate of the services for the purpose of compensation. In the context of unpaid care services, the court held that, the term 'services' is to be given a broad interpretation. It must be construed taking in to account the loss of personal care and attention to children as a mother and to husband as a wife.[24]

Matrimonial disputes also present situations where contribution of a homemaker, a non-economic member of the family is contested. The decision of the apex court in *Rajnesh* v. *Neha and Anr.*[25] is worth mentioning here. The Supreme Court framed guidelines for determination of the quantum of maintenance in case the divorced wife has been unemployed during the subsistence of the marriage. According to the court factors such as whether the applicant was employed prior to her marriage, whether she was working during the subsistence of marriage, and, whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing and looking after adult members of the family are relevant considerations.[26] In a recent decision, the Karnataka High Court,[27] enhancing the maintenance granted to a divorced wife, reiterated that due weightage must be given to her responsibilities as a mother while calculating the amount of maintenance. Mere fact that she is educated and abled bodied, and has quit her job for child care, cannot be a reason for reducing a higher maintenance, when she has care responsibilities. A path breaking judgement that recognised the contribution of a wife who was a home maker in the matrimonial property was delivered by the Madras High Court in *Kannaian Naidu and Ors* v. *Kamsala Ammal and Ors.*[28] It was a case where a wife's title to property acquired by her was contested as it was acquired by the earnings of the husband. The Court, while refusing to hold that she has no claim over the property, clearly acknowledged the value of the vital role played by a home maker in managing the daily affairs of the

[23] Prabha Kotiswaran, *An Ode to Altruism How Indian Courts Value Unpaid Domestic Work*, Vol LVI ECONOMIC AND POLITICAL WEEKLY (2021).
[24] Arun Kumar Agrawal and Anr v National Insurance Company and Ors, AIR 2010 SC3426.
[25] AIR 2021 SC 569.
[26] Criminal Appeal No. 730 of 2020 arising out of SLP (Cri) No. 9503 of 2018).
[27] Smt. Shylaja S.R vs Sri Hareesha A, WRIT PETITION No.14094 OF 2023 (GM - FC).
[28] MANU/TN/3343/2023.

family. Further, the court observed that, it is only because of her, that the husband is free to pursue his economic activities and thus, it is only just to hold that she must be entitled to a share in its fruits. As a wife, a home maker performs multiple tasks such as a manager, a chef, a home doctor, a home economist, etc. and it is job she performs without any holidays. Thus, the court found that contribution of wives towards acquisition of family assets must be taken in to account and thus, they must be entitled to a share in the property.

4. The Question of Reduction

The question of reduction has great relevance for a country like India, where clean water and clean energy sources remain a concern. Access to tap water and safe drinking water still remains a dream for many households in India. Building physical infrastructure, such as water sources, energy sources, and toilets can effectively reduce the time and labour spent on unpaid care work by women. The Government of India, in partnership with state governments, have been implementing Jal Jeevan Mission with the twin objective of providing tap water and safe drinking water to households. Yet, estimates suggest that about 29% of the rural household do not have access to tap water.[29] According to estimates, about 20% of Indian households have no access to electricity and about 2/3 doesn't consume LPG.[30] Reliance on energy sources like firewood, result in more time and labour being spent on care responsibilities and thus, disproportionately affect women and girls. The importance of prioritising clean energy sources to ensure environmental sustainability and human rights of women was highlighted by the Supreme Court in *M.K Ranjit Singh* v. *Union of India and Ors*.[31] The government of India has been implementing the Pradhan Mantri Ujwala Yojana under which adult women from poor households are given deposit free LPG connection and subsidised refills up to twelve a year.

Public provisioning of non-medical care services such as child care and elderly care is yet another measure the country has taken to reduce the care burden of women. The anganwadi centres under the Integrated Child Development Scheme provide early childhood care and education services to children between the ages 3 -6. The crèche under the National Crèche scheme (Paalna) which is now absorbed under the umbrella ICDS and various state government schemes such as *Koosina Mane* of the Karnataka government, provide creche services to younger children. Creches are also established under various labour legislations such as the Factories Act, 1948, Building and other Construction Workers (Regulation of employment and conditions of

[29] Enhancing Access to safe drinking water, (2023), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1985135#:~:text=Thus%2C%20as%20on%2007.12.,key%20priorities%20under%20the%20JJM.
[30] Rajeev Vishnu Ganesan, Karthik, *Energy Access in India- Today and Tomorrow*, COUNCIL ON ENERGY, ENVIRONMENT AND WATER. (2015).
[31] 2024 INSC 280.

service) Act, 1996, Mahatma Gandhi National Rural Employment Guarantee Scheme, 2005, and the Code on social security, 2020. These institutions, though having its own flaws, help women, particularly from poor socio-economic background, to reduce their care burden and undertake paid work.

5. The Question of Redistribution

The question of redistribution is crucial if the disproportionate burden of unpaid care work on women is to be equalised. Involving men in care responsibilities would lessen the burden of women as well as help eradicate gender stereotypes. Introduction of paternity leave is one such initiative, which is yet to be comprehensively adopted in India. The idea of father, taking leave from work to take care of the children would not only covey a message that men can care too, but also allow women more time and space to concentrate on their paid work. However, provision of paternity leave is restricted certain services in the government sector and there is no mandatory paternity benefit legislation applicable to private sector. The central civil service rules 1972 makes provision for paternity leave of 15 days which is applicable for both child birth and adoption.[32] However, provisions with respect to child care leave remain restricted to female employees.

A gender-neutral provision of creche facility introduced in the 2017 amendment to the Maternity Benefits Act, 1961 is also worth mentioning. Section 11A of the amended Act requires every establishment with fifty or more employees to establish a *crezhe* facility in the premises. This is in contrast to the earlier provisions where the number of women workers was taken as relevant for establishment of crezhe services in a workplace. For example, Sec. 48 of the Factories Act provides that in every factory where more than 30 women are ordinarily employed, there shall be a creche facility for the children of such workers. Thus, the 2017 amendment to the Maternity Benefit Act brings forth a welcome change in the direction of redistribution.

6. Conclusion

Unequal distribution of unpaid care work is one of the key factors affecting the quality of women's life and their labour force participation. Despite higher rates of education and employment among women, women still bear a disproportionate share of care responsibilities. Cultural stereotypes and social structures consider care as a feminine trait and duty. However, recent years have witnessed serious deliberations on the recognition of unpaid paid work and measures to reduce and redistribute it more equitably. The paper attempted to identify some areas where Indian law and policy have addressed the issue of unpaid care burden of women. Some progress

[32] Central Civil Service (leave) rules, 1972, *supra* note 21 at 43-A DOPT Notification No. 13026/1/99-Estt. (L), dated 18.04.2002).

is discernable in recognizing the unpaid care work of women, most of which has come through judicial pronouncements. However, the extent to which such recognition has transformed in to measures towards reduction and redistribution is doubtful. While the need for special treatment of working mothers with respect to child birth is recognized through legislation and progressive judicial pronouncements, absence of child care provisions exists in most of the employments. Moreover, child care provisions, mostly reinstate the notion of mother as the caregiver of the child. Other care needs such as such as geriatric care is yet to get adequate attention. Geriatric care is one of the challenges the country needs to equip itself, given the aging population. Efforts towards mitigating the burden through reduction and redistribution is yet to find a meaningful reflection in legal and policy measures.

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Breaking the Chains of Discrimination: An Assessment of India's Legal Framework and Rehabilitation Initiatives for Manual Scavengers

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Abstract

Tragically, between March and April of 2023, during a period lasting just one month, eight individuals perished while undertaking one of society's most hazardous jobs cleaning sewers. These fatalities have resurrected anxieties regarding the persisting deaths among manual scavengers despite explicit legal prohibitions against such practices nationwide. Despite legal efforts against it, news reports reveal that this harmful practice continues across India. The dangers are real for those who work in septic tanks or sewage systems, with incidents frequently cited where death results from accidental asphyxiation. Through a comprehensive analysis of social and legal factors at play for manual scavengers, this research looks into how far the laws and government schemes have successfully improved the condition of manual scavengers. It explores recent court cases alongside legal developments to determine efficacy while highlighting challenges faced in the implementation stages of relevant laws. By considering cultural perspectives and these factors, it becomes clear that pervasive stigmatization has severe psychological consequences for those working as manual scavengers within India's caste system today. This research highlights how this scenario affects those who scavenge as they deal with being socially excluded while enduring economic exploitation and denying their fundamental human rights and dignity. Furthermore, it examines current rehabilitation plans by analyzing their efficacy and what hinders implementation through social empowerment initiatives for these individuals who manually scavenge human waste.

Keywords

Manual Scavenger, Human Rights, Rehabilitation Scheme, Dignity & Caste System

1. Introduction

In this age, when everything is becoming increasingly digitalized and technologically advanced, everyone is working to simplify their lives. There are still pockets of the population that cannot meet their most fundamental requirements. One such group is people who engage in manual scavenging; these people are cut off from the benefits of our increasingly digitalized environment. People who are assigned the task of cleaning and disposing of human waste manually from locations such as sewers, drains, latrines, and the like are known as manual scavengers. [1] These individuals are primarily members of lower castes. Such practice might seem to be obsolete. In the present arena, however, the reality is different; still, in many parts of India, the practice continues to exist. This barbaric practice has not yet been completely removed from society, despite the many efforts that both government and non-government groups have made. Rehabilitating manual scavengers and helping them reintegrate into mainstream society is the population's primary challenge now [2]. Manual scavenging has persisted in India for generations despite being one of the most degrading practices imaginable. It is intimately linked to the country's caste system and social structure; those at the bottom rungs, like Dalits, face systemic discrimination and are forced into menial tasks such as manually cleaning human waste [3]. Recently, *Witness, a Tamil movie* directed by Deepak Bhagvanth, tackles a complex but essential topic of manual scavenging in India. Indranis deeply moving journey in search of justice for her son Parthiban who passed away while forced to work in a septic tank, highlights the difficulties inherent in addressing this practice and its impact on individuals [4]. The news is deeply concerning about the sanitation workers in Delhi who have been hit hard by COVID-19 as they carry out duties such as cleaning streets and handling hazardous materials from medical facilities [5]. Unfortunately, there is a severe shortage of reliable information about how frequently these essential front-line workers are exposed to life-

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[1] Mari Marcel Thekaekara, *Why the Proposed Manual Scavenging Prohibition Bill Looks Good Only on Paper*, THE WIRE (2020), https://thewire.in/caste/manual-scavenging-prohibition-bill-2020-caste-rehabilitation (last visited May 7, 2023).

[2] Rina Chandran, *India's Female Scavengers Enslaved by Caste, Gender Discrimination | Reuters*, THOMSON REUTERS FOUNDATION (2016), https://www.reuters.com/article/us-india-scavenging-women-idUSKCN0W503U (last visited Jul 13, 2022).

[3] Sujith Koonan, *Manual Scavenging in India: State Apathy, Non-Implementation of Laws and Resistance by the Community*, 5 INDIAN LAW REV. 149 (2021), https://doi.org/10.1080/24730580.2021.1905340.

[4] Shaileshwar Yadav, "Law On Reels : 'Witness' - A Hard-Hitting Criticism Of Manual Scavenging," Live Law, 2023,https://www.livelaw.in/columns/law-on-reels-witness-a-hard-hitting-criticism-of-manual-scavenging-218370?infinitescroll=1.

[5] Abhinav Rajput, *Delhi: Half of Covid Dead under Municipal Corporations Are Safai Karamcharis*, THE INDIAN EXPRESS (2021), https://indianexpress.com/article/cities/delhi/delhi-half-of-covid-dead-under-municipal-corporations-are-safai-karamcharis-7333365/ (last visited May 7, 2023).

threatening circumstances while performing their jobs. Data regarding related cases have not been consistently reported since 2017 [6].

According to previously published reports by the National Crime Records Bureau (NCRB), no cases were registered until after 2014 under the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act which aims to protect individuals' health by forbidding employment as manual scavengers or work with dry latrines directly or indirectly due to their toxicity issues.[7] In Karnataka, two incidents were logged in both years of 2015, while two were recorded each year for Tamil Nadu between those same years. However, starting in 2017, when information from "Other Special and Local Laws" was combined with records explicitly linked to the Act, it is now impossible just from NCRB-generated statistics alone to determine how many situations pertain exclusively to this legislation [8]. Minister of State for Social Justice and Empowerment *Ramdas Athawale* declared that at least 308 hardworking sanitation workers had died during the past five years (2018-2022) while cleaning sewers and septic tanks.[9] The actual number of cases may be much higher than what's reported, warn experts. Many cases go unregistered, which creates grave concerns.[10] It's crucial to understand that every figure represents a human life lost and a family in pain.

The continuation of this problem in society questions the effectiveness of the existing laws and policies. The problem subsides in the inadequate implementation of policies and enactments. The practice of manual scavenging is a gross violation of human rights and it is very pertinent to restore the dignity of people engaged in this employment. The rehabilitation of manual scavenging is also required for the economic as well as social upliftment of the community. The increased pace of rehabilitation will assist manual scavengers and their future generations to integrate into the main society and live a life of human dignity.

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[6] *Id.*

[7] NATIONAL CRIME RECORDS BUERAU, *Incidence & Rate of Cognizable Crimes under Special and Local Laws (SLL) under Different Crime Heads during 2014 and Decadal & Quinquennial Percentage Changes*, (2014).

[8] NATIONAL CRIME RECORDS BUERAU, *Cases Reported (I), Victims (V) & Rate (R) of Cognizable Crimes (SLL) under Different Crime Heads During 2015 Cases Reported (I), Victims (V) & Rate (R) of Cognizable Crimes (SLL) under Different Crime Heads During 2015 (Continued)*, (2015).

[9] Express web desk, *Athawale in Parliament: 73.31% of Manual Scavengers from Scheduled Castes*, THE INDIAN EXPRESS (2022), https://indianexpress.com/article/india/athawale-in-parliament-73-31-of-manual-scavengers-from-scheduled-castes-7653092/ (last visited May 7, 2023).

[10] Scroll Staff, *No Manual Scavengers in India but 330 Died Cleaning Sewers from 2017 to 2021, Centre Tells Lok Sabha*, 2022, https://scroll.in/latest/1029762/no-manual-scavengers-in-india-but-330-died-cleaning-sewers-from-2017-to-2021-centre-tells-lok-sabha (last visited May 7, 2023).

2. False Promises of Laws for the Protection of Rights of Manual Scavengers

This cruel practice traces back centuries when individuals from specific castes, such as *Bhangis or Valmikis,* were assigned their responsibility due to the stigma attached to their community.[11] The colonial era saw an expansion in manual scavenging practices despite the British government introducing modern sanitation systems.[12] The Manual Scavenging Act of 1889 institutionalized this inhumane act while reinforcing existing social hierarchies. After gaining independence in 1947, India attempted to address this issue through constitutional means; however, deep-rooted prejudices and slow societal changes prevented significant progress until legal interventions were implemented.[13] It's disconcerting that manual scavenging is still present in some areas despite having been outlawed by the Indian government back in 1993 with their Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act. Thankfully they have taken additional measures to fight against this terrible practice in the form of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act of 2013.[14] The Constitution of India was adopted by the people of the Republic of India on January 26, 1950. The Constitution was written with a progressive spirit and with a liberal philosophy in mind. The Constitution's force was the first legal strike dealt to the regressive narrative of caste discrimination, and it was a mighty blow. *Dr. Bhimrao Ambedkar* is well-known for being the "Father of the Indian Constitution" and a revolutionary figure.[15] He was the only member of the Untouchable Caste to successfully advocate their interests at the round table discussions and afterward in the Constituent Assembly. Article 17 of the Indian Constitution, which makes it illegal to engage in the practice of untouchability, allowed Ambedkar's concept of equality to prevail in India and led to the abandonment of the idea of untouchability.[16] It is the only clause in the Constitution that has been penalized because of the seriousness of the situation and the willingness of the people to get rid of it. The debates that took place within the Constituent Assembly brought up a new discussion on the topic of untouchability.[17]

Indian government enacted several laws as well as policies to tackle the problem of manual scavenging and rehabilitating them. The present major law is the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 which aimed to complete eradication of manual scavenging from India. The act focuses

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[11] Babasaheb Ambedkar, *Manual Scavenging in India:*
[12] ASANG WANKHEDE, *Working Paper No.1*.
[13] *Id.*
[14] Shaileshwar Yadav, *Dying Scavengers And Recurring Amendments*, SSRN ELECTRON. J. (2021).
[15] WANKHEDE, *supra* note 12.
[16] *Id.*
[17] Yadav, *supra* note 14.

on the rehabilitation aspect by assigning alternate employment, giving them training, and as well as providing education to their children. This act is a comprehensive plan with high hopes for completely and fully eradicating manual scavenging while providing help for those affected by it. Despite more than 120 years of efforts, caste-based discrimination and hazardous working conditions remain ongoing challenges that demand attention.[18] Inadequate cleaning facilities only add to these struggles, as highlighted by a WaterAid survey during last year's COVID-19 lockdowns revealed that 40% of sanitation workers lacked basic handwashing facilities at their workplaces.[19].

"Manual scavenger" has an evolving definition which illuminates lawmakers' intentions to prevent this harmful practice and support those subjected to it.[20] The initial Protection of Civil Rights Act 1976 prohibited scavenging only in "unlawful compulsory labor" cases based on caste discrimination. It excluded municipal corporation workers and domestic workers from the Dalit community who were compelled into manual scavenging due to their caste status.[21] However, this definition failed to account for cases where untouchability was not a factor for compulsion. In contrast, the Manual Scavengers (MS) Act that came into effect in 1993 explicitly forbids the construction and employment that are related to manual scavenging while defining "manual scavenger" as anyone directly involved with manually carrying human excreta.[22] This law represented progress from the old Act since it did not require untouchability as a condition for compulsion. To tackle the issue of unsafe sanitation work practices within India, reforms were needed - which came in the form of the MS Act introduced in 2013.[23] By addressing concerns around hazardous cleaning and manual scavenging without adequate protective gear or equipment, this new legislation aimed to provide sufficient protections for workers across India's sanitation sector.[24] According to the Manual Scavengers Act of 2013, "any person, employed or engaged in any kind of activity relating to the handling of human excreta" is considered a manual scavenger."[25] A descriptive fallacy is presented here in the form of a definition of manual scavenging. This definition is too limited and fails to account for demographic dividends; it treats [manual scavengers] as if they belong to a single, nebulous group.[26] The phrases that define

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[18] Yadav, *supra* note 4.
[19] Rajput, *supra* note 5.
[20] Shiva Shankar & Kanthi Swaroop, *Manual Scavenging in India: The Banality of An Everyday Crime*, 2 CASTE / A GLOB. J. SOC. EXCLUSION 67 (2021).
[21] WANKHEDE, *supra* note 12.
[22] Yadav, *supra* note 14.
[23] WANKHEDE, *supra* note 12.
[24] Shankar and Swaroop, *supra* note 20.
[25] Government of India, *The Prohibition of Employment as Manual Scavengers and Their Implementation Act,2013*, 1 (2013).
[26] Asad Ashraf, *The Truth About Manual Scavenging In India*, OUTLOOK (2022), https://www.outlookindia.com/magazine/story/india-news-the-truth-about-manual-scavenging-in-india/305414 (last visited May 6, 2023).

the scope of this practice do not consider gender, geography, or exposure to risk, which are the most critical aspects of this practice. According to the findings of the Sanitation Workers Project, which was research carried out by Dalberg Advisors, there are at least nine different types of manual scavengers.[27] Whereas the definition of the Act of 2013 is only limited to latrine cleaners, railway cleaners, sewer cleaners, and fecal sludge handlers, keeping a broad spectrum into an unrecognized category.[28] Now that the meaning and extent of manual scavenging (the legal definition) have been revealed, it is possible to comprehend how the idea of human dignity is connected to this practice and why it has been regarded as a practice that degrades human dignity.[29] Ultimately it is hoped that these reforms will end all forms of manual scavenging and ensure safer conditions for those working in sanitation. The legislative allowance for certain types of hazardous cleaning and manual scavenging goes against what should be at the heart of this Act eliminating employment as a manual scavenger and focusing on rehabilitation efforts for people involved and their families. Permitting such exceptions contradicts this comprehensive prohibition while also mirroring earlier definitions from the PCR act introduced back in 1976, followed by abandoned by earlier prohibitive reforms from 1993. Upon careful examination of The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013, several areas that require significant attention have been identified. One pressing issue is that despite Section 5 making manual scavenging illegal, government officials employed by railways and municipalities continue to engage in this activity covertly and without proper documentation rendering the Act virtually powerless. Another major shortcoming lies within Section 2(1)(d), where hazardous cleaning is defined as manual cleaning without proper safety protocols or protective gear but without providing clear guidelines on what would constitute adequate gear or safety precautions, cleaners are left exposed to various health hazards and diseases. The local authorities must conduct surveys of insanitary latrines within their jurisdiction and publish a list within two months of the Acts commencement according to Section 4(1). An unaddressed challenge remains even after implementing various steps to promote sanitation through legislation: identifying areas where people practice open defecation necessitating manual cleaning of public spaces in urban areas from human excreta remains unresolved. The primary issue arises due to insufficient willingness or resources, such as time and expertise, among most local authorities when conducting comprehensive surveys to identify insanitary latrines on their watch. Add that underreporting on their part might affect reported numbers;

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[27] "Shiva Shankar & Kanthi Swaroop, *When It Comes to Manual Scavenging, Enacted Laws Have Persistently Failed*, THE WIRE, 2020, https://factly.in/the-curious-case-of-data-on-manual-scavengers/ (last visited May 7, 2023)."

[28] Shankar and Swaroop, *supra* note 20.

[29] WANKHEDE, *supra* note 12.

hence surveys are more symbolic than functional. Hence calling the current state progressive would not be accurate since we are taking steps backward instead.[30]

Government marks a new amendment bill aiming at prohibiting manual scavenging practice. Typically, such amendments represent routine revisions in policies attempting to correct past deficiencies. Nonetheless, concerning this being the third prohibition proposal, previous attempts enacted in 1993 and 2013 have been significant failures in policy terms and regarding their efficient implementation effectiveness. Unfortunately, enough, there exist serious shortcomings within the newly proposed Amendment Bill of 2020 that repeat critical errors from previous proposals as well. At first glance, though, this new legislation appears instead assuring since it suggests complete mechanization replacing manual sewer cleaning while enhancing worker protection measures and compensations for workplace accidents. Currently punishing individuals who employ hazardous cleansing of sewers and septic tanks with imprisonment for up to five years or a Rs 5 lakh fine, the new amendment bill aims to increase the ban on manual scavenging by extending sentencing along with penalty amounts. However, the new bill fails at its fundamental objective - the emancipation of "manual scavengers." The inability to address human exploitation while lacking ethical and moral values renders this latest proposal too inefficient, similar to previous bills. Failing to eradicate manual scavenging is disappointing because it is one of the most cruel and degrading forms of labor known globally.[31] Denial by governments and municipalities constitutes a significant impediment to eradicating this problem as they often quibble over statistics while deliberately ignoring health risks associated with this type of work.[32] Despite promises made through legislation, the lackluster compensations offered for bereaved families only add salt to an existing wound.

To make matters worse, certain entities like the Delhi government have claimed they eradicated manual scavenging within their jurisdiction when evidence proves otherwise further indicating how poorly authorities handle this issue.[33] The general public careless waste disposal habits exacerbate matters since practically every form of human waste ranging from used condoms to sanitary napkins, ends up recklessly scattered around street corners at best. The sad reality is that those cleaning public spaces must inevitably come into contact with human excreta. Among the many job roles falling under manual scavengers are sweepers, garbage collectors, waste pickers (including minors), and those involved in sorting/recycling refuse. Although

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[30] *Id.*

[31] Thekaekara, *supra* note 1.

[32] Ministry of Social Justice & Empowerment, (2021).

[33] Sourav Roy Barman, *Manual Scavenging a Reality in Capital: Delhi Govt Survey*, THE INDIAN EXPRESS (2018), https://indianexpress.com/article/cities/delhi/manual-scavenging-a-reality-in-capital-delhi-govt-survey-5303486/ (last visited May 9, 2023)."

technically referred to as such, not all these individuals receive protection from laws like the Amendment Bill, which has been criticized for its limited scope.[34] Despite legislative provisions like the 2013 Prohibition Act aimed at eradicating discriminatory practices like manual scavenging through advocacy movements with institutional reforms involving stakeholders, no convictions have occurred, according to recent reports, indicating how stubbornly caste-based discrimination persists within Indian societies despite visible progress. Despite claims made by various states of eliminating manual scavenging and insanitary latrines, the National Human Rights Commission (NHRC) found such declarations untrue in January 2021.[35] Such remarks clearly indicate how far India still needs to go in ensuring proper sanitation practices.[36]

3. Judicial Angle and Its Progressive Discourse

Human dignity, as a concept, exists globally and is not constrained by national boundaries or political classifications. Regardless of their birth circumstances, every new human deserves to be treated with respect and decency. The Universal Declaration of Human Rights states, "All humans are born free and equal in dignity and rights." This is stated in Art 1 of the Declaration.[37] Even the Preamble to the International Covenant on Civil and Political Rights, written in 1966, acknowledges the importance of dignity. It believes human dignity is the cornerstone of other civic and political rights. This reading from the Preamble provides a notion of how significant it is for human dignity to be recognized and enjoy a variety of other civil liberties. It was claimed by Justice A.K. Sikri in an article the foundation of human dignity is where the legitimacy of human rights can be traced back.[38] The highest court in India, the Supreme Court, has repeatedly acknowledged that Art. 21 of the Indian Constitution contains the right to live with human dignity. The court observed *Kharak Singh v. State of Uttar Pradesh*, which stated that "Article 21 does not only connote to a mere animal existence." Additionally, in the case of "*Maneka Gandhi v. Union of India"*, it was stated that "Article 21 does include in its wide ambit, the right to live with human dignity." Nevertheless, human dignity is foreign to those who engage in manual scavenging. The type of work people conduct does not provide adequate protection for their health, adequate compensation for their efforts, or adequate safety equipment. Above all else, these scavengers have been

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[34] Shankar and Swaroop, *supra* note 27.

[35] NHRC holds zero manual scavenging claims of many States far from truth; recommends action against authorities for wrong reporting | National Human Rights Commission India, COMMISSION, NATIONAL HUMAN RIGHTS (2021), https://nhrc.nic.in/media/press-release/nhrc-holds-zero-manual-scavenging-claims-many-states-far-truth-recommends-action (last visited May 9, 2023).

[36] Shankar and Swaroop, *supra* note 27.

[37] United Nations General assembly Resolution, *Udhr*, UNIVERAL DECALRATION OF HUMAN RIGHTS 1102 (1948).

[38] WANKHEDE, *supra* note 12.

stigmatized. The practice results from social pressure placed upon the scavengers, and it is involuntary labour, unlike any other form of labour. Society, the contractors, and the government pressure the scavengers to force them to enter the manholes and the septic tanks. It is implicit that the concept of dignity has been absent for manual scavengers due to the exposure to risk and the availability of even the least minimal protection because of their work. Both in a hearing and a ruling, the judicial consideration of the prohibition of manual scavenging has gained traction in recent obiters of the SCI. Before examining the "*Safai Karamchari Andolan (SKA) vs. Union of India"*, a landmark judgement in the matter of anti-caste discrimination jurisprudence in India, it is necessary to analyze critical obiters of SCI. This should be done before studying the Safai Karamchari Andolan (SKA) vs. the Union of India. While proceedings of the case that involved the review of "*Dr. Subhash Kashinath Mahajan vs. The State of Maharashtra", 2018,* the SCI expressed severe concerns over the deaths of Manual Scavengers and asked, "why are you not providing them masks and oxygen cylinders? In no country in the world, people are sent to gas chambers to die. Four to five people are dying due to this every month." Both in a hearing and a ruling, the judicial consideration of the prohibition of manual scavenging has gained traction in recent obiters of the SCI.[39]

Although Art. 17 of the Constitution of India forbids untouchability expressly, the obiter dicta of the final judgment in the case of the Safai karamchari andolan acknowledges the widespread practice of untouchability. In addition, the bench makes the following observation: "The plight of untouchables is that they are still denied various civil rights; the condition is worse in the villages, remote areas where the fruits of development have not percolated down."[40] The Dalits are not allowed to have equal access to civic rights. Because of a lack of resources, improper planning, and apathy, We've been unable to teach Harijans any modern techniques for scavenging garbage up to this point. It is only through introspection that one can find the answer. The judgment struck to the core of caste discrimination, which opened the door that lead to discussion on the significance of legal protection in outlawing deeply ingrained discriminatory social practices which supports prejudices, discriminatory attitudes, and sociocultural and religious sanctions. Nevertheless, it did not address the issue of 'conditional prohibition' in the Act.[41] In SKA Public Interest Litigation (PIL), which sprang from a decades-old grassroots campaign for attaining social justice for Dalits and was spearheaded by SKA and other sister organizations, the primary focus was not only on eradicating all types of manual scavenging. The liberation of Dalits from the shackles of untouchability and caste discrimination was the

[39] *Id.*
[40] *Id.*
[41] Yadav, *supra* note 14.

main goal of the campaign. Widespread social mobilisations against discrimination, with human dignity as the primary goal of emancipatory efforts, played a crucial role in the establishment of rights frameworks within the Indian Constitution and International Human Rights Law (IHRL) to implement legal protections and safeguards for fundamental human rights. Starting in 2003, the Supreme Court's judicial activism led to the court issuing several mandamus orders requiring state governments to implement the 1993 Act within their respective jurisdictions. The SC requested specific information about all of the rehabilitation programs implemented by the government and the total number of manual scavengers rehabilitated as a result of these programs.[42] The court went on to transfer the responsibility of monitoring the compliance of the instructions and orders it had previously given to each of India's twenty - one High Courts.

It would be erroneous to just analyse the verdict in the more than ten-year legal fight and ignore the several mandamus orders the Supreme Court made throughout the writ petition's pendency.[43] In other words, it would be an error. In this sense, this success cannot be evaluated only on the final ruling, which was more of a letdown for SKA, but rather by giving proper consideration to the term "progressive safeguarding approach" adopted by the Supreme Court.[44] Even the judiciary presented problems for SKA by casting doubt on the reality of manual scavengers in India and the legitimacy of their work. The SKA employed popular mobilisation to carry out surveys in five sample states in order to ascertain the quantity of Dalits who engaged in manual scavenging. The results of these surveys revealed details on the socioeconomic and personal situations of the respondents.[45] SKA used the orders of the SC to push the local authorities to act on the directives of the SC and remove dry latrines within their jurisdiction. This allowed the SC to show the presence of manual scavenging on a rampant scale, which prompted the SC to direct the local authorities to enforce the 1993 act.[46] It was the first time in the court's jurisprudential history that the Supreme Court of India delegated its monitoring duty in a case to any of India's 21 High Courts to ensure compliance with the directions and the 1993 act.[47] This was done in 2011 for the execution of the directions and orders that the SC had

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[42] WANKHEDE, *supra* note 12.

[43] Ayush Mehta & Navya Bhandari, *Manual Scavenging: An Endless Cycle of False Promises & Failed Policies*, LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (2020), https://lawschoolpolicyreview.com/2020/04/13/manual-scavenging-an-endless-cycle-of-false-promises-failed-policies/ (last visited May 7, 2023).

[44] Sharmila E. J. & L. Chandrakanthi, *A Critical Analysis of Manual Scavenging Laws and Practice in India*, JOURNAL OF HUMAN RIGHTS LAW AND PRACTICE (2023), https://lawjournals.celnet.in/index.php/jhrlp/article/view/1162 (last visited May 7, 2023).

[45] Bhandari, *supra* note 45.

[46] Yadav, *supra* note 14.

[47] WANKHEDE, *supra* note 12.

previously made. Therefore, the final verdict is significant for the following three critical reasons: First, the judgment elucidated the jurisprudence on a concurrent reading of Article 17 which talks about the prohibition of untouchability, Article 14 which depicts the right to equality, Article 15 that states the right against discrimination, Article 21 for the celebrated right to life in the context of human dignity, and lastly, Article 23 which prohibits forced labour. Because of this approach, the path has been cleared for the nation to go forward with the development of anti-caste discrimination jurisprudence.[48] Second, the Supreme Court of India did something quite innovative when it expanded the scope of the above constitutional provisions by relying on India's international law obligations under the "Universal Declaration of Human Rights" (UDHR), the "Convention on Elimination of Racial Discrimination" (CERD), and the "Convention for Elimination of all Forms of Discrimination Against Women" (CEDAW). [49] Third, the court gave the directions and the judgment a sustained outlook by addressing the possibility to prevent future generations from having to endure the same humiliation and indignity, the SC has expanded the scope of rehabilitation measures to include the criminalization of entering sewers without the proper protective gear and the provision of a compensation of Rupees Ten Lakhs for deaths that occur in sewers; it has also directed the railways to stop the practice of manual scavenging on the railway tracks and to prevent manual scavenging. Finally, the court ordered the states to fulfill their obligation of implementing the directions issued by the court as well as Act and take legal action to address any instances of non-implementation of the same.

4. Analysis of Prohibition and Rehabilitation of Manual Scavengers with the Current Data

In response to a question raised in Lok Sabha, it emerged that over 58,000 people are employed as manual scavengers in India based on surveys conducted by the Ministry of Social Justice and Empowerment in 2013 and 2018.[50] However, activists contend that more individuals are likely involved in this exploitative practice than official estimates indicate because it persists despite being outlawed since legislation was passed against it in 2013.[51] Disturbingly, reports show that

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[48] Sanajna Bhalerao, *What Is Manual Scavenging, and Why Is It Still Prevalent in India?*, THE INDIAN EXPRESS (2022), https://indianexpress.com/article/explained/explained-what-is-manual-scavenging-and-why-is-it-still-prevalent-in-india-7815400/ (last visited May 7, 2023).

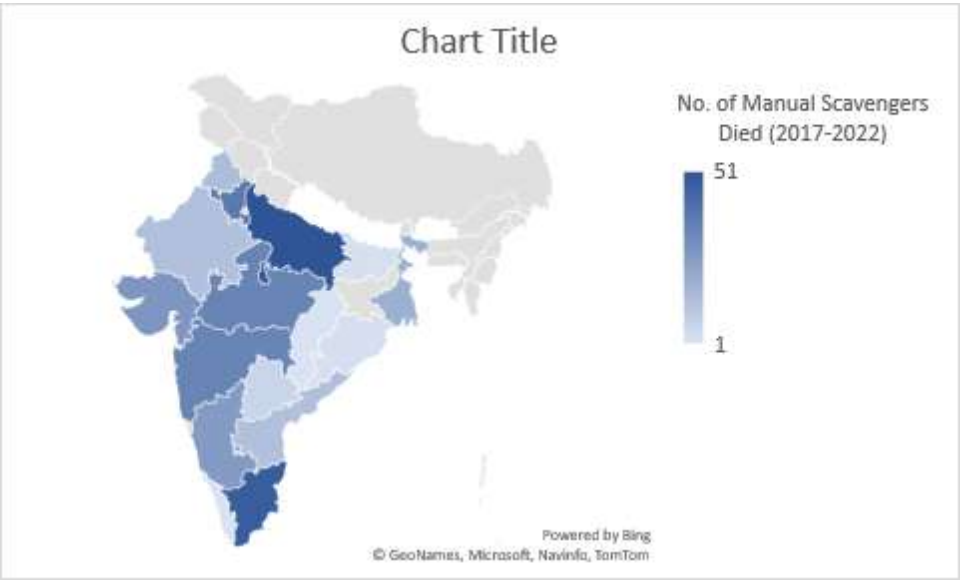
[49] Almas Naseem, *Jalaun's Manual Scavengers- Fighting for Right to Life with Dignity |Oxfam India*, OXFAM INDIA (2019), https://www.oxfamindia.org/blog/jalauns-manual-scavengers-fighting-right-life-dignity?gclid=CjwKCAjwue6hBhBVEiwA9YTx8AoYpOXqQNC2nPD6NPzII75RL0S2eNngWTFnvcU5Acz3ndtJQlIp-hoCu74QAvD_BwE (last visited May 7, 2023).

[50] Express web desk, *supra* note 9.

[51] REBECCA ROSE VARGHESE, *Data | Uttar Pradesh and Tamil Nadu Recorded Most Sewer-Cleaning Related Deaths in Last Six Years - The Hindu*, THE HINDU (2022),

between 2017 to early 2022, some sewer cleanup work continued resulting in nearly 350 deaths; among state-wise distribution, Uttar Pradesh tops with a maximum of 51 fatality counts recorded. Even more concerning, many workers affected by such practices belong to lower castes like Dalits.[52] However, it is not encouraging, although provisions for a rehabilitation scheme that includes a one-time compensation plan have been introduced for affected workers. Still, only minimal take-up has been made until now.[53] The figure 1 indicating reported manual scavenger deaths reveals how widespread this unacceptable practice has become.[54]

Figure 1



Source: National Survey of Manual Scavengers, Ministry of Social Justice & Empowerment 2018

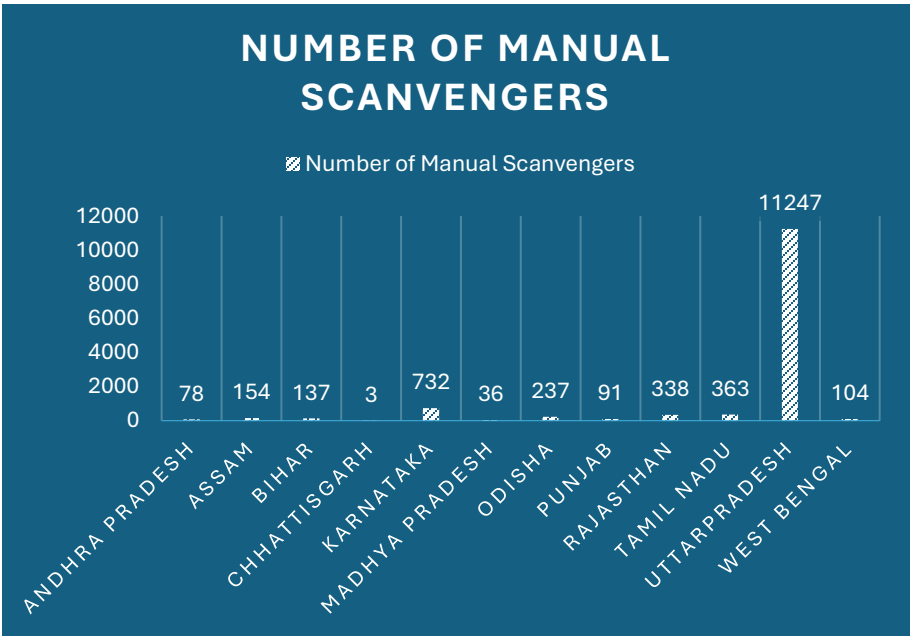
Figure 2

https://www.thehindu.com/data/data-uttar-pradesh-and-tamil-nadu-recorded-most-sewer-cleaning-related-deaths-in-last-six-years/article65810296.ece (last visited May 6, 2023).

[52] *Id.*

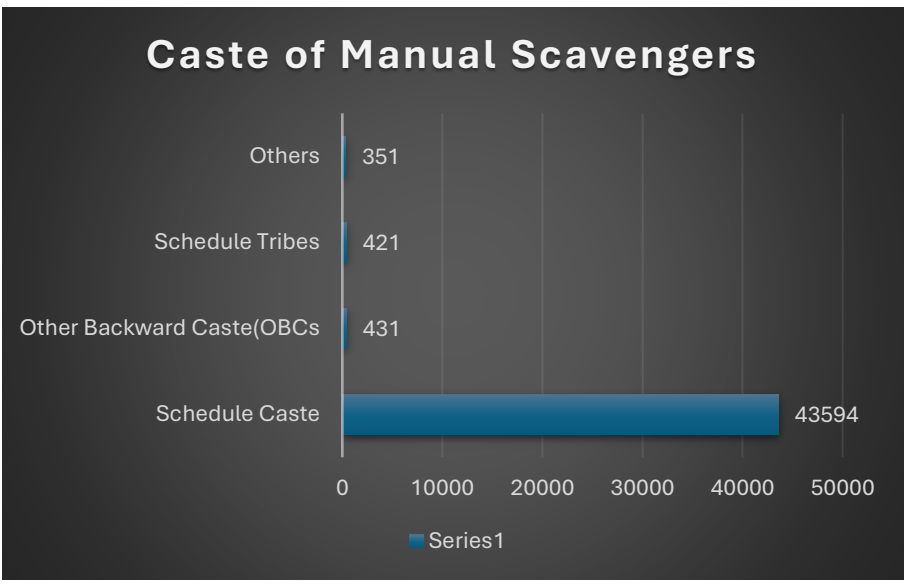
[53] Ashraf, *supra* note 26.

[54] VARGHESE, *supra* note 53.



Source: National Survey of Manual Scavengers, Ministry of Social Justice & Empowerment 2018

Figure 3



Source: Minister of State of Social Justice and Empowerment Ramdas Athwale said this in Rajya Sabha in a written reply to a question by RJD member Manoj Kumar Jha,2021

The figures 1, 2 and 3 indicate that the country has 58,098 manual scavengers, and 42,594 of them belong to the Scheduled Castes, the government has told Parliament, and 73.31% of manual scavengers from Scheduled Castes.[55]

5. Rehabilitation Scheme

When the budget 2023 was presented by the Finance Minister of India it was promised that there will be 100% transformation to mechanized cleaning. In order to honour this promise Namaste scheme has been launched by the Ministry of Social Justice and Empowerment. This scheme encompasses the Self-employment scheme for the Rehabilitation of manual scavengers, which was an existing incentive of the government for the manual scavengers. Unfortunately, the budget allocated for this scheme is 97.41 crores.[56] However, no amount has been sanctioned for the SRMS program in the present budget. The anomaly in the data reflected by the government states that 58,098 manual scavengers benefited under the SRMS scheme. On the other hand, only 18,800 have received assistance for skilled training and 2051 have got loans for any alternate business or employment.[57]

The objective behind creating the Self Employment Scheme for Rehabilitation of Manual Scavengers (SRMS) is to empower these workers by offering them valuable resources such as one-time cash aid worth ₹40,000 and skill-building programs along with a capital subsidy option for independent ventures, unfortunately. However, practical obstacles concerning the provision of loan subsidies amounting to ₹5 lakh through this scheme have kept several beneficiaries from partaking adequately compared to receiving monetary aid via other means during the last three years.[58]

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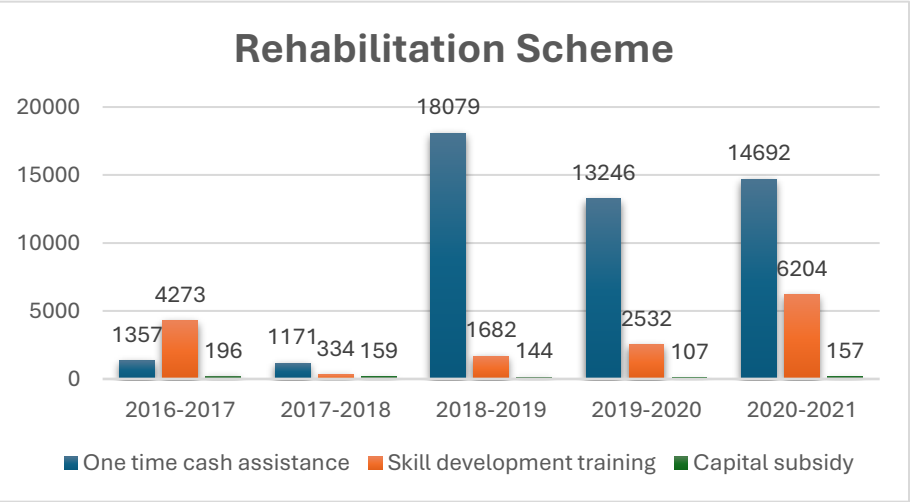
[55] Express web desk, *supra* note 9.
[56] THE HINDU BUREAU, *Budget 2023 | Finance Minister Pitches for 100% Switch to Mechanised Sewer Cleaning in All Cities and Towns*, THE HINDU (2023), https://www.thehindu.com/business/budget/budget-2023-cities-towns-to-transition-from-manhole-to-machine-hole-mode-fm-sitharaman/article66457528.ece (last visited May 7, 2023).
[57] Press Information Bureau, *Ru-32-01-0094-160522/Explainer*, 20 (2022).
[58] BUREAU, *supra* note 58.

Figure 4



The National Safai Karmacharis Finance and Development Corporation's (NSKFDC) Self-Employment Scheme of Liberation & Rehabilitation of Scavengers (SRMS) offered a hopeful outlook on rehabilitating manual scavengers over a decade ago; however, it couldn't meet its objectives. The initiative mentioned in figure 4 aimed to provide alternative occupations for manual scavengers and their dependents by 2009 but proved unsuccessful even after revisions until 2016-2017 following the PEMSR Act's enactment prohibiting insanitary latrines, manual scavenging, hazardous cleaning of sewers/septic tanks. Despite granting extensions periodically over the years, SRMS hasn't progressed much, prompting NHRCs advisory as recently as September 24th to safeguard workers' rights in manual scavenging. In light of hazardous cleaning tasks leading to fatalities amongst sanitary workers, the advisory highlights the necessity of attributing responsibility and accountability to relevant authorities. The NHRC advisory recommends considering sanitary workers as frontline health personnel across all domains while ensuring their safety measures are prioritized along with preserving their fundamental human rights.

6. What Can be Done to Stop the Menace?

In recent years legislation has been put in place by the Indian government to protect individuals affected by manual scavenging practices and eradicate this phenomenon[59] Despite these efforts,

[59] Garima Gupta, *Genderisation in the Field of Manual Scavenging and Why Does the Existing Legislation Fail in Protecting Them? | SCC Blog*, SCC ONLINE (2020), https://www.scconline.com/blog/post/2020/05/28/genderisation-in-the-field-of-

progress has been limited; further proposals have been tabled to improve the situation.

- Firstly, greater emphasis must be placed on strictly enforcing existing rules banning manual scavenging.

- This should include legal penalties that serve as a deterrent against this practice. Moreover, financial incentives such as better pay rates or alternative employment options would make life more manageable for those involved in this activity, while rehabilitating programs that offer job training programs are crucial in placing them into professional positions suitable for current market demands. In parallel with rehabilitating programs, campaigns to increase awareness among the general public concerning the danger associated with this exercise can be beneficial.

- Initiatives that encourage reporting manually scavenge activities via app-based platforms like Swachhata and other relevant channels will support tracking cases more effectively during identification processes.

- Technology is another viable solution; new equipment designed specifically for toilet cleaning and sewage management would drastically reduce reliance on individuals forced into hazardous working conditions like those involved in manual scavenging.

We can't ignore the plight of manual scavengers any longer it's time to take action! One way we can help is by strengthening legal protections for these workers.[60] We need harsher consequences for lawbreakers and improved mechanisms to provide rehabilitation and compensation following harm caused by their work conditions.[61] Ensuring our efforts are effective over time requires regular progress monitoring through periodic assessment protocols mandated by our laws themselves; implementing such measures will guarantee consistent results from any initiatives designed around this great challenge facing society today.[62] It will take a lot more than just legal provisions, though addressing this issue must become a multi-faceted approach towards progress: combining stringent law enforcement policies with innovative rehabilitation programs; improving compensation levels; raising awareness through intensive media campaigns; utilizing state of the art technology on effective ways of waste management.[63] Regardless of who's in charge, we must recognize that sanitation labor can be improved with technical, social, cultural, and environmental interventions. Reforms should focus on eliminating

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manual-scavenging-and-why-does-the-existing-legislation-fail-in-protecting-them/ (last visited Jul 13, 2022).

[60] Shankar and Swaroop, *supra* note 20.

[61] WANKHEDE, *supra* note 12.

[62] J. and Chandrakanthi, *supra* note 46.

[63] Bhalerao, *supra* note 50.

exploitative employment conditions while extending necessary provisions like better housing, working conditions, healthcare coverage policy, or insurance schemes.[64] Also, a comprehensive approach includes educational programs catering to sanitation workers' children's needs and conducting nationwide censuses and surveys so decision-making bodies can hear from all stakeholders concerned about this problem. Accurate data is essential if we're going to tackle this pressing issue. Data-related inefficiencies have resulted in laws meant to help manual scavengers being ineffective or not implemented.[65] To address this issue, we need a reliable database of these individuals across India, which can only come from conducting a nationwide survey regularly updated with data reflecting ground realities. Proper registration must also extend beyond just identifying these individuals because enumeration plays an essential role too. Transparency regarding cases related to manual scavenging would go a long way in promoting change in India; thus, The National Crime Records Bureau (NCRB) needs to be more inclusive in its reporting. A comprehensive rehabilitation scheme that includes skill development and employment opportunities is also required.[66] The Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) could supplement existing social security legislation. Technologies like sewage tank and drain cleaning can be promoted to reduce the number of individuals participating in manual scavenging. [67] Protective gear must also be defined clearly for sanitation workers' safety. Finally, coordination across central and state governments can help eliminate manual scavenging. Sanitation workers play a vital role in our communities, and we must prioritize their well-being. Taking stock of the 2013 legislation through a social audit will enable us to remove obstacles and promote good health among these invaluable members of society.

7. Conclusion

For centuries, manual scavenging in India has remained deeply ingrained within society, which continues to oppress marginalized individuals through exploitation and violence. The psychological norm perpetuated by this tradition aids marginalization further into the community, making it hard for any change towards progression, thus leaving these groups more vulnerable than ever. While fundamental human rights like dignity and freedom from discrimination are violated within this practice, safety measures for those exposed are not prioritized. Despite various legalities aimed at ending this unjust Act,

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[64] Koonan, *supra* note 3.
[65] Shankar and Swaroop, *supra* note 27.
[66] Jawed Alam Khan and Rahat Tasneem, *15 Years Later, Govt Scheme to Rehabilitate Manual Scavengers Has Made Little Progress*, THE WIRE (2022), https://thewire.in/caste/manual-scavengers-rehabilitation-scheme-progress-report (last visited May 7, 2023).
[67] WANKHEDE, *supra* note 12.

progress remains insufficient, owing majorly to cast dynamics within the system that deny manual scavengers access to essential welfare benefits leading to them being left unaccountable. The potential for challenges similar to those seen with the 1993 Act is troubling as India implements its 2013 framework for addressing manual scavenging.

Given that castes influence law creation and enforcement in this region, success will require significant advocacy efforts by affected communities on political, social, and legal fronts. A closer look at this issue reveals how deeply entwined lawmaking is with India's social structure, a fact underscored by past legislation about manual scavenging born out of caste-based dynamics. What's required now is a more humane approach that recognizes everyone's inherent dignity regardless of their background or how they've been marginalized historically. This means taking steps to empower those who've traditionally done society's most demeaning work so that they can fight for their rights within an equitable system.

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Evolving Equality: The Role of the Court Role in the Rights of the Transgender and the Need for Update in BNS

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Abstract

The Constitution serves as the cornerstone of India's legal framework, enshrining fundamental rights such as equality, freedom of speech, and liberty in Part III. Constitutional courts, particularly the Supreme Court and High Courts, play a vital role in upholding these rights through judicial review and interpretation. A landmark judgment in Navtej Singh Johar v. Union of India (2018) exemplified this by decriminalizing consensual same-sex relationships under Section 377 of the Indian Penal Code (IPC), affirming the right to dignity for LGBTQ+ individuals. With the introduction of the Bharatiya Nyaya Sanhita (BNS), 2023, replacing the IPC, there was an opportunity to embed the principles of the Navtej judgment. However, the omission of provisions addressing unnatural offences in the BNS leaves LGBTQ+ individuals and men without adequate legal protection, undermining their constitutional rights. This article examines the role of constitutional courts in protecting LGBTQ+ rights and highlights the gaps in the BNS that contravene judicial mandates. It proposes essential amendments to align the BNS with constitutional principles, ensuring fair treatment for all individuals, irrespective of gender or sexuality, while reinforcing the judiciary's commitment to safeguarding human dignity and equality under the law.

Keywords

Constitution, LGBTQ+, Indian Penal Code, Bharatiya Nyaya Sanhita, Society, Rights

"Constitution is not a mere lawyers document, it is a vehicle of life and its spirit is always the spirit of age" - B. R. Ambedkar[1]

[1] B. R. Ambedkar, *Quotes by Founding Fathers & Others*, https://dpe.gov.in/sites/default/files/Quotes_by_founding_fathers.pdf.

1. Introduction

The Constitution of India is a living and dynamic document, designed to respond and adapt to the evolving needs and progress of society. It is akin to an organic entity, constantly aware and responsive to its surroundings. Constitutional courts play a crucial role in understanding the evolving nature of our Constitution. They breathe life into it dynamically and purposefully to ensure it remains relevant and meaningful, rather than just a collection of mere dead words. The Fundamental Rights of 'liberty' and 'equality' under our Constitution are not static but are dynamic and timeless. It's crucial to recognize their evolving nature and avoid interpreting them in a rigid or outdated way, as that would go against the very principles of our Constitution. The courts have to interpret equal rights in line with present needs, not based on outdated standards from the past.

The notion of transformative constitutionalism, which is an authenticity concerning all Constitutions and especially so about the Constitution of India, is, as a matter of fact, its capability to adapt and transform with the changing needs of the times. Likewise, constitutional morality urges all branches of the State to preserve societal diversity and avoid succumbing to popular sentiments or majoritarianism. Upholding this principle means respecting varied perspectives rather than imposing a uniform ideology based on temporary trends. The primary responsibility of constitutional courts is to adjudicate the validity of laws based on well-established principles like legislative competence and fundamental rights. However, they must also uphold the core principles of the Constitution independently, without being swayed by majority opinions or popular beliefs. Their guidance should stem from constitutional morality, not societal morality.

The concept of dignity is an integral aspect of human personality, acknowledged as a crucial element under Article 21. Dignity is an essential part of a person's existence, without which their most complete well-being is unimaginable. It is the duty of both the State and the Judiciary to protect this basic right to dignity. Moreover, the collective society also bears a responsibility to respect each other's dignity, as it is not just a moral obligation but a constitutional duty. This respect for dignity is an expression of the fundamental principle of constitutional fraternity.[2] Criminalizing certain acts within an individual's private sphere restricts their personal choices based on outdated societal perceptions. Labeling such personal decisions as criminal undermines an individual's autonomy and right to dignity, turning it into a mere legal formality devoid of true meaning and spirit.

[2] Article 51A(e) Constitution of India, *supra* note 3.

1.1. Research Problem

The research problem revolves around a critical gap in the legal framework protecting LGBTQ+ individuals in India. While the Constitution promises equality and dignity for all, recent legislative changes, particularly the introduction of the Bharatiya Nyaya Sanhita, have failed to uphold these promises. Specifically, the BNS omits legal protections for LGBTQ+ individuals that were recognized under the Indian Penal Code, leaving a vulnerable community without necessary safeguards.

1.2 Hypothesis

The hypothesis of this research is that by not including provisions related to unnatural offences in the BNS, legislators have overlooked the essential principles set forth in the landmark Navtej Singh Johar judgment. This omission undermines the constitutional rights of LGBTQ+ individuals, especially their right to live with dignity and equality.

1.3 Objective

The main objective of this research is to highlight the vital role constitutional courts play in defending the rights of LGBTQ+ individuals. It aims to scrutinize the impact of recent legislative changes on these rights and to advocate for necessary amendments in the BNS. These amendments should reflect the progressive rulings of constitutional courts, ensuring that every individual, regardless of gender or sexuality, receives fair and unbiased treatment under the law.

1.4 Research Methodology

The research uses a doctrinal approach, focusing on the analysis of legal texts and judicial precedents. The comparison of the Indian Penal Code (IPC) is done with the new Bharatiya Nyaya Sanhita to identify changes in protections for LGBTQ+ individuals. Key judicial decisions, particularly the Navtej Singh Johar case, were examined to understand their impact on current laws. A comparative analysis is also conducted with the international standards to draw insights and propose necessary amendments to the BNS, ensuring it aligns with constitutional values and provides fair treatment for all individuals.

2. The Journey of Transgender Rights in India

India's cultural and historical narrative regarding homosexuality has seen shifts over time. Before colonial rule, evidence suggests that homosexuality was not subject to prohibition. Homosexuality in India has deep roots that can be traced back to ancient texts like the *Kamasutra,* authored by *Vātsyāyana.* References in sacred Hindu scriptures like the *Rigveda,* such as *"Vikriti Evam Prakriti"* (meaning

what seems unnatural is also natural) , have been interpreted by scholars to encompass homosexual behavior. Moreover, Indian narratives such as the Ramayana and Mahabharata, along with the cultural depictions found in Khajuraho's temples, offer insights into the historical acceptance of diverse sexual orientations. The Khajuraho temples notably feature artwork depicting women engaging in intimate embraces with other women and men openly displaying their bodies, reflecting the openness and inclusivity of ancient Indian society regarding human sexuality.[3]

However, the British Raj introduced Section 377 in the IPC, criminalizing homosexual acts and impacting queer individuals and relationships disproportionately. This section criminalized "unnatural offences," including consensual sexual activities "against the order of nature." The language of this law was vague and broad, leading to its misuse and targeting of Transgender people. Furthermore, the said provision survived and remained in force for around 150 years and interestingly during its existence, the IPC has seen relatively few amendments and none of them could result in the omission of this provision from IPC.

3. Law Commission Reports dealing with Section 377, IPC

The Law Commission of India is a non-statutory body, established by the Ministry of Law & Justice, Department of Legal Affairs, Government of India. It operates with specific terms of reference aimed at conducting research in legal matters and providing recommendations to the government through its reports. The Commission addresses various subjects based on references from the Department of Legal Affairs, Supreme Court, and High Courts, and it has submitted a total of 277 reports.[4] In the early history of the country, majorly, the 42nd Law Commission Report and the 172nd Law Commission Report talked about the offences given in IPC..

4. 42nd Law Commission Report

The establishment of the Fifth Law Commission dates back to 1968, with K. V. K. Sundaram serving as its chairman until 1971. During its tenure, this commission submitted a total of six reports. The 42nd Law Commission Report[5] extensively reviewed the IPC and recommended several amendments. It notably discussed making consensual sexual intercourse between adults an exception to Section 377 but succumbed to the belief that societal acceptance is a crucial factor in determining legal norms. It was observed by the committee that the majority of Indian society holds a strong disapproval towards homosexuality. This prevailing sentiment

[3] RUTH VANITA AND SALEEM KIDWAI, SAME-SEX LOVE IN INDIA: A LITERARY HISTORY 46 (2000).
[4] Parliament of India, *Law Commission of India | India.*
[5] FIFTH LAW COMMISSION OF INDIA, *42nd Law Commission Report*, 582 (1971).

justifies the classification of such acts as criminal offences, even when conducted privately by consenting adults. However, the committee also suggested that while *buggery* may still be considered an offence, its punishment should be reduced to a maximum of two years, a significant departure from the current maximum penalty of life imprisonment.

5. 172nd Law Commission Report

The Fifteenth Law Commission was instituted in 1997, with Justice B. P. Jeevan Reddy serving as its chairman until 2000.[6] During its tenure, this commission presented a total of 18 reports. 172nd Law Commission Report[7] comprehensively reviewed the Rape Laws in India. A significant shift occurred with the recommendation of the committee to delete Section 377 of IPC. This recommendation came in light of amendments to section 376, clarifying that consensual anal sex between adults, regardless of their sexual orientation, would not be punishable. However, despite the recommendations and discussions, the Legislature decided not to amend or revisit the law at that time.

6. Landmark Judicial Pronouncements

On July 2, 2009, the Delhi High Court made a significant ruling in ***Naz Foundation v National Capital Territory of Delhi,***[8] declaring much of Section 377 of the IPC as unconstitutional. The court held that consensual non-vaginal sexual acts between adults infringed upon fundamental rights such as equality before the law, non discrimination, and life and personal liberty under Articles 14, 15, and 21 of the Indian Constitution, respectively. However, the court upheld the validity of the section in cases of non-consensual non-vaginal intercourse or intercourse involving minors.

Later, on December 11, 2013, the Supreme Court of India, in ***Suresh Kumar Koushal and another v. NAZ Foundation and others,***[9] overturned the Delhi High Court's 2009 judgment and re-criminalized Section 377 of the IPC, citing sexual intercourse "against the order of nature" as punishable. Despite subsequent review petitions filed against this decision, including one by the Central Government and Naz Foundation, the Supreme Court upheld its ruling on January 28, 2015.

Efforts towards decriminalizing Section 377 continued in the legislative arena. Shashi Tharoor, a member of the Indian National Congress, introduced private member bills in the Lok Sabha on December 18, 2015, and March 12, 2016, seeking the

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[6] LAW COMMISSION'S REPORTS | Law Commission of India | India.
[7] FIFTEENTH LAW COMMISSION OF INDIA, *172nd Law Commission Report*, 59 (2000).
[8] NAZ Foundation v/s. Govt. of NCT of Delhi and Others, WPC No74552001 (2009).
[9] Suresh Kumar Koushal v. Naz Foundation, Civ. APPEAL NO10972 2013.

decriminalization of Section 377. However, both attempts were rejected by the house.

The turning point came on September 6, 2018, with the historic decision in ***Navtej Singh Johar v. Union of India,***[10] where the Supreme Court decriminalized a part of Section 377, thereby ending the criminalization of consensual homosexual activities marking a significant milestone for LGBTQ+ rights in India. Notably, this judgment did not affect the criminalization of unnatural sex with minors and animals, which remained in force.

7. Transgender Persons (Protection of Rights) Act, 2019[11]

The Transgender Persons (Protection of Rights) Bill, which later became the Transgender Persons (Protection of Rights) Act, 2019, was introduced in the Lok Sabha on July 19, 2019, by Thaawarchand Gehlot, Minister for Social Justice and Empowerment. After passing in the Lok Sabha on August 5, 2019, the bill was subsequently introduced in the Rajya Sabha on November 20, 2019, and was passed by the Rajya Sabha on November 26, 2019. Finally, the Bill received presidential assent on December 5, 2019, and was officially enacted as the Transgender Persons (Protection of Rights) Act, 2019[12] The Act has come into force on 10 January 2020 after notification of the same in the Gazette by the Ministry of Social Justice and Empowerment.

The Salient features of the Act are:

- Provides health care facilities like HIV surveillance and sex reassignment surgeries.[13]
- Recognizes offences such as physical and sexual abuse and specifies penalties of imprisonment and fines.[14]
- Defines transgender persons broadly, including those with intersex variations and genderqueers.[15]
- District magistrates can issue certificates of identification to affirm a person's transgender identity.[16]
- Establishes a National Council for Transgender to monitor policy impacts.[17][18]

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[10] Navtej Singh Johar & Ors. v. Union of India Thr. Secretary Ministry of Law and Justice, WRIT PETITION Crim. No 76 2016 (2018).
[11] The Transgender Persons (Protection of Rights) Act, 2019, Act No. 40 of 2019.
[12] *Id.*
[13] *Id.* at Section 15.
[14] *Id.* at Section 18.
[15] *Id.* at Section 2(k).
[16] *Id.* at Section 6.
[17] *Id.* at Section 16.
[18] *Id.* at Section 17.

- Prohibits discrimination in healthcare, employment, education, and public facilities.[19]

- Mandates government schemes for social welfare, vocational training, and self-employment[20].

- Recognizes the right of transgender persons to choose their residence.[21]

The Act was a pivotal legislative step to codify the rights and entitlements of India's transgender community. However, while it represented a positive step forward, the Act also faced criticism on the following grounds:-

- The Act lacks provisions for recognizing same-sex marriages, which is crucial for extending essential benefits and acknowledging LGBTQ+ relationships as the same lies within the domain of the parliament and the legislature and the court cannot step into the same.[22]

- The Act does not address the need for reservations in education and employment sectors for transgender persons, overlooking the directions given in ***NALSA*** case.

- Rape laws in India are not gender-neutral, failing to recognize transgender individuals as victims of rape. This disparity is evident when comparing the severe penalties that could be awarded to perpetrators of offence of rape of cisgender women under Sections 376A, 376AB, and 376DB of IPC, including the death penalty, versus the maximum 2-year punishment for rape against transgender individuals under Transgender Persons (Protection of Rights) Act, 2019. The lack of clarity on bail provisions further exacerbates the issue, potentially allowing perpetrators to escape accountability easily invoking Part II of the First Schedule of Bhartiya Nyaya Surakhsha Sanhita 2023/Code of Criminal Procedure, 1973.

- The Act overlooks the right to self-identification, contrary to the ***NALSA*** judgment, and grants the District Magistrate the authority to issue identity certificates. It also fails to provide a redressal mechanism in case of denial by the District Magistrate.

It is imperative that we promptly address these legislative gaps to uphold the principles of constitutional morality and fully address the complex challenges and diverse needs of the transgender community.

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[19] *Id.* at Section 3.
[20] *Id.* at Section 14.
[21] *Id.* at Section 12.
[22] Supriyo v. Union of India, Writ Petition Civ. No 1011 2022 (2023).

8. Navtej Singh Johar v. Union of India: A Critical Analysis

The five-judge constitutional bench of the Supreme Court, comprising Dipak Misra (CJI), Rohinton Fali Nariman, A. M. Khanwilkar, D. Y. Chandrachud, and Indu Malhotra, was tasked with determining the constitutionality of Section 377 of the Indian Penal Code. This colonial-era law criminalized homosexual acts as "unnatural offences," impacting same-sex relationships significantly. On September 6, 2018, the court unanimously ruled that the law was unconstitutional concerning consensual sexual conduct between adults of the same sex. This landmark decision was celebrated as a significant step forward for transgender rights in India, drawing cheers from campaigners outside the court.

The whole judgment can be summarized into the following three issues:-

a) Whether Section 377 violates Article 14 of the Constitution?

The constitutional challenge against Section 377 of the Indian Penal Code raised questions about its classification and its impact on the right to equality under Article 14 of the Constitution which mandates equal treatment before the law for all individuals. The court scrutinized whether the classification made by the law was reasonable and had a rational connection with its intended purpose. It was observed that the distinction between natural and unnatural sex, as mentioned in Section 377, lacked validity in contemporary society, given the evolving understanding of human sexuality. The court emphasized the need for laws to be based on intelligible differentia and to serve a legitimate objective, highlighting the inconsistencies between Section 377 which criminalizes consensual sex between competent adults, irrespective of sexual orientation, on one hand, and Section 375 IPC, which deals with non-consensual sex on the other. The court hence found that Section 377's arbitrary classification undermined the principle of equality concerning transgender individuals.

b) Whether Section 377 is violative of Article 19 of the Constitution?

The constitutional debate surrounding Section 377 also discussed its impact on freedom of speech and expression guaranteed under Article 19 of the Constitution in the light of decency and morality as the reasonable restrictions given under Article 19(2). The provision prohibits private acts between consenting adults raising concerns about its rationality and compatibility with constitutional freedoms. The court emphasized the importance of protecting private expressions of intimacy, especially for marginalized communities like the Transgender population that did not disrupt public order.

Drawing parallels with the recent ***NALSA***[23] judgment, the right of transgender persons to freely express their identity, further highlights the inconsistency of Section 377 with constitutional freedoms.

c) Whether Section 377 violates Article 21 of the Constitution?

The legal challenge against Section 377 also questioned its implications for the right to privacy and dignity enshrined under Article 21 of the Constitution. The criminalization of consensual sexual acts between adults under Section 377 was seen as an infringement on personal autonomy and privacy. The court highlighted the importance of recognizing individual autonomy and the right to personal choices, regardless of sexual orientation or identity. Moreover, it rejected the argument that the law's impact on a minority population justified its constitutionality, emphasizing that privacy rights are universal and not contingent on majority acceptance. The court's ruling declared Section 377 unconstitutional, affirming the rights of individuals to lead dignified lives free from unwarranted state interference.

Elements of Section 377 of the Indian Penal Code on certain aspects such as sex with minors, and non-consensual sexual acts including rape, and bestiality, continue to remain in force and only the consensual sexual conduct between adults of the same sex has been decriminalized.

9. The Need for Updating the Bharatiya Nyaya Sanhita in the light of Judicial Precedents

The Bharatiya Nyaya Sanhita was introduced in Lok Sabha on August 11th, 2023 by Amit Shah, Minister of Home Affairs, as a replacement for the Indian Penal Code, and subsequently subjected to thorough scrutiny by the Standing Committee on Home Affairs.[24] After incorporating recommendations, the Bharatiya Nyaya (Second) Sanhita, 2023 was presented on December 12th in Lok Sabha, which was passed on December 20th and eventually got passed from Rajya Sabha too on December 21st. Finally, on December 25th, the Sanhita received the assent of the President of India and will come into force on 1st July 2024.[25]

The unveiling of the BNS provided an ideal moment to integrate the guiding principles laid down in the ***NALSA*** and ***Navtej*** verdicts, thereby expanding the protective scope for transgender individuals. However, the provision related to unnatural offences finds no place in BNS which was earlier mentioned as Section 377 in IPC.

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[23] National Legal Services Authority v. Union of India, 2014 5 SCC 438 (2014).
[24] STANDING COMMITTEE ON HOME AFFAIRS, *The Bharatiya Nyaya Sanhita*, (2023).
[25] Ministry of Home Affairs, *Notification No. S.O. 850(E)*, (2024).

Members of the Standing Committee and various stakeholders expressed their opposition to the complete deletion of Section 377 of the IPC in the BNS, 2023. Experts who appeared before the Committee highlighted the Supreme Court's decision in ***Navtej Singh Johar***, where Section 377 of the IPC was read down as it infringed upon Articles 14, 15, 19, and 21 of the Constitution by criminalizing consensual unnatural sexual acts among adults. This change marked a positive step, particularly benefiting the LGBTQ community.

The Committee acknowledges that although the Supreme Court's ruling read down the provision related to consensual unnatural sexual acts, non-consensual acts of an unnatural nature continue to be prosecuted under Section 377 of the IPC. Therefore, several Members expressed their opinion that the remaining valid parts, such as non-consensual carnal intercourse with adults, all acts of carnal intercourse with minors, and acts of bestiality, of Section 377 should be appropriately retained in the Sanhita. In light of the BNS's objective to move towards gender-neutral offences, the Committee recommends the reintroduction and retention of Section 377 of the IPC to align with these objectives. Therefore, the Committee urged the Government to include Section 377 of the IPC in the proposed law.

The other potential avenue would have been to expand the definition of rape given under Section 63[26] by adopting gender-neutral terminology, thus extending protection to victims of any gender, including transgender individuals with male/female sex organs, as well as men who have been victims of sexual assault by other men. However, this crucial consideration was not acknowledged or acted upon by the government.

10. Conclusion and Suggestions

The constitutional courts in India are crucial in safeguarding rights through judicial review, protection of fundamental rights, progressive interpretation, and social justice initiatives. Despite challenges, the judiciary's commitment to constitutional values remains vital for India's democratic fabric and individual liberties. The judiciary upholds the rule of law and maintains the supremacy of legal principles. It protects the rights of individuals, resolves conflicts based on legal standards, and ensures that democracy remains free from individual or group dominance. The role and stand of the Supreme Court towards Transgender community can be seen from the statement made by the judges acknowledging that the delay in addressing the ignominy and ostracism faced by members of Transgender community, along with their families, is a historical injustice that warrants an apology. For centuries, they have endured

[26] Bharatiya Nyaya Sanhita, (Act No. 45 of 2023) Parliament of India (2023), https://www.livelaw.in/pdf_upload/bharatiya-nyaya-sanhita-2023-final-513877.pdf.

fear, persecution, and societal marginalization, leading to a life filled with apprehension and suffering.

The existence of a constitution empowers judicial bodies to review laws and executive actions. Judicial review is a fundamental aspect of the Indian constitution, with the judiciary being the sole authority to interpret it, as mandated by their duty. The constitution outlines clear provisions that grant citizens fundamental rights and assign the Supreme Court and High Courts the responsibility to protect these rights under Articles 32 and 226, respectively. Courts develop constitutional principles guided by constitutional morality and legal norms, which justify government actions. They also consider community morality, often referred to as the "public interest," in their decisions. This process ensures the protection of life and dignity as enshrined in Article 21. Without constitutional courts, there would be a significant gap in safeguarding the rights of individuals, especially those whose voices are often marginalized or unheard.

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Balancing Secularism and Religious Education, the Role and Regulation of Madrasa Boards

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Abstract

The article addresses the intricate balance between secularism and religious education within India's diverse legal and educational framework, focusing on the role and regulation of Madrasa Boards. It examines the Allahabad High Court's ruling that deemed the Uttar Pradesh Board of Madrasa Education Act, 2004, unconstitutional, arguing it violates secular principles by establishing religious-specific educational oversight. The Court's ruling, while upholding constitutional mandates, has raised concerns about disrupting the educational pathways for nearly 1.7 million students and displacing thousands of educators reliant on madrasa education. The article highlights the significance of Madrasa Boards as regulatory entities that maintain educational standards and enable inclusive education by integrating secular subjects with cultural and religious studies, promoting social and educational equity for marginalized communities. The necessity for a balanced approach is emphasized, ensuring Madrasa Boards align with secular principles while supporting the unique needs of the Muslim community.

Keywords

Secularism, Religious Education, Madrasa Boards, Constitutional Mandates, Educational Equity, Muslim Community, Inclusive Development, Educational Regulation

1. Introduction

"Each nation has a theme: everything else is secondary. India's theme is religion"[1]

-Swami Vivekananda

In his timeless reflection, Swami Vivekananda told the profound influence of religion in shaping India's identity. By juxtaposing with the contemporary legal and educational landscape, we can see how the principle of secularism must be balanced with the cultural and religious realities of India's diverse population. The challenge lies in harmonizing these elements in a way that respects constitutional mandates while also acknowledging the unique educational needs of communities that contribute to India's rich tapestry. This sentiment resonates deeply with the ongoing debate surrounding the role and regulation of Madrasa Boards in balancing secularism and religious education.

The Allahabad High Court ruled that the State lacks the authority to establish a school education board exclusively for a specific religion and its associated philosophy, as this contravenes the principle of secularism. This decision came in the case of "*Anshuman Singh Rathore v. Union of India Thru. Secretary, Ministry of Education and 3 Others*[2], where the Court declared the Uttar Pradesh Board of Madarsa Education Act, 2004[3] unconstitutional." The Bench, comprising Justice Vivek Chaudhary and Justice Subhash Vidyarthi, stated that *"The State has no power to create a Board for religious education or to establish Board for school education only for a particular religion and philosophy associated with it. Any such action on part of State violates the principles of secularism, which is in the letter and spirit of the Constitution of India. The same also violates Article 14 of the Constitution of India, which provides for equal treatment to every person by the State."*

The Court further declared that the education provided under the Madarsa Act is in violation of Articles 21[4] and 21A[5] of the Constitutin of India. *"It is the citizens of this country who have right to profess and propagate their religion and its values. It is not mandatory for a citizen of this country to be secular by nature. He can have faith in his own religion or in some/every religion or may not have faith in any religion. But, the State cannot do so. The State has to remain secular. It must respect and treat all religions equally,"* the court stated. The Court emphasised the State's need to refrain from any kind of religious

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[1] Swami Vivekananda, The Abroad and The Problems at Home, The Hindu (Madras), Feb. 1897.
[2] Anshuman Singh Rathore v. Union of India, 2024 SCC OnLine All 857.
[3] Uttar Pradesh Board of Madarsa Education Act, 2004.
[4] INDIA CONST.art. 21.
[5] INDIA CONST.art. 21 A.

discrimination in the execution of its obligations. This statement was made during the deliberation of a case presented by Anshuman Singh Rathore, who questioned the validity of the Uttar Pradesh Board of Madarsa Education Act, 2004, and certain clauses of the Right of Children to Free and Compulsory Education (Amendment) Act, 2012[6]. In previous legal hearings, the High Court legal questioned both the Union of India and the State government about the reasoning behind placing the Madarsa Board under the Minority Department instead of the State's Education Department.

The Court observed that it made numerous inquiries to the respondents to identify specific provisions that may be isolated in order to save the Madarsa Act. However, no evidence or information was presented to the Court in response to these requests. *"We also find that since the very purpose of the Madarsa Act is found to be violative of Secularism; it is not possible to segregate and save any portion of the Act which would be of any relevance,"* the Court noted.

The statement highlighted that the Madarsa Act failed to provide a clear rationale for the need of a distinct educational board for a particular religion, particularly considering that Uttar Pradesh already had non-religious primary education boards as well as boards for high school and intermediate education, which offered education without any religious bias. *"While the students of all other religions are getting educated in all modern subject denial of the same quality by the Madarsa Board amounts to violation of both Article 21-A as well as Article 21 of the Constitution of India,"* the court stated. Furthermore, it is worth noting that the 2004 Act gives the Madarsa Board powers similar to those granted to the University Grants Commission (UGC) under the UGC Act. These functions are enumerated in Entry 66 of List I of the Seventh Schedule of the Indian Constitution.

The High Court, in striking down the provisions of the Madarsa Act, appears to have misconstrued the Act's purpose, which is regulatory rather than religious. *"Article 28(1)[7] of the Constitution stipulates that no religious instruction shall be provided in any educational institution wholly maintained out of State funds."* Although , the Madarsa Act does not mandate religious instruction in such institutions. Its objective is to regulate madarsas, not to impose religious education. Moreover, the High Court's directive for the State to relocate nearly 17 lakh students disrupts their educational paths without justifiable cause[8]. This relocation directive seems prima facie unwarranted, as it impinges on the students' and parents' freedom to choose their educational institutions. The decision raises concerns

[6] The Right of Children to Free and Compulsory Education (Amendment) Act, 2012.
[7] INDIA CONST.art. 28(1).
[8] Manish Sahu, "SC stays order against Uttar Pradesh madrasa law: A look at madrasa education in the state," Indian Express, https://indianexpress.com/article/explained/uttar-pradesh-madrasa-law-education-9254643/ cite in bluebook 21st edition.

about its effect on the students' educational trajectories and the autonomy of choice in education.

2. History and Function of the Madrasa Board

The history of Madarsa education in the province of Uttar Pradesh began in 1909. In 1987, executive rules and regulations were established, and in 2004, legislation was implemented.[9] The Madarsas mentioned before were not officially recognised by the State Government. However, the same continues to give education at local levels. For the first time in the year 1969, the State Government came out with the "Rules of Recognition of Arabic and Persian Madarsas, U.P. by Government Order No.Ga-2/1390/15-40(41)-65, dated 18.06.1969[10]." The specified regulations require Arabic and Persian institutions seeking recognition to submit an application to the Registrar of Arabic and Persian Examinations in U.P., Allahabad. The application should clearly describe the specific examination or examinations for which recognition is being sought. The same basically encompasses the establishment, library, financial standing, and faculty of such Madrasas.

"Statement of Objects and Reasons of U.P. Board of Madarsa Education Act, 2004-

> *In para 55 of the Education Code the Registrar, Arabi Pharasi Examinations, Uttar Pradesh Allahabad had been authorised to recognise the Arabi-Pharasi Madarsas in the State and for conducting the examinations of such Madarsas. These Madarsas were managed by the Education Department. But with the creation of the Minority Welfare and Wakfs Department in 1995 all the works relating to such Madarsa were transferred from Education Department to the Minority Welfare Departments by virtue of which all the works relating to Madarsas are being performed under the control of the Director, Minority Welfare Uttar Pradesh and the Registrar/Inspector Arabi-Pharasi Madarsas, Uttar Pradesh. The Arabi-Pharasi Madarsas were being administered under the Arabi-Pharasi Madarsas Rules, 1987 but since the said rules have not been made under an Act, many complication arose in running the Madarsas under the said rules. Therefore with a view to removing the difficulties arisen in running the Madarsas, improving the merit therein and making available the best facility of study to the students studying in Madarsas it was decided to make a law to provide for the establishment of a Board of Page 32 of 86 Madarsa*

[9] Fahimuddin, Modernization of Muslim Education in India (Delhi: Adhyayan Publishers 2004), referenced in International Journal of Frontiers in Multidisciplinary Research (IJFMR) Volume 6, Issue 2 (March-April 2024).

[10] U.P. Government Order No. Ga-2/1390/15-40(41)-65 (June 18, 1969).

Education in the State and for the matters connected therewith or incidental thereto."[11]

The object and purpose of the act is to "provide for the establishment of a Board of Madarsa Education in the State and for the matters connected therewith or incidental thereto". "The expression "Madarsa Education" is defined in Section 2(h)[12] of the statute to mean "education in Arbic, Urdu, Parsian, Islamic-studies, Tibb Logic, Philosophy" and to include "such other branches of learning as may be specified by the Board from time to time". Section 3 provides for the constitution of the Board.[13]

"Section 20 empowers the Board to frame regulations, inter alia, in the matter of conferring degrees, diplomas and certificates; the conditions of recognition of institutions; courses of study; conditions in which candidates shall be admitted to the examination and research programmes of the Board; fees for admission to the examinations of the Board; the conduct of examinations; appointment of examiners and other related staff for the conduct of examinations; and admission of institutions to the privilege of recognition and the withdrawal of recognition. Section 23 provides for the appointment of the heads of institutions, teachers, and other employees in terms of the regulations.[14] Section 24 provides for the conditions of service of the heads of institutions and other employees. Section 29 empowers the Board to have its own funds into which all its receipts will be credited. Finally, a rule making power is conferred on the State Government under Section 32."[15]

The aforementioned clauses clearly demonstrate that the statutory Board established under the Madarsa Act has a regulatory nature and purpose. The High Court's ruling suggests that the very presence of the Board would be seen as a breach of secularism principles, since it combines the concept of Madarsa education with the Board's regulatory authority.

The High Court's judgement caused a disturbance in the existing condition, which was prevalent both before and after the law was introduced. This is significant since Madarsa education has been present in the State of Uttar Pradesh for 120 years. Out of nearly 16,000 Madarsas in Uttar Pradesh, only about 560 receive funding from the State.[16] The recent directive from the High Court poses a significant disadvantage, as it would require transferring

[11] Uttar Pradesh Board of Madarsa Education Act, 2004.
[12] Uttar Pradesh Board of Madarsa Education Act, 2004.
[13] Uttar Pradesh Board of Madarsa Education Act , 2004, § 3.
[14] Uttar Pradesh Board of Madarsa Education Act, 2004.
[15] Ibid.
[16] National Institute of Educational Planning and Administration, Evaluation of the Implementation of the Scheme for Providing Quality Education in Madrasas (2018), https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/spemm_report.pdf.

approximately 1.7 million children who are currently receiving education in Madarsa institutions. In addition to this, some 10,000 professors who have been providing instruction will be displaced.[17]

3. The Role of Madrasa Boards in Secular Education-

The debate around the constitutionality of the Madrasa Board in Uttar Pradesh highlights the intricate balance between secularism and religious education in India. The Allahabad High Court's ruling that declared the Uttar Pradesh Board of Madarsa Education Act, 2004, unconstitutional, citing violations of secular principles, has raised critical questions about the nature of education provided by madrasas. The Supreme Court's intervention and subsequent stay on this ruling underscore the need for a nuanced understanding of religious education versus religious instruction within the framework of the Indian Constitution.

4. Constitutional Interpretation of Religious Education

In landmark cases such as S.R. Bommai vs. Union of India (1994)[18], the Supreme Court clarified *"that the State's tolerance of religion does not transform it into a religious or theocratic State. The Court emphasized that while the State allows the practice of religion, it must not permit the intrusion of religion into secular activities. This distinction is pivotal in understanding the role of madrasa education, which integrates both religious and secular studies."*[19]

The S.B. Chavan Committee advocated for "*acquainting students with the basics of all religions and their inherent values, suggesting a comparative study of different religious philosophies. This approach aligns with the notion that religious education, when framed as an academic study of various religions and their impacts on civilization, does not equate to religious instruction aimed at inculcating specific religious practices."*[20]

5. Judicial Clarifications on Religious Instruction and Education

In Aruna Roy v. Union of India (2002), the Supreme Court drew a clear distinction between religious instruction and religious education. Justice M.B. Shah noted *"that religious instruction involves teaching the specific tenets, rituals, and modes of worship of a particular religion, which is prohibited in State-funded institutions by Article 28(1) of the Constitution. Conversely, religious education, which includes the academic study of various religious philosophies and their cultural*

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[17]Ziya Us Salam, "Why have madrasas been in the spotlight in Uttar Pradesh?,https://www.thehindu.com/news/national/why-have-madrasas-been-in-the-spotlight-in-uttar-pradesh-explained/article68044227.ece.

[18]S.R. Bommai v. Union of India, 1994 SCC (3) 1.

[19] Ibid.

[20] Parliamentary Standing Committee's 81st Report under Shri S.B. Chavan.

impacts, is permissible and indeed desirable in promoting religious pluralism and understanding."[21]

Para 81 of the Aruna Roy judgment *"further elucidates that the Constitution does not prohibit the study of religions; rather, it forbids the imposition of religious instruction in State-funded institutions. This interpretation supports the view that madrasas, under the regulatory framework of the Madrasa Board, provide a broad-based education that includes religious education without violating secular principles."*[22]

If the objective of the Public Interest Litigation is to guarantee that secular education in core subjects, such as Mathematics, Science, Social Studies, and History, in addition to languages, is provided in institutions offering Madarsa education, the solution would not be to nullify the provisions of the Madarsa Act. Instead, issuing appropriate directives to ensure that students in these institutions are not deprived of the quality of education provided by the State in other institutions would be the appropriate course of action. The State has a legitimate public interest in ensuring that students across all educational institutions, whether at the primary, secondary, or higher levels, receive an education of a standard quality. This education should enable them to lead a dignified life upon obtaining their degrees.

The Muslim community, being one of the most educationally underprivileged groups, relies heavily on madrasas for both religious and secular education. The existence of a dedicated Madrasa Board is crucial for ensuring that these institutions can continue to function effectively and modernize, thus contributing to the broader goal of educational equity. The Court's ruling undermines these efforts and could potentially exacerbate the educational disadvantages faced by the Muslim community, hindering their progress and integration into the national educational framework. It is essential to recognize the importance of madrasas and the need for supportive structures like the Madrasa Board to address the unique educational needs of the Muslim community and promote inclusive development in India.

6. The Importance of Madrasa Board

Every nation's growth is dependent on its educational system, and education is widely acknowledged as the key to human advancement and societal transformation. Education is a powerful tool for empowering individuals. It helps people and communities gain confidence in their own abilities and innate attributes, allowing them to create their lives and thereby improve their inner power. Education is the vehicle that has enabled civilizations throughout history to progress from oppression to democratic participation and involvement.

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[21] Aruna Roy v. Union of India ,2002 (7) SCC 368.
[22] Ibid.

In India, madrasas have a long-standing historical presence, consistently contributing to societal well-being. Originally established to address both the educational and religious needs of the populace, madrasas have significantly influenced the religious and educational landscape of the country through various eras. According to UNESCO, from the Medina mosque in the 7th century to the 10th century (Ghazni period) and up to the 17th century, madrasas initially focused on teaching the Qur'an, theology, law, history, the Arabic language, and literature. Over time, they evolved into centers for both religious and secular education.[23] Recent data indicates that the madrasa education system currently educates over 1.5 million students annually. This system has played a crucial role in the universalization of education, particularly following the implementation of the Sarva Shiksha Abhiyan (SSA), and has significantly contributed to the socio-cultural and economic advancement of the Muslim community, preparing an increasing number of students for higher education.[24]

The number of madrasas in India is estimated to be between 35,000 and 40,000. To enhance the acceptability of madrasa education, the government has undertaken various modernization efforts. "The High-Power Panel on Minorities (1980) and the Group on Minorities Education (1990), established by the Department of Education, have advocated for relevant curriculum changes. The National Policy on Education (1986) and Programme of Action (1992), along with the Prime Minister's 15 Point Programme for Welfare of Minorities, recommended modernizing traditional madrasas. Consequently, the Scheme for the Modernization of Madrasas was launched in 1994 as a centrally sponsored initiative, proposing the voluntary inclusion of English, Science, Mathematics, and Hindi in the curriculum. Additionally, in 2004, the Standing Committee of the National Monitoring Committee for Minorities was constituted to oversee these efforts."[25]

The Sachar Committee report (2006) highlighted the educational status of Muslims in India, revealing that they were the most educationally backward community in the country. Despite making up nearly 13% of India's population, Muslim enrollment at the primary school level (Class 1-5) was only 9.39% of the total enrollment for 2006-07.[26] According to the 2011 census, Muslims constitute 13.43% of the

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[23]UNESCO, "Cultural Selection: Madrasas as Universal Centers of Education and Culture," https://en.unesco.org/silkroad/content/cultural-selection-madrasas-universal-centers-education-and-culture.

[24]M. Chandra, "Implications of Contract Teaching in India: A Review," Policy Futures in Education (February 18, 2015), doi:10.1177/1478210314567288.

[25] National Institute of Educational Planning and Administration, Evaluation of the Implementation of the Scheme for Providing Quality Education in Madrasas (2018), https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/spemm_report.pdf.

[26] Computed based on Unified District Information System for Education (UDISE) data, different years.

total population in India.[27] Although the Muslim population is dispersed across the country, its concentration and composition vary by state. Uttar Pradesh, with a Muslim population of 19.26% and a literacy rate of 58.76%, has the largest number of Muslims, while Lakshadweep has the highest percentage of Muslims among the states and Union Territories.[28] The average dropout rate for Muslim students in Uttar Pradesh is 17.92% at the elementary level and 17.95% at the secondary level.[29]

The Madrasa Board plays a critical role in standardizing and regulating the education provided by madrasas. It ensures that madrasas offer a balanced curriculum that includes both religious education and secular subjects such as science, mathematics, and languages. This dual focus is essential for the holistic development of students, enabling them to integrate into mainstream society while retaining their cultural and religious identities. The Board facilitates uniformity in educational standards, conducts examinations, and certifies qualifications. Without the Board, individual madrasas would struggle to maintain consistent educational quality, leading to disparities and potential administrative chaos.

Madrasas cater to the cultural and religious needs of the Muslim community, providing an environment where students can pursue their education without compromising their religious practices. The Board ensures that this culturally sensitive education does not impinge on the secular ethos mandated by the Constitution. The distinction between religious instruction and religious education is crucial; madrasas, under the regulation of the Madrasa Board, provide an inclusive and balanced education that adheres to secular principles while addressing the educational needs of the Muslim community. Disbanding the Madrasa Board would not only disrupt the administrative and educational structure but also impede the socio-cultural and economic advancement of a significant portion of India's population. Thus, maintaining the Madrasa Board is essential for fostering an inclusive, educated, and culturally diverse society.

7. Conclusion

The crucial importance of contemporary education, which provides pupils with necessary information and skills to contribute meaningfully to society and progress the nation, cannot be emphasised. Denying pupils in Madarsas access to such education represents a breach of their constitutional rights and limits their potential for a good future. It is worth noting that if this were the lone

[27] Muslim Population in India, Census 2011, retrieved from https://www.census2011.co.in/data/religion/2-muslims.html.
[28] Ministry of Home Affairs (MHA), Census 2011, retrieved from https://censusindia.gov.in/census.website/.
[29] Education for All in India, retrieved from https://educationforallinindia.com/number-of-muslim-children-dropped-out-between-2020-21-2021-22-in-india/.

issue, the court may elect to strike down certain portions while maintaining the remainder of the Act.

The High Court's directions, however, are unduly ambitious, urging the transfer of 17 lakh pupils from Madarsas to normal schools and the prospective building of new schools by the State. Such directions, particularly considering the school year's approaching completion, might lead to substantial disruptions and logistical challenges. Also, the Court's decision was based on the premise that the State must remain secular and cannot establish educational boards exclusively for a specific religion. However, this interpretation overlooks the regulatory nature of the Madrasa Board, which aims to standardize and modernize madrasa education rather than promote religious instruction.

The Madrasa Board plays a crucial role and an attempt to offer a balanced curriculum that integrates both secular and religious education. This integration is essential for the holistic development of students, enabling them to navigate both their cultural and religious identities while preparing for broader societal participation. The existence of the Madrasa Board ensures that madrasas maintain educational standards, conduct examinations, and provide certifications, which are necessary for the educational equity and advancement of the Muslim community. Moreover, it could exacerbate the educational disadvantages faced by the Muslim community, which relies heavily on madrasas for both religious and secular education.

Disbanding the Madrasa Board, as the High Court's ruling suggests, could lead to significant disruptions in the educational trajectories of nearly 17 lakh students and displace thousands of educators. The court directive can be here to that Madrasa Board's regulatory framework should aligns with the principles of secularism by ensuring that education in madrasas adheres to constitutional mandates while catering to the unique cultural and religious needs of the Muslim community. Therefore, the Madrasa Board is essential not only for the standardization and modernization of madrasa education but also for promoting inclusive development and educational equity in India. The way forward involves recognizing the Board's regulatory nature and ensuring that it continues to function effectively to support the educational needs of the Muslim community while upholding secular principles. This balanced approach will contribute to the broader goal of fostering an inclusive, educated, and culturally diverse society.

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Unraveling Juvenile Delinquency: Causes, Legal Frameworks, and Pathways to Rehabilitation

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Abstract

Children happen to be the world's most valuable resources. When they engage in criminal activities due lack of developmentally appropriate alternatives, it often leads to juvenile delinquency – a serious social problem. Highlighting the impact of financial difficulty, dysfunctional family systems, and lack of parental supervision on juvenile misbehaviour, this paper investigates the intricate connections between adolescent misbehaviour and factors such as family dynamics, financial hardship, peer pressure, substance abuse, and media impact. The teenagers who use drugs and hail from low-income families are more prone to commit crimes, and peer pressure encourages them to take risks. Furthermore, the mass media constantly normalises criminal activity and violence, which has a significant impact on young people's perceptions of these actions. The study aims at examining the growing trend of adolescent delinquency, its underlying causes, and rehabilitation techniques so as to make the interventions effective. A range of legislative measures and rehabilitative strategies, such as juvenile courts and reformative schools, are being researched in an effort to address and reduce delinquency. The Juvenile Justice (Care and Protection of Children) Act of 2015 and the Protection of Children from Sexual Offences (POCSO) Act of 2012 provide the groundwork for juvenile rehabilitation. Case studies—like the well-known Nirbhaya case—highlight the need for ongoing legal and societal change in order to advance safety and justice. The paper emphasises the need for a comprehensive approach that considers societal factors, family dynamics, financial situations, the educational environment, and psychological well-being in order to manage and avoid teenage delinquency. Understanding these complex relationships can help policymakers and practitioners develop targeted therapies to protect society and rehabilitate young offenders.

Keywords

Juvenile, Delinquency, Factors Children, Society, Rehabilitation, Factors.

1. Introduction

Children who break the law do not do it of their own free decision; rather, it is a result of their lack of developmentally appropriate alternatives.[1] Juvenile delinquency is an important societal issue that has been getting a lot of media coverage recently. Juvenile delinquency is not a relatively new problem in community. It refers to children engaging in unlawful actions ranging from small violations to more serious criminal conduct. These young people, who typically fall around their teen years of thirteen and eighteen and sometimes below thirteen also, are caught up in a complicated web of cultural, family, and mental factors which lead to their aberrant conduct. Understanding the problem of juvenile delinquency is critical for developing efficient treatments and safeguarding the safety of both young offenders and society at large. The issue can be treated in two different ways narrow and other one being in a broader sense. The simple breach or criminal offence can be considered in narrow sense, in addition to committing crimes it can include various ethical and societal norms violation. A delinquent child and adult criminal are difference is important from the case work approach. This fast-growing trend in juveniles getting involved in criminal acts have put the government, societies and many policy makers to examine the main source of these issues. Resolving this problem requires an integrated plan which considers financial situations, relationships within families, social effects, the educational environment, and psychological well-being.

1.1 Research Objectives

The aim of this research is to analyze the issue of juvenile delinquency. To understand how juvenile delinquency is becoming a major problem day by day. To analyze the underlying causes of juvenile delinquency and to explore the various ways through which it can be controlled or monitored like rehabilitation. The research also focuses on the laws that govern juvenile, alongside it also analyzes factors such as family environment, peer pressure, and social media, substance abuse, etc.

1.2 Hypothesis

According to this hypothesis, teenagers' socioeconomic status has a significant impact on how likely they are to participate in delinquent behaviour. It makes the argument that living in underprivileged areas, having a poor family income, and having parents with lower educational levels all raise the likelihood of young people engaging in criminal activity. After adjusting for other possible factors including peer pressure, access to school, and leisure activities, the relationship

[1] UNICEF, https://www.unicef.org/montenegro/media/7931/file/MNE-media-MNEpublication391.pdf

between these socioeconomic characteristics and rates of adolescent delinquency will be examined in order to evaluate this hypothesis.

1.3 Research Questions

a) What causes juvenile to indulge in criminal activities?

b) What are the rehabilitation methods used to protect juveniles?

1.4 Methodology

The study of juvenile delinquency uses a descriptive strategy with the goal of using secondary data sources to comprehend the variables that lead to juvenile delinquency and the efficacy of different rehabilitation techniques. The information was acquired by a thorough examination of books, scholarly publications, official documents, and case studies. Essential resources are introductory books, peer-reviewed journals, court orders such as the Juvenile Justice (Care and Protection of Children) Act, 2015, and well-known case studies like the Nirbhaya case.

2. What is Juvenile Delinquency?

Misconduct by a juvenile who exhibits antisocial behavior that is outside the authority of their parents and thus susceptible to judicial action is known as juvenile delinquency.[2] According to the juvenile justice act 'children in conflict with laws' is defined as a child who is under the age of 18 on the day the offence was allegedly committed or found to have committed.[3] The age of 18 is used to distinguish a child and an adult. A child between the age of 13-18 sometimes also below 13 are considered as juveniles. Acts that were adopted before to the country's independence included prohibitions on offences committed by minors. Section 82 of the Indian Penal Code, 1860 provides protection and immunity from prosecution for children under the age of seven. The idea of "doli incapax," which maintains that minors lack the mental capacity to conduct crimes on their own, is the basis of this section. According to Section 83 of the IPC, a child who is older than seven but less than twelve and who has not reached the required maturity cannot be prosecuted.[4] It is believed that juveniles are in a phase of development characterized by growth in their social, emotional, cognitive, and physical domains. Significant changes occur at this time, including as puberty, identity formation, and the growth of moral and social thinking. The major reason why a child below the age of 18 is treated as juvenile is because of the level of maturity as compared to an adult. Juvenile justice boards are established in order to protect the child offenders from the strict laws. This approach

[2] Merriam Webster Collegiate Dictionary: Eleventh Edition, 2014

[3] THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, § 2(13), No. 23, Acts of Parliament, 2015.

[4] Indian Penal Code, 1860, § 83, No. 45, Acts of Parliament, 1860.

grantees that the juveniles have a chance to improve, root cause of this behavior can be traced back to their family, peer pressure, lack of education and exposure to substance abuse.

3. Causes of Juvenile Delinquency:

3.1 Family

Family dynamics play a critical role in shaping juvenile behaviour, often serving as a root cause of delinquency. Dysfunctional families marked by domestic violence, substance abuse, or neglect can expose children to harmful behaviours that they may come to perceive as normal or acceptable. The absence of parental guidance due to factors like divorce, work commitments, or ineffective parenting styles can leave children without the necessary emotional support and discipline. It can be challenging for minors to develop a proper understanding of what is right and wrong because certain households place an excessive amount of emphasis on academic success while ignoring moral growth, rule of law education, and the mental health of their children. Inconsistent discipline practices further confuse children about behavioural boundaries, making it difficult for them to internalize norms of acceptable conduct.

Economic hardship within families can exacerbate these issues, leading to heightened stress, instability, and potential neglect. Moreover, children often model their behaviour after their parents or caregivers; if adults in their lives engage in criminal activities or exhibit antisocial behaviours, children may emulate these actions. Addressing these root causes requires promoting stable and nurturing family environments, providing support systems to struggling families, and ensuring children have access to positive role models and opportunities for healthy development. By intervening early and addressing familial challenges comprehensively, societies can mitigate the risk factors associated with juvenile delinquency and promote positive outcomes for youth.

3.2 Substance Abuse

Children from economically disadvantaged backgrounds, particularly those residing in impoverished urban areas or slums, are increasingly susceptible to substance abuse, including drugs and alcohol. This vulnerability often culminates in criminal behaviour, frequently involving robberies to fund their substance dependencies. Recent surveys indicate a normalization of drug use and alcohol consumption among today's youth, highlighting a concerning societal trend. Illegal activities and abuse of substances are strongly linked. Their connections may occasionally be ambiguous and confusing. Drug usage may have either an indirect or direct impact on crime and violence. The association between drugs and violence is further complicated by the fact that certain narcotics have intoxication doses

or withdrawal symptoms. According to UNICEF estimates from 2002, 100 million children worldwide are homeless, with India accounting for the majority of these children.[5]

The use of drugs as a coping mechanism by adolescents who are going through personal hardships might worsen delinquent behaviours as substance addiction rises. The legal repercussions of drug-related offences further entrench youth in criminal cycles and hinder their rehabilitation and reintegration into society. It is said that the use of illegal substances such as alcohol and marijuana, in particular, has a substantial influence on criminal activities such as theft, deceit, and robbery.[6] Comprehensive measures that include prevention, intervention, and treatment are necessary for adolescent offenders to lessen the negative impacts of substance use on behaviour, development, and chances for the future. Children might become involved in juvenile delinquency due to peer pressure, familial influence in substance-abusing families, media representation, dealing with trauma, a lack of appropriate role models, and exposure in school settings. Effective prevention, supportive surroundings, education, and access to mental health resources are essential for preventing this progression.

3.3 Mass Media

Another significant issue is the media's influence on adolescent crime. Mass media, including television, movies, music, video games, print media, sports, and the internet, plays a pivotal role in shaping youth perceptions and behaviours towards crime and violence.[7] The media has a large and diverse impact on juvenile delinquency, impacting young people's attitudes, behaviours, and perceptions in a variety of ways. One of the most dangerous consequences is the acceptance of violence. Violence is sometimes shown as sensationalised or praised in films, television shows, video games, and other forms of media, making it appear exciting or even heroic. This representation may blind young people to the real-world repercussions of violent action, blurring the gap between fiction and reality and making aggressive behaviour appear more acceptable or justified.

Moreover, repeated exposure to violent or criminal content can desensitize young people, numbing their emotional responses to aggression or crime. This desensitization makes it easier for them to overlook the seriousness of criminal behaviours, potentially

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[5] Substance use and criminality among juveniles-under-enquiry in New Delhi Indian journal of psychiatry, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4919962/ (last visited Jul 12, 2024)

[6] Substance use and criminality among juveniles-under-enquiry in New Delhi Indian journal of psychiatry, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4919962/ (last visited Jul 12, 2024)

[7] Dr. Prakash. D. Haveripeth, Contributing Factors of Juvenile Delinquency, Vol 2, IJIRD, 12 (2013)

influencing them to minimize or rationalize their own delinquent actions. Media portrayals can also distort perceptions of crime and justice. By glamorizing criminal lifestyles or downplaying consequences, media can mislead young audiences about the risks and moral implications of illegal behaviours. This misinformation can lead to misguided decisions and actions among adolescents. One of the most common issues in these days among high school going teenagers is the widespread sharing of nude images and videos on social media, under Indian penal code the act is punishable up to 3-7 years of imprisonment, in addition to fines.[8] To mitigate these challenges, it is important to raise awareness of the media among young people. Teaching youngsters how to critically evaluate media messages helps them understand and avoid negative results. Open communication with parents about media content is also essential for improving children's understanding and decision-making skills. Finally, promoting positive role models and practices in media depictions can provide young people options that value empathy, transparency, and obedience to the law.

3.4 Peer Pressure

Peer pressure is a big deal for us teens. It's like this invisible force pushing us to do things just to fit in with our friends. Sometimes, that means getting involved in stuff that we know isn't right. You see it all the time, friends daring each other to do things like vandalizing or trying drugs, just to prove they're cool or to avoid being left out. When your friends are into something, it's easy to think it's okay because everyone's doing it. It's like the rules change when you're with your friends, and stuff that seems wrong suddenly doesn't seem so bad anymore. That's how peer pressure messes with our heads – it makes us ignore what we know is right and wrong, just to feel accepted.

It's not just about doing bad stuff to fit in, though. It's also about how our friend's approval shapes what we think is normal or okay. When everyone around you acts a certain way, you start thinking it's normal. That makes it harder to see why some things are really bad ideas. Peer groups can be like echo chambers where everyone encourages each other to do risky things. You might feel pressure to keep up with what everyone else is doing, even if it means bending the rules or taking chances you wouldn't on your own. It's like you're trying to prove yourself to your friends, even if it means doing stuff that could get you into trouble.

Peer pressure promotes juvenile delinquency by shaping adolescents' attitudes and behaviours, encouraging them to participate in activities that defy societal norms and legal boundaries. An ordinary teenager aspires to be just like adults. A teenage person

[8] Indian Penal Code, 1860, § 354C, No. 45, Acts of Parliament, 1860.

most likely tried to imitate a man by trying to smoke, chew tobacco, or grow a moustache. Yes, we are responsible for our children's behaviour as adults. Understanding these dynamics is crucial for developing interventions and support systems that help adolescents resist negative peer influences and make positive choices for their future.

3.5 Poverty

The high rate of juvenile delinquency can be attributed to most socioeconomic conditions, including poverty, unemployment, and educational attainment. Since a lack of financial resources and basic necessities are both considered forms of poverty, young people from disadvantaged backgrounds may resort to criminal behaviour as a coping strategy or as a means of making ends meet. Delinquent children typically come from low-income homes. When they perform crimes, they are members of gangs. 83% of children were raised in families with limited incomes, as per Uday Shankar's research an Indian researcher.[9] It is difficult to ensure, though, that children from low-income families never experience problems.

Parents in poverty might have to work extended hours outside the home just to make money. There is unlikely to be any interaction with the children at all. Even if they are not aware of it, these children may work with criminals to commit crimes together. This is particularly common in working-class and impoverished communities. Social marginalisation and inequality have a significant impact on the experiences and behaviours of adolescents, particularly those from disadvantaged backgrounds. When young people feel they are not wanted in mainstream culture or are being treated unfairly, deep feelings of alienation and resentment can develop. They understand they are not as lucky as their friends who are wealthier in terms of opportunities, resources, or esteem, which is why they feel these ways.

4 Method of Rehabilitation for Juveniles:

In the past, supporters of a separate juvenile justice system have frequently expressed fear that locking up juvenile offenders with more experienced ones might corrupt the latter. Reformers aimed to prevent young offenders—who were seen as above the law—from acquiring criminal ideas and abilities by keeping them apart from adult offenders. Reformers also aimed to provide young criminals the guidance and discipline they needed to grow up to be respected, contributing members of society.[10] However, not every young criminal was thought to be a good fit for rehabilitation. Use of rehabilitation is a method to give delinquent children a proper guidance and training in order for them to improve and become normal children. This method

[9] C N Shankar Rao, Principles of sociology with an introduction to sociological thoughts, 548, (7e ed 2022)

[10] Anna Louise Simpson, Rehabilitation as the Justification of a Separate Juvenile Justice System, Vol. 64, No. 4, p.no- 984 (Jul., 1976)

is not used to punish them. Following are some methods of rehabilitation that are currently being followed in India;

4.1 Juvenile Courts

Children's court, sometimes referred to as juvenile court or young offender's court, is a special kind of tribunal that hears matters involving minors who have not yet attained the age of majority. In the majority of contemporary legal systems, juvenile offenders are handled differently by these courts from adults who commit the same crimes, with a greater emphasis on rehabilitation than punishment. Juvenile courts operate under the premise that children and adolescents are still going through a period of mental and emotional development. This indicates that, with the proper assistance and direction, they stand a better possibility of transforming their behaviour. Juvenile courts are more casual and private than adult courts. To preserve the anonymity of the juvenile offenders, the records frequently get sealed. However, when the juvenile courts are not available, they could be tried in normal courts but on a special day and a fixed time when there are no adult criminal hearings. Also, juveniles cannot be chained and the police officers that are with the juveniles are ordered not to be in uniform.

4.2 Legislative Measures

In order to prevent juvenile delinquency and provide the basis for safeguarding and rehabilitating of young offenders, India has implemented a variety of legislative initiatives.

4.3 Juvenile Justice (Care and Protection of Children) Act, 2015[11]

The Juvenile Justice (Care and Protection of Children) Act, 2015, is a landmark piece of legislation in India that addresses the treatment of juvenile offenders. To address matters involving these youngsters, it creates specialised tribunals known as Juvenile Justice Boards (JJBs). These boards, which are made up of judges and social workers, decide how best to help the young people instead of just penalising them; some ideas include counselling or community service. Another element of the Act is the Child Welfare Committees (CWCs), which are tasked with monitoring children that require care and protection, especially those who have been mistreated or abandoned. Additionally, by providing special households with access to education and vocational training, the Act fosters rehabilitation. The main goal of this Act is to make sure that young people who make errors get the help they need to grow from them and become responsible adults. It's about not letting their past define their future, but rather offering them an opportunity to change their ways and make a meaningful contribution to society.

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[11] THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, No. 23, Acts of Parliament, 2015

4.4 Protection of Children from Sexual Offences (POCSO) Act, 2012[12]

One important piece of legislation that protects children from sexual abuse and establishes guidelines for dealing with juvenile offenders is the Protection of Children from Sexual Offences (POCSO) Act, 2012. It emphasises how crucial it is for the judicial system to take a child-friendly stance with the goal to treat victims and criminals with empathy. Under the Act, POCSO cases must be tried in special tribunals for the welfare and protection of child witnesses and victims. Because young criminals are often still growing, the POCSO Act puts more emphasis on societal integration and rehabilitation rather than on criminal punishment. With the implementation of child-specific safeguards and harsh penalties for violators, the Act seeks to create a protective atmosphere that upholds children's rights and dignity throughout India.

4.5 Reformatory Schools Act of 1897

This Act is thought to have been a major shift from previous delinquent treatment practices. Nearly every Indian state has this Act in place. While they are being held under this Act, judges have the authority to send young male criminals to Reformatory School for a maximum of three years. Maybe they'll raise it to seven. Anybody over the age of eighteen cannot be imprisoned there. This Act gives state governments the authority to create and run reformatory facilities in order to expedite the rehabilitation of prisoners. All educational institutions must offer clean water, sanitary facilities, industrial training, food, clothing, and a place to sleep.

4.6 Criminal Procedure Code

Under Section 399 of the Indian Criminal Procedure Code (ICPC), a juvenile offender who is under 15 years old and found guilty may be committed to state-run reformatory schools.[13] Section 562 of the Criminal Procedure Code allowed for the probationary release of certain convicted offenders.[14] It might enable their release under close supervision. Younger than seven-year-olds are not accountable for any illegal activities, as per Section 82 of the Indian Penal Code. Section 83 of the same Code lowers this age to 12 in some situations.

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[12] The Protection of Children from Sexual Offences (POCSO) Act, 2012, No. 32, Acts of Parliament, 2012

[13] The Code of Criminal Procedure, 1973, §399, No. 2, Acts of Parliament, 1973

[14] The Code of Criminal Procedure, 1973, §562, No. 2, Acts of Parliament, 1973

5. Case Laws

5.1 Nirbhaya Case

The Nirbhaya case, the brutal gang rape and murder of Jyoti Singh on December 16, 2012, shocked India and ignited widespread outrage and demands for justice and women's safety. Six men, including a minor, perpetrated the heinous crime, leading to her death on December 29. The case led to significant legal reforms, including the Criminal Law (Amendment) Act, 2013, which broadened the definition of rape and introduced harsher penalties. The Justice Verma Committee's recommendations further influenced these reforms, emphasizing the need for better police training, faster legal proceedings, and enhanced victim support. Despite initial momentum, the long-term impact on societal attitudes and consistent implementation of safety measures remains a challenge, highlighting ongoing issues of justice and safety for women in India.

5.2 Anuj Kumar v. State of U.P. (2021)[15]

After completing the written and physical exams, the petitioner in this case, Anuj Kumar, applied for and was appointed as a police officer. But the Senior Superintendent of Police discovered that Kumar had previously been charged with a crime after doing a background check. That implied the cancellation of his appointment. Kumar contested this ruling in a writ petition, claiming that he shouldn't have been excluded since he wasn't old enough when the criminal prosecution was brought. The Allahabad High Court noted that Kumar did not change his age at the time of his trial, even though he denied being young. The prosecution's case against him should be withdrawn in accordance with the Juvenile Justice Act. This shouldn't make him ineligible. The court directed the respondent authorities to assign Kumar to the constable position for which he qualified, provided that the legal process was followed.

6. Conclusion

Juvenile delinquency is a pressing societal issue rooted in complex factors ranging from family dynamics and socioeconomic conditions to peer influence and media portrayal. This research has underscored the critical need for holistic interventions that address these multifaceted causes and provide effective rehabilitation strategies for young offenders. Moving forward, it is imperative to strengthen legal frameworks and ensure their effective implementation nationwide. Additionally, enhancing public awareness and education about juvenile delinquency and its root causes can foster a supportive

[15] Anuj Kumar vs State Of U.P., AIRONLINE 2021 ALL 687 (India)

environment for prevention and intervention efforts. Schools, communities, and families must collaborate to provide positive role models, safe spaces, and educational opportunities that steer young people away from delinquent behaviour.

To effectively combat juvenile delinquency, it is crucial to implement a multi-faceted approach that addresses the root causes and provides comprehensive support to at-risk youth. Enhancing community support through robust mentorship, counselling, and skill development programs can provide crucial guidance and stability to young individuals facing challenging circumstances. Expanding educational initiatives to include life skills and ethical education in school curricula promotes positive behaviour and empowers students to make informed decisions. Promoting media literacy is essential to help youth critically evaluate media influences and understand their impact on behaviour.

In conclusion, addressing juvenile delinquency requires a comprehensive approach that integrates legal, social, and educational strategies. By prioritizing rehabilitation, promoting positive youth development, and addressing underlying societal issues, we can create a safer and more supportive environment for our future generations.

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Black and White Laws, Rainbow Realities: The Clash of Gender Identity and Legal Systems

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Abstract

This study explores the intersection of gender identity and legal frameworks in India focusing on the challenges faced by transgender individuals within a binary gender-structured society. Analyzing historical and contemporary contexts, the study critiques the effectiveness of the Transgender Persons (Protection of Rights) Bill, 2019 and aims to examine the societal and legal dynamics impacting transgender individuals. Looking at the theoretical insights from Michel Foucault and Robert Stoller, the essay discusses the differentiation between sex and gender and the biopolitics surrounding transgender rights. It highlights the historical significance of the Hijra community and the ongoing discrimination they face, despite the legal advancements. Through an analysis of landmark Supreme Court rulings and the existing legal laws, the research identifies gaps and calls for more inclusive legal reforms. Advocating for the inclusion of transgender voices in policymaking, the study emphasizes the need for a deeper understanding and acceptance of gender diversity to ensure equality and justice for all individuals, regardless of gender identity.

Keywords

Transgender Rights, Gender Identity, Sex and Gender, Gender Diversity, Equality and Justice

1. Introduction

A baby is born, the doctor announces it a “boy” or a “girl” by looking at its genitalia. Although, after a couple of years, especially during puberty that baby starts to identify itself as a transgender. Will the parents, society, and friends accept them for who they are? Or will they be forced to conform to the gender binary imposed on them by

society? Can the state provide sanctuary and safeguards when they are openly threatened by societal prejudices? That one hospital decision made in a split second can profoundly shape a person's life trajectory.

With definitions varying across different societies, the lines between the concepts of sex and gender are often blurred. For the first time, the distinction between the two terms was drawn by Robert Stoller in his book *"Sex and Gender: The Development of Masculinity and Femininity."*[1] Stoller identifies sex of a person based on the clinical characteristics such as chromosomes and genetalia, while gender is by what a person prefers to be identified as, which may or may not conform to with the sex assigned at birth. The differentiation is also based on a multitude of societal acceptations and beliefs, which forces an individual to act in a certain way based on a person's social status and position. This further becomes a source of power dynamics, where one gender starts to exert dominance over another which is often justified through the institution of law.

This research explores this intersection of gender identity and legal frameworks, focusing on the challenges and conflicts that arise due to the intersection of binary legal frameworks with more gender diverse realities. This study aims to analyse the extent to which existing laws like the Transgender Persons (Protection of Rights) Bill, 2019, and other laws, address and accommodate the marginalized non-cisgender identities by taking regard of the historical and present context of India.

This research study was written using a qualitative, secondary approach. A comprehensive examination of secondary sources, including newspapers, journals, case laws, articles, books and websites, has been conducted in order to fully comprehend the methods in which the law fails to take into account the real challenges of the transgender community.

2. Review of Literature

The two major works reviewed in this paper are Michel Foucalt's "The Will to Knowledge: History of Sexuality" and his lecture "Society Must be Defended" and Robert stoller's book "Sex and Gender: The Development of Masculinity and Femininity."

2.1 Michel Foucault

In his works "*The Will to Knowledge: History of Sexuality*"[2], Foucault introduces the concept of "biopolitics" and "biopower". Biopolitics can

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[1] Robert J. Stoller, Sex and Gender: The Development of Masculinity and Femininity (1968).

[2] Michel Foucault, The Will to Knowledge: History of Sexuality (Robert Hurley trans., Penguin Books 1998) (1976).

be understood as a political rationality that considers population and life administration. It is a power that seeks to manage, enhance, and multiply life while subjecting it to strict guidelines and extensive restrictions.[3] Biopower on the otherhand decides the way in which biopolitics will be put to use in the society. However, a clear distinction between these two terms were pretty much blurred in his works, the distinction received more clarity when he delivered a lecture "Society Must be Defended". Where he described biopower as a power which does not require a sovereign to be actually present, instead it relied on a tightly knit web of material coercions that are decided upon by the society.

This sovereign judicial power had the authority to "take life or let live," but biopower had the authority to either promote life or forbid it from existing to the point of death. In these power play as explained by Foucault the state started to interfere in biological processes such as propagation, births and mortality, through a very control and restrictive mechanism.

In his lecture on "Society Must Be Defended"[4], he widens this concept. In his lecture he illustrates this conflict that is not merely between different races but is characterized by a dominant race's efforts to maintain its power and dictate the societal norms. The dominant race is taken as the "one true race" following an ideology and rules. Those who are seen deviating from these norms, are often perceived as threat to their biological heritage.

The principle of both of the concept lies essentially as an expansionary model, where there are certain norms mandating even the biological autonomy. This can manifest in various ways, including discriminatory policies, social exclusion, and even violence against perceived "others" (here as the trans community). The conflict is rooted in the fear of losing power and the desire to preserve a particular racial identity, lineage and purity, which is often justified through pseudo-scientific or cultural arguments about biological heritage. The tension is then intensified to the point where the divisions brought about by society turn against its own constituents and products. Hence, this permanent "purification" then becomes on of the basic dimension of state normalization.

2.2 Robert Stoller

In his book "*Sex and Gender: On the Development of Masculinity and Femininity*" (1984)[5], Stoller offers an interdisciplinary analysis of

[3] Rachel Adams, Michel Foucault: Biopolitics and Biopower, (May 10, 2017), https://criticallegalthinking.com/2017/05/10/michel-foucault-biopolitics-biopower/.
[4] Michel Foucault, Society Must Be Defended: Lectures at the Collège de France 1975-1976 (David Macey trans., Picador 2003).
[5] Robert J. Stoller, Sex and Gender: On the Development of Masculinity and Femininity (Science House 1968).

sexuality, combining insights from biology, theories, and psychoanalysis. His works drew separation between gender roles, gender identity, sex and sexual behaviors.

According to Stoller, social roles refers to the roles assigned to individuals based on society's normative behavior, whereas gender identity implies an individual's perception of being male or female. He contends that gender identity unfolds at least until the end of adolescence and is composed of "core gender identity," which is fully established before the phallic stage of development.[6] The core gender identity of this corresponding sex might be influenced by the relationship between the child and his/her parents, the child's perceptions of his/her external genitalia, and the biological factors connected to sex. Stoller claims that the first two factors, the relationship with the parent and the perceptions of the genitalia, are the ones that most significantly form the gender identity in someone.

Stoller further elaborates sex as the biological difference where we distinguish the body organs, the gonads, the hormones, and the chromosomes. According to him, sexual behavior, which might include sexual orientation, is mostly biologically determined, especially the hormones. However, he also recognizes that sexual behavior is not exclusive to biology. As per his argument, the sex-role learned from birth is a sine qua non factor of sexual behavior, closely related to the biological system, which is the most important. The fact that many behaviors are almost always both gender and sex components often draw out the intricacy.

3. Transgenderism: Faltering Between Tradition and Discrimination

In human civilization, people who does not correspond to the stereotypical male and female binary are referred to as the third gender. The binary gender theory became prominent because it was consistent with the continuity of genealogy and reproduction. The inclusions of the third gender within this paradigm was not done because it saw such deviations from the gender norms as an aberration that threatened the stability of the society. To protect the society from such "aberrations"strict and harsh laws were passed targeting these groups. As a result people who identified as third gender started to justify their existence through cultural stories and folklore in an attempt to seek acceptance within conservative and rigid societal norms.

In India, where Hinduism is regarded as the oldest religion, the third gender is deeply incoorporated in mythology, folklore, and folk tales. Govindasamy Agoramoorthy, in his article *"Living on the*

[6] Available at, https://www.scielosp.org/pdf/physis/2019.v29n1/e290103/en.

Societal Edge: India's Transgender Realities"[7]*,* examines how the third gender knows as the *Hijra* in India, is represented and understood within these cultural narratives. The article draws attention to how widely recognised the Hijra community was, historically. Their incorporation into mythologies was indicative of their acceptance. This community even held respectable posts in military under the Mughal rule. But when Section 377 of the Indian Penal Code was introduced, which made "unnatural sexual relations"[8] illegal, that's when the problem of non-acceptance started. A community that formerly was broadly welcomed was now publicly shunned as a result of this regulation, which also started to shape the public opinion.

In his work, Agoramoorthy highlights the perennial presence and significance of the Hijra community in the Indian culture. The infamous tale of Iravan, a hero destined to marry Mohini, originated from a boon given by the goddess Kali. Lord Krishna, who assumes the form of Mohini to fulfill this desitiny turns into his previous identity after grieving Iravan's death. [9] This folk is extensively celebrated among the Hijra community during the ceremonies of transformation.

4. The Social Exchange Theory

Society is nothing but a web of conflicting opinions. Agoramoorthy highlights this duplicity in the society. When it comes to shower blessings on important occasions such as birth and marriages, the Hijra community is well respected and are seen auspicious. But on a regular basis, their existence is often viewed as an abnormality, subjected to discrimination and marginalization. In his work he underscores this duality of the societal behavior towards the community, where they are ready to celebrate their cultural significance but reluctant enough to marginalize their existence.

This concept aligns with George Homans' social exchange theory, which he introduced in his essay *"Social Behavior as Exchange" (1958)*[10]. He argues that social behaviour is an exchange of goods, both material and non-material, where individuals only seek to maximize their rewards while minimizing their costs. People engaging in social interactions thus have this ulterior motive of receiving something in return, be it tangible benefits or social approval.

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[7] Govindasamy Agoramoorthy, Living on the Societal Edge: India's Transgender Realities, 54 JOURNAL OF RELIGION AND HEALTH 1451 (2015).

[8] Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. *See,* Indian Penal Code, 1860, No. 45, § 377.

[9] Alf Hiltebeitel, *Dying Before the Mahabharata War: Martial and Transsexual Bodybuilding for Aravan*, 54 J. ASIAN STUD. 441 (1995).

[10] George C. Homans, Social Behaviour as Exchange, 63 Am. J. Soc. 597 (1958).

This theory is demonstrated by the society on the acceptance of the Hijra community during important occasions. The Hijras are associated with Ardhanari[11], a manifestation of Lord Shiva who symbolizes the combination of male and feminine forms, they are often asked to bless events such as births and marriages. Their everyday experiences of discrimination and marginalization are in start contrast to this momentary acceptance on such occasions. This dichotomy in the societal perceptions illustrates how approval of Hijra is contingent upon the immediate social or cultural advantages they offer. These interactions between the community and the society demonstrates that how societal approval is not based on a consistent recognition of their inherent worth but rather on the situational utility they offer.

5. The Rise of Trans Visibility: A Movement for Equality

The trans movement in India started to gain momentum as soon as the movements relating to gender also started to rise. The trans community in order to gain recognition and acceptance in the society started to vouch for their rights under the veil of feminism movement. Even though the feminists were reluctant at first to include transgender, a meeting ground was necessary for both the groups in order to fight against the rigid norms of patriarchy.

Barry L. Tadlock, in his book "Issue Framing and Transgender Politics"[12] suggests that this collective mobilizations of the ideas for common issues and grounds can act as a "vehicle" through which the rights based strategies emerges. As essentially the feminist movement is against the division of gender and so is the trans community, framing their issues around the cis-gendered issues such as education, equality, employment, etc. would help to raise support from the society members especially from the liberals. This in turn would better assist the government to formulate effective law to address these issues as they are already acquainted with the issues unlike issues such as transformation therapy, identity document, etc. Are more of a complex issue to address due to the unfamiliarity of the government on these issues.

Hence, the trans started to vouch for their acceptance, which was often reflected in creation of the laws and the Supreme Court judgments. The movement gained more traction with the universal recognition of trans right by the Universal Declaration of Human Rights[13]. Not only this, the movements and recognition in the

[11] Ramesh Menon, The Mahabharata: A Modern Rendering (2006).
[12] Barry L. Tadlock, Issue Framing and Transgender Politics (Univ. of Michigan Press 2022).
[13] Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948. Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights.

neighbouring countries like Nepal, and Bangladesh became another source of motivation for these trans activists.

6. From Paper to Practice: Do Transgender Laws Deliver on Their Promises?

As the trans movement went from getting no position in the society to being on the cover page and columns of popular newspapers and magazines, the pressure on the government to formulate laws also started to increase.

The position of the trans community in India gained prominence primarily due to the "3 N" rulings of the Supreme Court in the cases of Naz Foundation Vs Govt. of NCT of Delhi (2009)[14], National Legal Services Authority Vs. Union of India (2014)[15], Navtej Singh Johar And Ors. Vs. Union of India (2018)[16]. From the fight to repeal Section 377 of the Indian Penal Code, to widely recognizing the rights of transgenders these cases predominantly set the course of the recognition of the rights and the community in the Indian society. They have challenged societal attitudes and prejudices, advocated for legal and policy reforms to ensure equality and justice for all people, regardless of sexual orientation or gender identity, and helped bring attention to the discrimination and marginalization experienced by the transgender community. The case of *Navtej Singh Johar* acted in a suggestive nature to the government of India to formulate a law recognizing the rights of the trans community and guaranteeing them the safety. The result of this suggestion was the Transgender Persons (Protection of Rights) Bill, which was enforced in 2019.

The Bill essentially prohibits discrimination of the community on the basis of gender and one's sexual orientation. It also regulates the formation of a committee, "national council for transgender persons". The council constitutes the union minister for social justice, a minister of state for social justice, a secretary of the ministry of social justice, and one representative each from ministries including health, home affairs and human resources development. Representatives of the NITI Aayog and the National Human Rights Commission are also be included.[17] The council's primary responsibilities is to advise, oversee, and evaluate the central government's transgender policies and programs.

6.1 Intersecting Struggles: Where Poverty, Violence, and Trans Identity Collide

[14] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC OnLine Del 1762.
[15] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[16] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[17] Mehr Gill, *Explained: What transgenders' rights Bill passed by Lok Sabha says*, The Indian Express (Aug. 11, 2019), Available at, https://indianexpress.com/article/explained/what-the-transgenders-rights-bill-passed-by-lok-sabha-says-5896444/.

The current status quo of two genders fails to accommodate transgender community in many of the public welfare schemes as they are often deemed misfit. This results into them missing out on opportunities like education, jobs, etc., which in turn forces them to take on streets as beggars and prostitutes. When it comes to this community, one often seems to forget that Article 19(1)(g)[18] of the Indian Constitution grants the citizens of India the fundamental right to pursue a profession, whether it be that of a doctor or of a prostitute (must be conducted willingly). But the already existing bias against them and then the addition of the "not so socially approved job" further tarnishes their image in the society, resulting in an increased prejudice against them. The lack of job opportunities is not due to the skill but rather because of how society perceives them.

This is where the roots of sexual violence and trafficking starts to develop. Prostitution in India is governed under the Immoral Traffic (Prevention) Act, 1956. The act was originally enacted as the Suppression of Immoral Traffic in Women and Girls Act (SITA)[19] in 1956 and later amended and renamed in 1986 to address emerging challenges and enhance its effectiveness. The act aims to penalize offenses of forceful prostitution and trafficking. In the amendment in 1986, the "non-female" workers was added.[20]

The adding of the word "non-female" is in itself is ambiguous in nature due to the emerging fluidity in gender identities. How a person interprets this notion of "non-female" increases the ambiguity in the term, for example in a remote area the notion of "gender-fluidity" might be something that is not known or even in urban areas even if it is known there might be some kind of existing bias against the whole community. This leads to unfair targeting of the transgender community, resulting in a situation where law itself becomes the site of exploitation.

In the case of *Jayalakshmi v. The State Of Tamil Nadu Rep By Its Secretary, Public Department And Ors.*[21], the Court held that every person regardless of their gender has the right to access basic human rights and they must receive equal protection from such abhorrent instances of sexual harassment and abuse. In this case the petitioner's deceased transgender brother was brutally sexually

[18] To practise any profession, or to carry on any occupation, trade or business. *See,* INDIAN CONST. Art. 19(1)(g).

[19] Enacted in 1956 in response to the international convention signed in New York regarding the suppression of immoral traffic of women and children. Available at https://www.indiacode.nic.in/bitstream/123456789/15378/1/the_immoral_traffic_%28prevention%29_act%2C_1956.pdf .

[20] Mansi Singh, Transgender Persons and Public Spaces: Lack of Protection from the Law, Centre for Law & Policy Research, Available at https://clpr.org.in/blog/transgender-persons-and-public-spaces-lack-of-protection-from-the-law/.

[21] Jayalakshmi v. The State Of Tamil Nadu Rep By Its Secretary, Public Department And Ors 2007 (4) CTC 529.

assaulted by the Tamil Nadu police. The court held this act of police as a gross misuse of power and violations of human rights. This case itself signifies the recognition of basic human and constitutional rights of the trans community by the court. This case also brings forth the harsh realities of the communities, where the position of power and law are often used to justify the atrocities committed against them.

6.2 Critique of the Protection of Transgender Rights Bill

The initial part of the bill is just a reiteration of the fundamental rights enshrined under Article 15[22] and Article 16[23] of the Indian constitution, which essentially forbids the discrimination of any person based on gender and other factors; and that every individual much have equal opportunity for employment in matter of public employment, respectively. This reiteration, fails to establish any essential safeguards for the community to address the real time challenges and issues faced by the community members in contemporary times.

The creation of the council under the bill also seems like a hoax. The council that is ironically created for the advocation of trans rights, to suggest reforms and changes in laws and policies does not even include a single trans member in the panel. How a body of people who do not relate to any of the challenges by the trans community will be able to create essential policies tailored to the community, just adds a big question against the formulation of the whole bill. The government for the creation of such council should have taken into account of the case of Tamil Nadu's state law to protect trans community. This was the first state to create a transgender board with the members of the community in the panel which gave effective results. The board identified key issues of the trans community and addressed them through reforms and digital platforms. For example, one of the key issues was that the transgenders face a lot of discrimination, and are often rejected by the family which results in a loss for identification documents. To address this issue, an app, "Thirunangaial"[24] was formed to enable transgenders to register themselves and avail the identity cards through which they could access public welfare schemes such as ration cards, free skill training, etc.

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[22] Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. *See,* INDIAN CONST. Art. 15.

[23] Equality of opportunity in matters of public employment. *See,* INDIAN CONST. Art. 16.

[24] Tamil Nadu Transgender Welfare Board, Social Welfare & Women Empowerment Department, Gov (Dec. 7, 2024),Available at, https://www.tnsocialwelfare.tn.gov.in/en/specilisationstransgenders-welfare/tamil-nadu-transgender-welfare-board.

Even after many shortcomings in the bill, it was seen as a harbinger of transformation of the societal attitude towards the community. The bill was widely accepted and celebrated by the community members. The reason behind this was the nation wide recognition of the community by the government, which also meant a slow but an effective recognition from the society members. But this sudden limelight came with a cost. Trans Murder Monitoring Project, which is a research project under Transgender Europe (TGEU)[25] that tracks the murder of transgender and other gender-diverse people globally, reports that the number of victims of trans murders increased after the formulation of the bill. From 2014-2018, the total number of trans murders were 36, but after the formulation and implementation of the bill, the numbers went to 53 from 2019-2023[26]. Four years prior to and after the implementation of law, instead of a decrease in the number of murders, an increase of 19.1%. This reflects the inefficiency of the law to provide and guarantee security to the community. Hence, adding a question mark to the concept of "inclusion of all gender equally" as preached by the legislative and executive.

The reluctance of the government to address these challenges can be seen in their formulation of ineffective laws and policies. On the other hand, there is more openness shown by the judiciary in recognizing and addressing the challenges faced by the trans community. This openness of the judiciary towards the trans community is reflected in the recent case of *Deepika Singh v Central Administrative Tribunal (2022)*[27]. The bench comprising of CJI Justice DY Chandrachud and Justice AS Bopanna asserted that relationships manifesting love and familial bonds, even if a typical, are as genuine as traditional family structures. The court underscored that these non-traditional family units deserve equal protection under the law and should be entitled to the same benefits provided by social welfare legislation.

By guaranteeing that non-traditional families face no discrimination and are treated equally in the eyes of the law, this decision greatly advances inclusion. This decision also opens the door for a more accepting and comprehensive knowledge of many kinds of relationships by challenging the roots of the prejudices connected to family arrangements. This in turn widens the scope of the law to even include non-traditional relationships, securing them with some kind of security in the society.

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[25] Trans Murder Monitoring, TGEU - Transgender Europe (Feb. 5, 2024), Available at, https://www.tgeu.org/trans-murder-monitoring/.

[26] TMM numbers - TvT, Available at, https://transrespect.org/en/map/trans-murder-monitoring/?submap=tmm_2023.

[27] Deepika Singh v Central Administrative Tribunal [2022 SCC Online SC 1088].

7. Conclusion

The continued increase of violence, hate crimes, murder and suicide of the trans community members showcases the ineffectiveness of the existing laws. The Transgender Persons (Protection of Rights) Bill, 2019 is a significant step towards the institutionalized recognition of the trans community. However, its implementation and effectiveness remains a question. The failure of the government to include a trans voice in the National Council for Transgender Persons highlights a critical gap in addressing the community needs.

Even though some families have started accepting transgenders, the social non-acceptance is results in increased number of crimes against them. In a recent case, where a teenage school boy name Pranshu committed suicide because of the constant bullying by his classmates and teachers. There are not one but many cases concerning trans suicides due to societal pressure and harassment. Moreover, societal attitudes towards transgender individuals remains largely negative, which contributes in their marginalization and vulnerability. Despite legal recognition, the trans community continues to grapple with pervasive discrimination in various spheres, including education, employment, healthcare, and public life. This societal nonacceptance not only increases violence and hate crimes but also hinders the participation and integration of transgenders into society.

A more inclusive approach is to start allowing transgender community to be a part of the legislative process. This would help in formulating effective laws and policies for their respective concerns. This can be addressed first by clearly defining certain terms , as it would help in clearing out the ambiguity which leads to misuse and misappropriation of law. Then to have various government and NGO initiated collaborations with various organizations to ostracize and strengthen the support.

The issue of non-acceptance started from law and they can now be socially included back in the society through effective laws. The legislature needs to keep aside their own prejudices and should start to formulate laws to protect the rights of the trans community. The legislature, the judiciary and the executive should be on the same page while addressing the problems of the trans community. Instead of showcasing the acceptance of the trans community as “others” in the society, it must be seen acceptance on humanitarian grounds, where people have the right to choose who they want to be. Only through a continued effort with real motivation to address the societal inclusion, the trans community can achieve true equality and protection.

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Emulsification of International Human Rights and Constitutional Rights: A New Order for Recognizing Affirmative Action

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Abstract

This paper endeavors to explicate the relationship between International Human Rights Law and Constitutional Law theory that relates to what is called 'Fundamental Rights'. Carving out a space for discussion on affirmative action as a human right by delving into its intricate nature, it argues that the skewed nature of international law prevents states to oblige international obligations they have towards human rights that does not result in entrenchment of constitutional fundamental rights. Moreover, its enforcement is not done in the way interpreted by International Conventions, rather made to be enforced in the way the legislature of that country wants. While the justifications for both systems of law are valid and reasonable, this distorts the idea of universalism entrenched in the International Human Rights thought. The dissonance can be construed as a consonance and inextricable connection between the two systems of law perceived from the perspective of universalism. In this light, affirmative action becomes a relevant topic for discussion as it has the potential to vary from place to place. The paper attempts to demonstrate it by looking at the practices in the USA, India and South Africa.

Keywords

Affirmative Action, International Human Rights, Constitutional Rights, International Conventions, Decontextualize, Natural Law

1. Introduction

Hans Kelson is one such legal theorist who has, claimed himself to be a positive law theorist. Prof. Shivprasad Swaminathan has argued on

the contrary by terming him as a naturalist.[1] The latter's argument is precisely true. Hans Kelsen refers the Constitution to be the *Grundnorm. Grundnorm* is a philosophical project which demands the authority and legitimacy of the presupposed law or "basic law" of the land. Constitution construed as the *grundnorm* can be conceptualized as something which consists of facets of natural law. The facets can be enumerated in the following terms, Firstly, the law is universal and immutable i.e., something that cannot change. Secondly, natural law is a higher law, i.e., it enjoys preponderance over all other laws made by the concerned authorities and is morally binding in nature. Lastly, it should be discoverable by reason i.e., it should have some sense of rationality and inherent natural quality of being morally binding to meet the ends of justice.[2]

These characteristics evince the foundations of International Human Rights Law (IHRL). Linda Hajjar Leib has asked a pertinent question regarding the subject, she says that the oscillation of IHRL between natural law and positive, *"reflects the unsettled debate in International Human Rights Law over the source of human rights that is, whether they emanate from the inherent dignity of a person or from the will of the state."*[3] This question becomes an inception point of the discussion we are going to have in the next few sections.

A brief outline of the paper comprises of Section I that will talk about International Human Rights Law as a system based out of the natural law theory. Section II will talk about the evolution of human right conventions in the Post-War era. Section III will particularly deal with Affirmative Action, its nature and need in the global society. Section IV will deal with the conflict between Constitutional Law and International Human Rights Law. Section V will talk about the inextricable connection between Constitutional Law and IHRL. Lastly, Section VI will deal with the idea of Hersh Lauterpacht in his seminal work *An International Bill of the Rights of Man* (this will be described in Section V) and its implication with regards to affirmative action. Section VII will further delve into the reason why there should be emulsification of the both types of systems with regards to Affirmative Action as it will talk about the decontextualizing theory apparent in India and USA as opposed to South Africa.

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[1] Shivprasad Swaminathan, *Projectivism and the Metaethical Foundations of the Normativity of Law*, 7 JURISPRUDENCE (2016)
https://www.tandfonline.com/doi/full/10.1080/20403313.2015.1070556
[2] BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 58 (6th Edition, Sweet & Maxwell 2012)
[3] LINDA HAJJAR LEIB, HUMAN RIGHTS AND THE ENVIRONMENT: PHILOSOPHICAL, THEORETICAL AND LEGAL PERSPECTIVES (Brill 2010). See Chapter 2.
http://www.jstor.org/stable/10.1163/j.ctt1w8h1t2.6

2. International Human Rights Law: A Natural Law Theory

We have already discussed the characteristics and basic tenets of the natural law theory in the abovementioned section. Before pontificating much on the natural law theory, we should first critique the positivist side of law. The critique should not be construed as a way of perceiving that it is purposeless and not useful. Positive Law, it must be stated is an important tool for the State to display its sovereignty and codify a set of rules the society must follow. However, the way the law is enforced is an element one needs to ponder over. Jeremy Bentham was one of the famous proponents of positive law and had propounded the theory of utilitarianism, meaning that the state should do things in such a way that promotes the idea, *"the greatest amount of good for the greatest number of people."* for achieving ultimate happiness. This analysis of achieving ultimate happiness led to the recognition of other theorists recognizing the need for socio-political rights, as the natural right theory had failed to take into account the economic aspect of a person's life.[4] Karl Marx also expressed his disgruntlement with the natural rights theory by equating the 'rights of man' with the rights of the bourgeoise that ignored factors like labor and production of wealth.[5]

A contrary argument has been provided by Amartya Sen. According to Sen, the moral value and spectrum of a human right is much broader than the significance of the legal spectrum embodying it. This is so because, *"the coercive force emanating from a legislated right does not necessarily lead to better enforcement of the desired claim; instead, the social and political awareness of human rights abuses often create a tremendous public pressure that incites appropriate legislation or actions to address the violated right."*[6] Sen is arguing that we should first know and determine the social impact of the violated right and how it is connected to the moral realm in order to address the basic rights that are inherent in a system of law and give support to the natural law theory. Sen in this sense, is arguing for the natural law theory that is based on principles to be codified into the positivist framework of law rather than give credence to John Austin's idea of a robber's command. This is an interesting interpretation of Sen's argument. The need to make a case for a human right needs two requirements. The primary requirement is to interpret the need for a human right from the lens of the natural law theory. If the framework and objective of the right fall under the moral realm on which the natural law theory is based, then the secondary requirement of codifying the law through the positivist framework. It is important to note here, the moral realm would mean to assert that laws should be followed by the people in conformity with reasons.

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[4] Ibid. p. 42
[5] Ibid
[6] Ibid. p. 43

Sen has rightly argued in this way, and it rebuts the assertions of legal philosophers such as Edmund Burke that people are not inherently equal in nature and inequalities will persist. This is not true, these inequalities in socio-political conditions should not act as mere obstructions in the pursuit to achieve justice and equality but rather as a reason to act for the betterment of society.[7] The fact there are inequalities in socio-political conditions, is a result of the deprivation of resources people have been subjected to by the feudal and landowning class. The rights of every person should, therefore, be equal. If they are not, then measures should be taken to ameliorate their condition and achieve the foundation of justice, this is based on the essential claim of Affirmative Action, whose discussion is the one of the basic purposes of the paper. Therefore, we can safely say that moral values and principles are the basic foundation of the natural law theory and international law as its primogeniture.

3. Human Rights Conventions in Post-War Era

The bloodshed and use of brute power in World War-II led countries to adopt peaceful ways to move forward. The Post-War era saw emergence of peace-making organizations such as the United Nations that further led to nation-states adopting Human Rights Conventions such as Universal Declaration of Human Rights (UDHR), International Convention for Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESR). The preamble of the United Nations Charter asserts that an individual should be entrusted with fundamental rights, men and women be treated equally and with dignity. Article 1 of the Charter, goes further by saying, the objective of the United Nation is to encourage growth and respect of human rights irrespective of race, sex, religion etc. According to Leib, *"the primary influence lies in the revolutionary idea that human rights can no longer be left to the discretion of public and that the international community should respond to gross violations of human rights."*[8] This is an important assertion as it makes the public authorities accountable, burdened and pressurized by the international community if they are violating certain human rights.

The Universal Declaration of Human Rights (UDHR) was carved out through Article 56 of the United Nations Charter. The declaration was a significant step that propelled the nation-states to follow and adopt the rights that are based on the natural law theory and are universal in nature. Its universal nature is an important aspect, as it burdens the nation-states to respect the basic tenets of IHRL as it needs to maintain a place in the comity of nations. Guinn has argued that articulation of these human rights through the declaration was an

[7] Ibid. p. 44
[8] Ibid. p. 46

important rhetorical step to promote the existence of these rights.[9] However, he notes that this mere rhetoric is not the only requirement. The essential and major requirement he points, is, *"consciousness of poverty and the consciousness of oppression and the conviction that poverty and oppression are not the natural order of this world."*[10] Therefore, mere existence of the UDHR was not sufficient. The mélange of natural and positivist theory (as discussed above) that usually leads to codification resulted in the creation of ICCPR and ICESR, eighteen years after the adoption of UDHR.[11] These conventions helped in understanding the broad spectrum of the rights enshrined under the UDHR. These conventions gave Civil, Political, Economic and Cultural rights that are essential for a person living in a country. However, mere ratification and signing of these conventions is not a sufficient safeguard for human rights violations. We will understand this problem in the later sections.

4. Affirmative Action as a Human Right

We should start this section by defining the broad the contours of the term, "Affirmative Action". The genealogy of this term can be traced in USA. The term 'Affirmative Action' was first used by former President of U.S.A, John F. Kennedy on March 6, 1961, through an Executive Order 10925 which stated, "take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, colour, or national origin."[12] However, the practice of Affirmative Action has been exercised and observed much before in India. Affirmative action seeks to ameliorate the condition of the depressed classes or the disadvantaged groups in order to make them at *par* with the upper strata of the society. Affirmative Action seeks to take forward the idea of equality to its truest purpose. Marc Galanter has termed, Affirmative Action in India as 'compensatory discrimination'. He has particularly used this term to remind people to recompense or redress for, "historical deprivations and to offset present handicaps."[13] The idea of Affirmative Action is based on the notion of substantive equality.

The notion of substantive equality, means that unequal persons cannot be treated equally. They should be treated unequally in the sense that they should be given ameliorative measures and preferential treatment. This is mainly due to the oppression and discrimination,

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[9] David E. Guinn, *Human Rights as Peacemaker: An Integrative Theory of International Human Rights*, 38 HUMAN RIGHTS QUARTERLY (2016) http://www.jstor.org/stable/24738042

[10] Ibid. p. 756.

[11] LINDA HAJJAR LEIB, HUMAN RIGHTS AND THE ENVIRONMENT: PHILOSOPHICAL, THEORETICAL AND LEGAL PERSPECTIVES (Brill 2010). See Chapter 2. http://www.jstor.org/stable/10.1163/j.ctt1w8h1t2.6

[12] *A Brief History of Affirmative Action,* UCI OFFICE OF EQUAL OPPORTUNITY AND DIVERSITY https://www.oeod.uci.edu/policies/aa_history.php

[13] RAJEEV BHARGAVA, POLITICS AND ETHICS OF INDIAN CONSTITUTION (OUP 2008) 268.

the marginalized groups have been subjected to over the years. They have been deprived of the opportunity to prosper and grow and that is why as Marc Galanter rightly puts it, that 'compensatory discrimination' is imperative. We should go one step further by explicating how the notion of, substantive equality is a result of the theory of distributive justice. Distributive justice is a Rawlsian idea. For John Rawls, equality has a two-pronged basis to it. Firstly, he asserts that a person should have an equal right to the basic liberties and necessities of life. Secondly, the distribution of resources is to be made in such a way that social and economic inequalities present in the society are reasonably catered to all sections of the society.[14] Affirmative Action in a nutshell, seeks to atone or make a reparation in the lives of the people who have socially deprived of the material resources and dignity that are required and deemed necessary for the survival of a human being.

At this point, it is important to state that use of policies imbibing Affirmative Action also requires a good discussion on the term, "differentiation" to get a better understanding of the concept. Differentiation is a legally valid practice allowed in IHRL until it is discriminatory in nature. Differential treatment is a way to in the words of McGregor, "to re-establish the balance in such society and as a part of a broader effort to eliminate all inequalities, affirmative measures have to be implemented for such people."[15] This statement exudes the basic tenets of Affirmative Action embodying and imbibing the principles of the theories of Substantive Equality and Distributive justice. It is further important to note that the idea of Affirmative Action further seeks to fulfil other human rights as it then obligates the nation-states to respect and not violate the rights of a person belonging to a marginalized community.

International Covenants such as ICCPR, ICESR embodying tenets of Affirmative Action have become guiding light for the states to enforce legal norms and obligations in conformity with international behavior. According to McGregor, these instruments emphatically advocate for elimination of all forms of discrimination. Article 2 of both conventions namely ICCPR and ICESR require member countries to oblige, adopt and implement policies on Affirmative Action. Moreover, Article 2(2) of the International Convention of the Elimination of All forms of Racial Discrimination require states to take "proactive measures" against racial discrimination. In precise terms, it requires the states, "to take in the social, economic, cultural and other fields, special and concrete to ensure the adequate development and protection of certain racial groups or individuals belonging to them."[16] Therefore, we can see how

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[14] JOHN RAWLS, A THEORY OF JUSTICE (Belknap 2009) 529

[15] Marie McGregor, *Affirmative Action and Non-Discrimination: South Africa Law Evaluated against International Law* 39(3) THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTH AFRICA (2016) 390 http://www.jstor.org/stable/23252705

[16] Ibid. p.389

the IHRL regime is premised on the natural law theory that emphasizes on the moral value and principles as well as accommodates the broad contours of the basic rights needed to live a dignified life that is connected to what we have called, the "higher law".

5. Conflict between Constitutional Law and International Law

An article written by Gerald L. Neuman[17] would be instructive for the topic of discussion in this section. It has been argued that judges should refrain from delving into the realm of International Law in matters pertaining to Constitutional Law. One of the key differences is that International Law is a treaty made law and requires the consent and ratification of the nation-state, whereas in Constitutional Law the citizens are guaranteed certain fundamental rights acting as a bulwark against the arbitrary and unreasonable use of power by the state. Another, key difference is that International Law is a result of a consensus reached by different countries after coming up together. Constitutional Law on the other hand, is a law created by the legislature or parliament of the country taking into consideration its social realities. We will touch upon these differences in detail afterwards. The starkest difference in both theories is its legally binding nature. Constitutions are undoubtedly legally binding, but international law is not legally binding that can described as what people in the international legal community would call as, "soft law". Conventions and treaties that are non-binding in nature are referred to as, soft law. According to Chinkin, if nation-states want treaties to come under, "hard law" i.e., something that is legally binding in nature, then, "it must be precisely worded and specify the exact obligations undertaken or the rights granted." Where the treaty only provides goals, objectives, and general standards, then it would fall under the category of soft law.[18]

Most of the legal instruments in International Law are soft in nature and hence the problem of legal bindingness comes into play. If laws are not legally binding upon nation-states, then states would have enough latitude to maneuver and adjust the legal obligations imposed by the document according to their wishes.[19] It has been further asserted that, "even hard treaty law has soft grey areas".[20] Adoption of legal principles and values in International Human Rights Law by different countries through their own interpretation and reasoning leads to skew the meaning and essence of the human rights enshrined in the document. Chinkin rightly argues on this point by saying,

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[17] Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance* 55(5) STANFORD LAW REVIEW (2003)1866-1867 http://www.jstor.org/stable/1229566

[18] C.M Chinkin, *The Challenge of Soft Law: Development and Change in International Law* 38(4) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (1989) 851 http://www.jstor.org/stable/759917

[19] Ibid. p. 852-853

[20] Ibid. p. 865

international law in the form of soft law obfuscates and convolutes the meaning and objectives of instruments of international law as they are prone to acts of maneuvering. This results in a nugatory effect, it does not play the major role in the development of international law it is meant to play.[21] On, other hand, Constitutional Law has a different kind of normative force. Neumann terms this aspect as suprapositive. But what does it mean? By using this term, he means to say that the constitutional fundamental rights, "supply an external standard of normative evaluation, which the legal system fully or partially internalizes as a positive fundamental right."[22] He is suggesting the normative nature of the legal bindingness of the constitutional fundamental right guaranteed by the state. This legal bindingness is absent in the case of international law.

It was important to delineate the problem of soft law and its implications, this will help us understand the situations of conflict even if we assume that the soft law has turned into hard law i.e., it has become legally binding. First is the element of consent we had talked about earlier. The consensual aspect in international law has its own problems. Human Rights will not fulfill its goals and objectives if many states oppose its inclusion in the sphere of International Law. Moreover, according to Neuman, *"a state's understanding of its own consent is not determinative of its international obligations."*[23] This is again an example of soft law problematizing and complicating the regime of international law. He points out another problem with regard to the enforcement of the consent given by the state. Since, constitutional provisions pave way for many countries to follow and fulfill international law, such as Article 51 in the Indian Constitution, there can be a situation where the state did not constitutionally consent to the international obligation. It has been argued that from the perspective of US International Human Rights with respect to freedom of expression have been underprotected but with respect to equality they have been overprotected.[24] This conundrum exists because it is the Constitution of a country that designates international law its position in its framework.[25] Therefore, these are some problems that emanate from the realm of soft law and convolutes the understanding of international law and make it distinct from Constitutional Law which is made by the 'morally legitimate authority' (using words of Joseph Raz)[26] and is thus legally binding in nature. This takes us to the next part that argues for an inextricable connection between the two concepts of legal theory.

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[21] Ibid. p. 866
[22] Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance* 55(5) STANFORD LAW REVIEW (2003)1868 http://www.jstor.org/stable/1229566
[23] Ibid. p. 1874
[24] Ibid. p.1879
[25] Ibid. p.1875
[26] JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 112 (OUP 2009)

6. Inextricable Link between Constitutional Law and International Human Rights Law.

We have already explained and delineated the broad problems and divergences between Constitutional Law and International Human Rights Law. We have also observed that this dissonance results in a nugatory effect on the obligations of member countries to respect and fulfill the moral responsibility to protect human rights of its people. The regime of International Law and Constitutional Law acts as a way of imposing limitations on the arbitrary and tyrannical behavior of the states towards its people. Hence, one cannot say that there is absolute dissonance between the two legal systems, there is certainly a sense of harmony in the purpose and design of the goals and objectives of both legal systems. However, there is certainly a structural and institutional dissonance between the two systems that, *"blurs the moral authority that each system seeks to exert on conduct and public opinion."*[27] This is the nugatory effect we have been emphasizing in this paper. The pertinent question is how to reduce the dissonance between the two systems? Apart from traditional methods of incorporating international law in constitutional law, Neumann has suggested an alternative plan to achieve this objective. This is based on Hersh Lauterpacht's wartime proposal described in his work *An International Bill of the Rights of Man*.

There was an exigent need of protecting human rights at the time of the war and international obligations in the comity of nations would have necessitated this. Hence, it was imperative to come up with a plan to counter violations of human rights. Lauterpacht suggested, that states should endeavor to enshrine only the internationally protected civil rights and a constitutional court that would help in judicial enforcement of the said rights. A U.N High Commission would further look into the compliance of the bill of rights.[28] The inclusion of only civil rights and exclusion of political, social and economic rights was an important idea. Lauterpacht did not want the internationally recognized political, social and economic rights to enter the domain of constitutional law as they would vary from place to place with regards to their social conditions. A kind of uniformity imposed by such rights would have impaired the states to implement them so as to bring out the true conception of social and economic justice. But what was the idea behind internationally recognized civil rights getting constitutional entrenched? Civil rights are based on the premise of equality and equality is the most important thing to get other freedoms. If one is not equal to the other, he/she will be socially deprived to exercise other freedoms.

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[27] Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance* 55(5) STANFORD LAW REVIEW (2003)1880 http://www.jstor.org/stable/1229566

[28] Ibid. p. 1880-1881

The conflation of International Human Rights and Constitutional rights imbued from the idea of Lauterpacht is an important step to eliminate the problems caused by the soft formation of international law. Insertion of particularly only the civil rights will impose obligations on the governments to recognize the political, social and economic rights from the lens of equality and give equal treatment to everyone, in the sense that it curbs the inequality prevalent in the society through the measure of Affirmative Action as discussed in Section III. Therefore, we can see a harmony that was discussed in the beginning of this section that, there is certainly a sense of harmony in the purpose and design of the goals and objectives of both legal systems. Neumann also argues by saying, that the two systems should cooperate and coordinate with each other by saying, *"seriously considering one another's interpretations and engaging in respectful mutual critique."*[29] This is how one can reduce the dissonance and bring out the inextricable connection existing between the two legal systems.

7. Implications of Lauterpacht's idea on Affirmative Action

In this section, we need to explore the implications of the idea advocating for conflation of International Human Rights and Constitutional rights on Affirmative Action. We have already delineated the broad aspects of the concept in Section III, there is no need to regurgitate and reiterate them any further. Since, Lauterpacht's idea emphasized on the right to equality is the prerequisite for the exercise of other rights, it is imperative for us to show how the interpretation of Affirmative Action has been done in various jurisdictions and is there a need to embrace the alternative model proposed by him. We will be delving into jurisdictions of three countries namely, USA, India, and South Africa and this will be done from a constitutional law perspective.

To start with, USA, the apex court has recently ended Affirmative Action in *Students for Fair Admissions Inc. v President and Fellows of Harvard College*[30] holding it violative of the equality code. The Supreme Court has mostly dealt with Affirmative Action with the originalist interpretation of the constitution and has thus justified its inimical relationship with the concept. The court has displayed this in, *Regents of the University of California v Bakke*[31], which is a classic example of originalism. In this case, the majority held that the university program of granting 16% reservation to minority classes is not permissible because the framers of the constitution did not contemplate the same. The notion of substantive equality is absent in USA and that is why Affirmative Action as a policy has not gained attention there.

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[29] Ibid. p. 1900

[30] Students for Fair Admissions Inc. v President and Fellows of Harvard College 600 U.S 181

[31] Regents of the University of California v Bakke, 438 U.S 265

Now moving forwards towards India, which is a caste-ridden society and has bifurcated into what can be termed as upper castes and lower castes. From the inception of the Indian Constitution, affirmative action has been constitutionally entrenched and given the lower castes who have been socially deprived of all the basic and material resources in the past. However, recently, the highest constitutional court of the country in *Janhit Abhiyan v Union of India*[32] has upheld a legislation giving affirmative action to economically weaker sections of the forward castes, a group which has not been socially deprived of the resources in the past. This is not affirmative action in its truest sense.

The last jurisdiction is South Africa, that has right to equality entrenched in its constitution in its conformity with international human rights law.[33] The South African case is the best and classic example of the model suggested by Lauterpacht. As can be seen in the abovementioned discussion, non-entrenchment of international human rights law in the Constitution leads to a skewed interpretation of the concept of equality that is an inherent part of a person's dignity. Lauterpacht's idea of conflation between International Human Rights and Constitutional rights does lead to a universal notion of human rights that further prevents the problems of soft formation of international law. Conversely, if that is not followed a convoluted understanding of Affirmative Action enshrining the concept of substantive equality within itself would be defeated as can be seen from the jurisprudence of the concept by Constitutional Courts in India and USA that disregard the social context of the disadvantaged group or community.

8. Decontextualizing the Idea of Equality

As has been deliberated in previous sections, there should be conflation of IHRL and Constitutional Law. However, one should not ignore and forget that social structures and dynamics differ in each country and region. The academic discussion pertaining to this subject is growing as it is germane in the times we are living in. As discussed in the previous section Constitutional Courts in India and USA have rendered judgements in a narrow manner and understood the idea of equality in a formal rather than in a substantive sense. Michael Rosenfeld in his article, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality* has fervently stressed on the notion decontextualizing equality amongst people.[34] But what does he mean by decontextualizing?

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[32] Janhit Abhiyan v Union of India 2022 SCC OnLine SC 1540

[33] Marie McGregor, 'Affirmative Action and Non-Discrimination: South Africa Law Evaluated against International Law' 39(3) THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTH AFRICA (2006) http://www.jstor.org/stable/23252705

[34] Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality,* 87(7), MICHIGAN LAW REVIEW (1989)

Rosenfeld's contemplation of this term refers to not having regard to the historical deprivation and social context of the disadvantaged group. He says that the Supreme Court of USA in *City of Richmond v J.A Croson Co.* has decontextualized the many forms of inequality, *"including lifting race relations out of their social setting."*[35] Michele S. Moses also lays emphatic stress on the importance of determination social context as a requirement of ensuring equality that would inculcate a feeling of self-determination amongst people.[36] Similar stance has also been taken by Jalrath Clifford, who points out the importance of substantive equality within the realm of International Law and its importance of being transmuted into the domestic laws of countries.[37]

India has also unfortunately, traversed the woeful path of decontextualization through the judgement rendered by the apex court in *Janhit Abhiyan v Union of India* where it has overlooked the argument that upper-castes have not been ever historically exploited or deprived and extending the provision of reservation to them is a counter-intuitive practice. This flagrant disassociation of the historical social context by the apex court is regrettably a sad sight and does not fulfill the meaning and purpose of Affirmative Action and Substantive Equality whose core idea has been to compensate the aggrieved community for the wrongdoing of the past and give it a chance to enter a level-playing field with dominant races or castes. The ghost of Richmond has made inroads in India as well.

Whereas, in South Africa much emphasis has been given to the social context and application of international convention with regards to Affirmative Action. The South African text believes in the concept of Ubuntu. Ubuntu is a word that, "evokes an ethos or culture of community, interdependence, sharing mutual respect and the dignity and the worth of each person."[38] Recognition of this concept conveys that a good understanding of history and socio-political scenario of culture and the country is also important to be kept in mind. It is an interesting and important constitutional entrenchment that emulsifies as well as demystifies the conflict between both systems of legal framework.

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[35] Ibid. p. 1732

[36] Michele S. Moses, *Affirmative Action and the Creation of More Favorable Contexts of Choice,* 38(1), EDUCATION RESEARCH JOURNAL (2001) 3-7

[37] DINAH SHELTON, THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW (OUP 2013). See Chapter 18. https://academic.oup.com/book/42626/chapter-abstract/358048022?redirectedFrom=fulltext

[38] Karl. E. Klare, *Legal Culture and Transformative Constitutionalism* 14(1), SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS (1998) https://doi.org/10.1080/02587203.1998.11834974

9. Conclusion

Over the course of this entire discussion, we have talked about different concepts and came to an understanding that conflation of International Human Rights and Constitutional rights helps in enhancing and encouraging the role of human rights in entirety. Since the ideas, goals, and objectives of both the legal systems are more or less similar, the conflation is necessary to achieve the role of Constitutions being the higher law and the conception articulated by Hans Kelson in his theory of *Grundnorm.*

Focus on Affirmative Action particularly is of greater interest as it helped in providing a justification of the argument that there is an existence of a harmonious connection between the two legal systems in the eyes of both natural as well as positive law theory. The delineation of the conflicts was important in order to highlight the lacunae in the prevailing idea of International Law and the need to depart in light of the severe violations of human rights happening around the world. The idea of decontextualization apprarent in India and USA clearly reflects the convoluted manner in which Affirmative Action is paving its way forwards that needs to be thwarted by supplanting it with a universal global practice of Affirmative Action.

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Navigating the Metaverse: Sociolegal Challenges and Frameworks for a Digital Frontier

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Abstract

Technological advancements have shaped our society from the age of inventions and modernization. Growth in technology has led to innovations to enhance user experience. The rise of virtual reality also known as the metaverse further shapes our socio-legal systems. This article analyses the socio-legal implications of metaverse by focussing on understanding the cultural and legal framework that is required to prevent crimes within metaverse. With an aim to understand the culture of metaverse, the article sheds light on the social construct of metaverse and the kind of groups that exist in metaverse. It also analyses behavioural patterns of citizens within the realm of metaverse. It analyses the psychological impact on the user while using the metaverse. Identifying the need for forming a metaverse constitution for accountable citizen behaviour, the article aims at securing constitutional right to citizens within the metaverse. In addition to identifying the institutions which are accountable to uphold the rights, the article also aims at resolving the jurisdictional issue that exists due to metaverse by focussing on crime regulation in the metaverse by identifying different types of crimes that are committed in the metaverse. With an objective to curb potential crimes, it analyses the functioning of law enforcement within the metaverse and seeks to provide a solution to existing socio legal issues by proposing a dynamic legislative framework and establishing a new form of social conduct.

Keywords

Metaverse, Social, Legal, Crime, Constitution

1. Introduction

Metaverse is the part of the digital realm. It is a simulation of real-world environment. It is a place where users interact in their digital model.[1] Users can create virtual environment through which they can interact mirroring the actual world. Social interaction within metaverse is a growing phenomenon. Studies show that spending time on metaverse will become common within few years.[2] This will lead to rise in social interaction within the platform.

Interaction amongst users may lead to inappropriate social behaviour. Such behaviour requires regulation. The violation of a digital model (also Known as avatar) can lead to legal issues.[3]It is important that metaverse creates a safe environment for its users. It is still difficult to implement societal laws within the virtual realm. To implement a standard of conduct within the platform it is important identify the social construct.

Metaverse gives its users the freedom to create a virtual community. The community will consist of individuals. These individuals will require same protection as they get in the actual world. This requires some sort of legal attribution to the digital models. To prevent crimes within metaverse it is important to focus on building ethical standards.

To build ethical standards it is important to analyze the behavioural pattern within the platform. This behaviour can be regulated through law. To implement legal regulation the role of law enforcement becomes pivotal. However, jurisdiction is the area which is open ended. With universal usage of metaverse assigning jurisdiction is difficult.

Metaverse also has a psychological impact on its users. The users will be interacting with through different social perceptions. Their experience will be influenced by the technology. Social interaction will be different in comparison to the actual world. Therefore, it becomes important to understand the culture of metaverse and how it shapes individuals within the platform.

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[1] Ogilvy Consulting, Nothing Changes Everything Changes a behavioural perspective on metaverse, (Jun 24,2024,11:01 AM), https://www.ogilvy.com/sites/g/files/dhpsjz106/files/pdfdocuments/Metaverse%20BehSci%20POV.pdf

[2] Yunato Wang, Zhou Su, Miao Yahn,Social Metaverse: Challenges and Solution,arXiv:2301.10221v3, 1 (2023), https://arxiv.org/pdf/2301.10221

[3] Ben Chester Cheong, Avatars in the metaverse: Potential Legal issues and Remedies, Int. Cybersecurity Law Rev. 464, 470 (2022), file:///C:/Users/Kartikey/Downloads/s43439-022-00056-9.pdf

1.1 Research Problem

As the metaverse develops into a well-known digital social media platform, it poses distinct socio-legal issues that the current legal framework is ill-prepared to handle. The creation of a metaverse constitutional framework, user rights protection, digital behaviour regulation, and the resolution of jurisdictional uncertainties in relation to crimes committed in virtual environments are among the major concerns.

1.2 Research Objectives

The primary objective of this research is to analyse the socio-legal implications of the metaverse, with a focus on:

- Recognising the social and cultural structures of the metaverse.
- Investigating the user's psychological effects and behavioural habits.
- Putting out a constitutional framework to protect user rights and control conduct.
- Recognising and resolving the legal obstacles and crime control systems required for efficient law enforcement in the metaverse.
- Creating a flexible legal framework to set new guidelines for socio-legal behaviour in the metaverse.

1.3 Hypothesis

The integration and expansion of the metaverse will necessitate the development of new socio-legal frameworks to effectively regulate user behaviour, protect constitutional rights, and prevent crimes within the digital realm.

1.4 Methodology

This research employs a qualitative, exploratory approach, integrating doctrinal legal analysis with socio-legal studies. It involves a comprehensive review of existing literature, case studies, and international conventions to propose a robust socio-legal framework for the metaverse.

2. The Culture of Metaverse

Metaverse is a multifaceted platform. Its core culture includes individual engaging in activities like gaming, business etc.[4] It is observed that countries which possess better technological infrastructure will build the core culture of metaverse.[5] Other countries such as India will have bigger issues to address such as digital inequality. With rise in use of metaverse the demography of users will be restricted to only westerners.[6]

Technology interface within metaverse will also favour the users in western countries.[7] A survey conducted in USA showcased how different groups associate themselves with metaverse.[8] It is found that men are more inclined to using metaverse than women.[9] It is also shown that higher income household were keener to use metaverse than lower income household.[10] There are certain cost barriers which prevent users from having holistic metaverse experience.[11]

Male users feel safer in a virtual environment than female.[12]This indicates how female related crimes are prevalent in metaverse. Users can hide behind digital avatar and commit crimes with no accountability. With growing base of metaverse it is also important to examine the user's behaviour. Metaverse creates an environment where users can deliberate on social issues.

However, it is also seen that metaverse has created a certain divide. Not every user can afford technology like metaverse. Which means that the social construct of metaverse won't include as many members of lower income strata. It is important to examine the social construct to understand the need for regulation in the metaverse.

2.1 The Social Construct

The metaverse has the potential to change perceptions. It does affect the way we interact with other users. It can challenge the existing

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[4] Nidhi Singh, Metaverse and the Global South: Bridging the digital divide, Medianamma (Jun 26,2024,11:28 AM), https://www.medianama.com/2023/06/223-metaverse-global-south-digital-divide-2/

[5] Arnav Joshi, The metaverse: a universe without culture, the Stanford review (Jun 26,2024,11:36 AM), https://stanfordreview.org/the-metaverse-a-universe-without-culture/

[6] Id

[7] Id

[8] Natalie Lacey, Are immersive experiences creating a new digital divide? World Economic Froum (Jun 26, 2024, 11:49 AM) https://www.weforum.org/agenda/2023/01/davos23-immersive-experiences-close-digital-divide/

[9] id

[10] id

[11] Id

[12] Id

social issues.[13]It has the capability of engaging users in diverse outlooks and participate in virtual world building. However, the leadership within the metaverse is mostly led by men.[14] There is lesser involvement of third gender users.[15]This can lead to inequality within the platform as certain users may feel excluded.

Studies have shown that certain communities feel marginalized.[16]To maintain diversity within the platform it is important to include individual from different social groups. This can be achieved by spreading awareness about metaverse through public-private partnership.[17]There is also a need to teach the requisite skill to operate in metaverse to the marginalized communities.

Diversification within the platform ensures users participation. However, accessibility does become an issue. The existing digital divide in many countries specially India makes it difficult to involve individual from marginalised community. Maintaining equity can be difficult due to higher costs. Other concerns such as maintaining law and order within the platform also requires attention to secure users' rights.

Gender equality is yet to be achieved within metaverse. Cases of sexual assault are also being reported against women.[18]These crimes mirror the actual world. It affects the mental wellbeing of the victim.[19] Such instances require to examine the social behaviour in metaverse. It is important to understand how a user behaves in a virtual setting which is different from the actual world.

2.2 The Behavioural Pattern in Metaverse

Metaverse can make the user feel that his virtual interactions are real. Consistent usage of metaverse can change self-perception.[20] It is important that inappropriate behaviour is kept in check through in-built mechanisms which trigger warning against such

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[13] Vince Gennaro, Michael Diamond and Elizabeth Haas, Four lenses to understand metaverse impact on culture and community, NYU School of Professional Studies (Jun 26, 2024, 3:42PM), https://www.sps.nyu.edu/homepage/metaverse/metaverse-blog/four-lenses-to-understand-the-metaverse-s-impact-on-culture-and-community.html

[14] Cathy Li, Kathyrn White, Social implications of metaverse, World Economic Forum (Jun 26, 2024, 4:01 PM), https://www3.weforum.org/docs/WEF_Social_Implications_of_the_Metaverse%20_2023.pdf

[15] Id

[16] Id

[17] id

[18] Adam Smith, Rape in virtual reality: How to police the metaverse, Context (June 26, 2024, 4:29 PM), https://www.context.news/digital-rights/sex-assault-claims-and-crime-raise-fears-of-new-virtual-wild-west

[19] Id

[20] Patrick Henz, The psychological impact of the Metaverse, Discover Psychology Discov Psychol 2, 47 (2022), https://doi.org/10.1007/s44202-022-00061-3

behaviour.[21]Metaverse is in itself a society. However, it is also found that users are not always aware of their acts in the metaverse.[22]

The behaviour of a user in metaverse is similar to the actual world with little variance.[23]This is due to years of learned social patterns.[24] Metaverse can also be used by the perpetrators to commit misdemeanours and leave unscathed. The platform can be used to escape punishment for such act which are condoned in the actual world. Prolonged usage of metaverse can lead to cognitive dissonance.[25]

It is also found that if users are in constant engagement with their digital model it can lead to changes in the user's behaviour in the actual world.[26] Instances of users disconnect with their actual social life are also documented.[27] Metaverse has the potential of changing a user's behaviour in a negative manner. Constant disconnect with the actual world can psychologically impact a user's behaviour. Which may lead to users behaving inappropriately.

Metaverse consist of devices which provide physical sensations. Making the experience feel real while interaction. It becomes important to monitor behaviour through ethical and legal considerations.[28]It is also important to examine the psychological impact of metaverse and how it affects the users.

2.3 Psychological Impact

Metaverse provides an immersive user experience. The line between actual world and the virtual setting is blurred. The user feels same emotions in the virtual world as he does in the actual world. Therefore, psychologically a user will feel the impact of an action made by the other users. It has been observed that instances of online bullying have become rampant in metaverse which creates adverse mental impact.[29]

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[21] Id
[22] Id
[23] Id
[24] Id
[25] M.B. Benosman, Social Psychology in the era of metaverse: An overview of recent studies, MERL (Jun 26, 5:20 PM), file:///C:/Users/Kartikey/Downloads/Benosman-paper-v3%20(1).pdf
[26] Id
[27] Id
[28] Bernard Marr, The Metaverse and its Dark Side: Confronting the reality of Virtual Rape, Forbes (Jun 26,2024,5:36 PM) https://www.forbes.com/sites/bernardmarr/2024/01/16/the-metaverse-and-its-dark-side-confronting-the-reality-of-virtual-rape/
[29] Miguel Barreda Angeles, Main Risks and Benefits of Metaverse on mental health, Telefonica (Jun 27,2024,4:00 PM), https://www.telefonica.com/en/communication-room/blog/main-risks-and-benefits-of-metaverse-on-mental-health/

Interaction through metaverse can lead to mental health issues.[30]This can lead to uncontrolled behaviour. This impulsive behaviour can lead a user to commit crimes without judging the consequence of his action.[31]Metaverse can also lead users to evade actual world norms.[32]Addiction of metaverse can make it difficult for users to disengage from the platform.

It is also been observed that metaverse can interfere with daily actual world activities of the users affecting their cognitive and social wellbeing.[33]Continuous engagement in metaverse can lead users to gratify their social void by engaging in inappropriate behaviour.[34] A user engages in metaverse to satisfy the need of social interaction which leads to behavioural issues.[35]

Metaverse has become a new ground for social interaction. It is evident that users are going to spend most of the time within metaverse. It becomes important to curb the social issues within metaverse. This can be achieved by holding users accountable for their behaviour. It is to be soughted by a system of rules and regulations. Framing of metaverse constitution can ensure regulating rights and duties of users within metaverse.

3. Significance of Constitutional Law in Metaverse

Metaverse creates a new dimension for social interaction. We are governed by rules and regulation in the actual world. Constitution sets those rules into motion. Enactment of a constitution in metaverse can secure rights for users. It can also provide a frame work of regimes of different countries to work within metaverse.[36] Establishing a constitution will ensure regulation of private entities.

It helps to navigate the issue of protecting a user's privacy from getting breached by a private entity. It can protect users from criminal activities. It is important to protect rights of the users from getting violated due to digital intervention. Metaverse has the potential to exploit user's choices without consent.[37] Therefore, building a constitution can provide grievance redressal.

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[30] Sumona Banerji, Future of Well Being: The Metaverse Era, OCAD University (Jun 27, 2024, 4:15), https://openresearch.ocadu.ca/id/eprint/4103/1/Banerji_Sumona_2023_MDesSFI_MRP_Future%20of%20Well-being%20in%20the%20Metaverse%20Era.pdf

[31] Id

[32] Id

[33] Id

[34] Id

[35] Id

[36] Manav Subodh, Creating Constitution for the metaverse, ET India (Jun 28, 3:41 PM), https://cio.economictimes.indiatimes.com/news/corporate-news/creating-a-constitution-for-the-metaverse/94364316

[37] Tala Agil Attas Alkhiri, Human Right Requirements in the Metaverse era, VOL.22 No.8, IJCSNS, 67, 72,(2022), http://paper.ijcsns.org/07_book/202208/20220809.pdf

Establishing a constitution in the metaverse is a step towards digital equity. It can be used as a tool to include marginalised communities to engage in the metaverse. Constitution can empower public institutions to involve marginalised communities in metaverse.[38]Forming a constitution can help in paving the way for technology to form a metaverse which protects rights of its users.[39]

It can incorporate themes of social contract.[40] Which enables users to connect via an agreement.[41] Drafting a constitution will bring transparency amongst policy makers and users. It will ensure protection of fundamental rights within metaverse. It is important to understand what kind of rights a user can exercise while operating in the metaverse.

3.1 Rights of Citizens in Metaverse

Users should be treated as citizens in metaverse. This will lead users to gain rights and perform duties. Maintaining Privacy in metaverse is a form of right. Institutions should exercise minimum intervention with users' privacy. To protect privacy of a user in metaverse their cognitive integrity shall be maintained.[42]Metaverse has the potential of influencing a user's opinion. It has an effective control over the cognitive data of the user without consent.[43]

Therefore, it is important to integrate right to privacy in metaverse. Labour rights should also be protected within metaverse. As metaverse has become a business hub labour issues will also arise. To recognise this right metaverse needs to be treated as a workplace.[44]Right of minimum wage should be secured. Bargaining right should also be enshrined to protect workers interest in the metaverse.[45]

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[38] Council Of Europe, Metaverse and its impact on human rights, the rule of law and democracy, IEEE (Jun 28, 2024, 4:33 PM), https://rm.coe.int/the-metaverse-impact-on-and-its-impact-on-human-rights-the-rule-of-law/1680ae6bce

[39] JURI Committee, Metaverse, European Parliament, (Jun 28, 2024, 4:33 PM), https://www.europarl.europa.eu/RegData/etudes/STUD/2023/751222/IPOL_STU(2023)751222_EN.pdf

[40] Ehud Shapiro, Nimrod Talmon, Foundation for Grassroots Democratic Metaverse, arXiv:2203.04090v3 (Jun 28, 2024, 4:58 PM), https://arxiv.org/pdf/2203.04090

[41] Id

[42] Adeline Fredriksson, Lost in the Metaverse Navigating Privacy Challenge in the jurisdiction of virtual worlds, University of Gothenburg (Jun 29,2024, 2:13PM), https://gupea.ub.gu.se/bitstream/handle/2077/78187/fredrikssonadeline_2023.187.pdf?sequence=1&isAllowed=y

[43] Id

[44] Valerio Destefano, Antonio Aloisi and Nicola Counttouris, the metaverse is a Labour issue, Social Europe (Jun 29,2024, 2:35 PM), https://www.socialeurope.eu/the-metaverse-is-a-labour-issue

[45] Suryansh, What are the rights of the labor in the metaverse? IIPRD Blog (Jun 29, 2024, 2:41 PM), https://iiprd.wordpress.com/2023/02/21/what-are-the-rights-of-the-labor-in-the-metaverse/

It is important to protect rights of children in metaverse. They are at risk of engaging with cyberbullies in metaverse.[46]This can be detrimental to their mental health. It is important spread awareness amongst children for effectively using metaverse.[47]There should be safety mechanisms in place to ensure a child's wellbeing in metaverse. It is also important to involve guardians to protect children from adverse psychological effect of metaverse.

Metaverse has contributed immensely in the field of education. It provides a medium of virtual learning to children. Thereby it becomes important that it is accessible to children of all age groups. Metaverse should protect right to education of children regardless of their status and physical or mental disabilities.[48]However, to accomplish this objective of protecting the users rights it is important to identify the institutions who are capable of being accountable for protecting these rights.

3.2 Accountable Institutions in Metaverse

Metaverse is in a developing stage. Its regulation is not looked upon by any public institution. However, to protect user's rights, it is important that internationally countries should be involved for its standardisation. International conventions should be used as a starting point for regulating metaverse. As conventions provide guidelines for institutions to regulate conduct in the actual world.

European union has been successful in enacting laws which can protect the interest of children in the virtual world.[49]The law also helps in regulating private entities from pushing narrative-based promotion.[50]This helps in ensuring privacy rights of users in metaverse. It also protects minority from getting influenced by public institutions who may use technology to sway opinions into their favour for political milage.[51]

Asian countries have also involved their ministries to regulate metaverse.[52]Enacting laws helps to regulate unlawful actions in metaverse. It is important that public institutions are involved in ensuring transparency and good policy making in metaverse. There also needs to be a limit with respect to interventions made by such

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[46] Supra note 38
[47] Id
[48] Id
[49] Shravishtha Ajaykumar, Crime and Punishment: A Primer, ORF (Jun 30,2024,4:06 PM), https://www.orfonline.org/research/crime-and-punishment-in-the-metaverse-a-primer#_edn56
[50] Id
[51] Id
[52] Paul Bond, EU South Korea, Japan Announce Metaverse Regulations Plans, Holland & Knight (Jun 30, 2024, 4:24), https://www.hklaw.com/en/insights/publications/2022/09/eu-south-korea-japan-announce-metaverse-regulation-plans

institutions. Countries should involve separate bodies to regulate metaverse to ensure global regulation.

This can be achieved by examining technology laws of different nations. Committees can be formed to examine the social regulation in metaverse. Through such examination laws can be formed according to the needs of social interaction in metaverse. However, countries will also have to examine the issue of jurisdiction.

Metaverse is a global platform. There by millions of users can interact with each other globally. However, when a crime is committed against a user or his legal rights are violated it is difficult to assign jurisdiction. Therefore, it is important to understand jurisdictional issues that persist in metaverse.

3.3 Jurisdictional Conundrum

The global nature of metaverse makes it difficult for the users to claim infringement. Users also face difficulty to identify the wrongdoer in metaverse. It is due to digital models which the wrongdoer Possesses. There are certain countries which have permitted claims against unidentified wrongdoer.[53] This approach can be adopted for addressing infringement in metaverse.

However, assignment of jurisdiction is rests upon the nature of the claim. Claims which are related to tort law are generally associated with the place of infringement and the place where the damage occurred.[54]This approach can be maintained while dealing with instances of tort in metaverse. There has been an instance where a country has adopted the idea of virtual hearing.

Recently, a court in Columbia conducted a hearing in metaverse.[55]It was observed that cases can be heard within metaverse.[56] It is important to evolve an approach to deal with cases in metaverse. One such approach is through implementing actual world laws in the virtual world.[57]This can be achieved by checking into user end agreements.[58] This helps public institutions to act against the

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[53] Danny Ong, Stanley Tan, Jason Teo, Metaverse Disputes-navigating jurisdictional issues in the metaverse (Jun 30, 2024, 5:26 PM), https://www.setialaw.com/metaverse-disputes-navigating-jurisdictional-issues-in-the-metaverse/

[54] Ben Coleman, Jurisdiction, and torts in metaverse, Bristows LLP (Jun 30, 2024,5:51 PM), https://www.lexology.com/library/detail.aspx?g=9932ecc2-ad17-4e6b-b0c2-8f054083fd18

[55] Nidhi Bhardwaj, Colombia's Court adopts metaverse to solve traffic dispute case, India Today (Jun 30,2024,6:03 PM), https://www.indiatoday.in/cryptocurrency/story/columbia-metaverse-traffic-court-case-2341167-2023-03-01

[56] Id

[57] Richard Wee, Fatin Ismail and Kimberly Chan, The Metaverse and Legal Jurisdiction, Richard Wee Chambers (Jun 30, 2024, 6:17), https://www.richardweechambers.com/the-metaverse-and-legal-jurisdiction/

[58] Id

wrongdoer. As the user explicitly agrees to the terms of metaverse and any breach would lead to consequence.[59]

Another approach is based on territory. An offence committed by a person of X country his trial will take place in X country's jurisdiction.[60]Through this way offences committed within metaverse can be kept in check. Assignment of jurisdiction is a big step towards crime regulation in metaverse. It is also important to identify other means through which crimes can be regulated in metaverse.

4. Crime Regulation in Metaverse

Virtual space has mirrored the occurrence of actual world crimes. The only difference being that crimes are committed in digital environment. The rise of virtual commodities has resulted in crimes.[61]To eradicate crime in metaverse regulation needs to be strict. Seriousness of offences should be examined. Crime regulation in metaverse requires ethical considerations.

Public institutions need to take appropriate actions against virtual crimes. It also requires private entities to assess legal damage in metaverse. It is observed that laws which regulate crimes in actual world could prove ineffective for metaverse.[62]Various nonprofit institutions are involved in developing a technological safeguard for metaverse.[63]These institutions are working on developing a code which includes elements of international conventions, Constitution, principles of international law, data management laws etc.[64]

Crime regulation in metaverse requires legal hierarchy. It is a point of deliberation amongst countries to establish such hierarchy. To build this system it is important to identify existing laws on crime and technology to integrate them in metaverse.[65] This can be implemented by taking into consideration the international conventions. To ensure global regulation of crime.

It has been observed that norms which exist in actual world when in conflict with the virtual world can cause rise in criminal

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[59] Id
[60] Id
[61] Virtual Crimes in metaverse, geeks for geeks (Jul 2,2024, 4:04 PM), https://www.geeksforgeeks.org/virtual-crimes-in-metaverse/
[62] Oleksii Kostenko, Dmytro Zhuravlov, Oleksii Dniprov, Oksana Korotiuk, Metaverse: Model Criminal Code, BJES Vol 9 No. 4, 134, 135, (2023), https://www.researchgate.net/publication/375774993_METAVERSE_MODEL_CRIMINAL_CODE
[63] Id
[64] Id
[65] Id

activity.[66]Therefore regulations should align with moral values of the actual world in metaverse. There are various crimes committed in the virtual world. It is important to identify the kind of crimes that are committed in metaverse.

4.1 Identification of Crimes in Metaverse

In recent times metaverse has seen a lot of crime. There is a concerning rise in crimes related to sexual misconduct. A probe was conducted in case related to gang rape.[67]This incident took place in a game.[68]The experience being so immersive caused trauma to the victim.[69]There is a threat that many instances of sexual misconduct can go unreported if the victim does not know the jurisdiction to be invoked.[70]

Metaverse is a host of virtual assets. Any unauthorised claim over assets can amount to trespass. It also includes any form of systematic malfunction caused to the user.[71]Theft of virtual assets are also seen in metaverse. Offenders' anonymity in the platform acts as a safeguard. It is difficult to assign the value of an asset stolen in metaverse. The Dutch apex court held that, Objects in virtual world should exhibit some value.[72]

Extortion also exists in virtual world. A threat can be made by an offender to leak confidential information in exchange of valuables. An extortion attempt was made to a firm in Italy.[73]The threat was to leak confidential data to extract money.[74]The developers must ensure the safety of user's confidential data in metaverse. Mechanism should be put in place to detect any ransomware.

Metaverse is also susceptible to publication of obscene material. It brings the risk of circulating content related to child pornography.[75]Therefore it is important that independent organisations should develop restrictive mechanisms to prevent

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[66] Christian Laue, Crime Potential of Metaverse, In: Cornelius.K, Hermann, D.(eds) Virtual Worlds and Criminality (2011), https://www.researchgate.net/publication/226170289_Crime_Potential_of_Metaverses

[67] Livemint, UK Teen virtually gang raped in metaverse game, cops begin probe, Mint (Jul 3,2024, 4:22 PM), https://www.livemint.com/news/world/uk-teen-virtually-gang-raped-in-metaverse-game-cops-begin-probe-11704257068800.html

[68] Id

[69] Id

[70] Louise Donovan, A wake up call: After alleged metaverse rape, calls to protect women and girls grow, The Fuller Project (Jul 3, 2024, 4:31 PM), https://fullerproject.org/story/a-wake-up-call-after-alleged-metaverse-rape-calls-to-protect-women-and-girls-grow/

[71] CompuServe, Inc v. Cyber Promotions, Inc,962 F. Supp. 1015, 25 Media L. Rep 1545(S.D. Ohio 1997)

[72] Judgement of 31 January 2012, Case No. 10/00101 J

[73] Tim Enterprise, The double extortion technique: the Campari case, Telsy (Jul 3, 2024, 5:51 PM), https://www.telsy.com/en/the-double-extortion-technique-the-campari-case/

[74] Id

[75] Supra Note 66

circulation of such material. It is important to assess the systems which can prevent potential crime in metaverse.

4.2 System for Preventing Potential Crimes in Metaverse

Ensuring security for the users should be the core aim of metaverse. International organisation is coming up with measures to ensure user safety in metaverse.[76]Technology has been used as a medium for enforcing laws. Through virtual reality enforcement regulations can be fructified. Metaverse can be used as a training ground for enforcement officers.

Through simulated training officers can improve their skills do deal with potential threat.[77]It can also be used for investigative purposes.[78]The platform can create a replica of the actual crime scene thereby preserving it for further analysis.[79]It will also ensure presence of a Police officer within the virtual world. Users can approach officers for violation of their rights.

A virtual community can be formed for collaborating with the police.[80]Through these lesser crimes will go undetected. Involvement of police in metaverse can ensure user security. It also helps to police to deal with actual world crimes through simulation.[81]Law enforcement of various countries can connect through metaverse for better protection of users.

However, dynamic nature of technology can be a roadblock for policing. Detection of crime can be difficult due to usage of artificial intelligence.[82]A wrongdoer may use virtual tools to relinquish their liability.[83]Therefore, it is important that law enforcement should work with private entities to put in place crime detection mechanisms in metaverse. Officers should go through relevant training to deal with virtual crimes.

It can be observed that law enforcement in metaverse is still in its nascent stages. Involvement of policy makers and a legislation dealing with technical loopholes in metaverse can help in better law enforcement. Therefore, it is important to highlight the areas that demand attention to protect users in the virtual world.

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[76] Jurgen Stock, Metaverse a law enforcement perspective, Interpol (Jul 4, 2024,8:20 PM), file:///C:/Users/Kartikey/Downloads/Metaverse%20-%20a%20law%20enforcement%20perspective%20(1).pdf
[77] Id
[78] Id
[79] Id
[80] Id
[81] Id
[82] Id
[83] Id

5. Metaverse: A New Era

Metaverse is formation of a new world. It is a part of technological innovation. Private entities are making heavy investment in the platform. It is a key market for consumer attraction. Users will interact in a digital environment. Every action of the user while interacting or buying assets in metaverse will provide data to the companies to expand their business.

Metaverse has the capability bring in a social reform. Due to is global nature it has the potential to overcome barriers posed by international borders. Users of different cultures and identities can interact in the same interface. It can improve digital literacy. It can be used for education, policing, policy making etc. Metaverse is a step towards global collaboration.

A platform that has the potential of involving millions of users requires a new framework. A framework which involves ethical, social, and legislative considerations. Metaverse will become the medium of expression. Thereby regulating unwanted expression will be a challenge. Enterprises will build their working space around metaverse. Thereby corporate governance will also play a major role in metaverse. [84]

Multiple organisations have regulatory power over metaverse.[85]It is important to define and limit those powers for enhancing user experience. Hierarchy of power can ensure better data management and preserve human rights. Tools should be put in place to curb fraudulent activities within the platform. Therefore, it important to formulate a legislative framework to overcome potential socio-economic issues in metaverse.

5.1 Requirement of Dynamic Legislative Framework

A panel should be formed to underline the major regulatory aspects of metaverse. This panel can involve policy makers, lawyers, business enterprises, non-government entities etc. While formulating a draft the committee needs to take human behaviour into consideration while using technology. This will help in making laws which can adapt to changing behaviour of a user. Any inappropriate action can be detected through AI which and the law will come into force.[86]

As technology is dynamic in nature policy makers must integrate artificial intelligence in law making. This will require collaboration with independent organisations which specialize in building preventive mechanism in the field of technology. There needs to be a separate

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[84] Luis Calzadilla, Establishing the legal system of the metaverse, Perez Burelli & Cazadilla (Jul 05,2024,5:42 PM), https://perezcalzadilla.com/establishing-the-legal-system-of-the-metaverse/

[85] Id

[86] Id

jurisdiction for metaverse. Virtual courts should be integrated in metaverse. Hierarchy of these courts should also be discerned to overcome jurisdictional issues.

While dealing with cases the courts should refrain from inordinate delays. Arbitration can also be a tool of conflict resolution for commercial matters in metaverse. The decision-making process will be helped though application of AI mechanisms. It is also important to include new terminologies in existing criminal jurisprudence to cover the crimes committed in metaverse.[87]It is important to establish the severity of the offence committed in the metaverse as opposed to the actual world.

Policy makers must investigate the quantum of punishment that is appropriate for a criminal act in metaverse. Analysis should be made of existing criminal laws while assigning penalties for crimes in metaverse. The existing digital policy framework should also be integrated. It is also important bifurcate regulatory power amongst the three state organs.[88]System of check and balance should also be adopted. By forming such policies, the policy makers will pave the way for a new form social conduct. One which is different from the actual world. Therefore, it is important to understand the socio legal conduct of metaverse with reference in comparison to actual world.

5.2 Formation of a New Socio-Legal Conduct

Metaverse will set a new standard for social conduct. Users will have similar set of rights and duties that they have in the actual world. However, its exercise will be based upon technological influence. Integrating technology is essential for user protection. User behaviour will be guided by virtual agreements. To maintain ethical standards policy makers will ensure that users do not engage in criminal activity.

If the users engage in inappropriate behaviour law enforcement agencies can get involved through AI messenger. Social groups within the platform can also inform of any acts of misdemeanour. Metaverse is an evolving platform users must ensure that their conduct is in consonance with the existing policies.

Intelligent policy making can make users more socially accountable. The concept of rights should be included for users to exercise. Users can approach the appropriate virtual court for seeking remedies. Technology can also provide citizenship to the users in metaverse. Awarding citizenship will bring user accountability. Policy makers involving representatives of countries can formulate a uniform criterion for citizenship.

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[87] Supra note 76
[88] Supra note 84

Engagement of users in metaverse can also keep public institutions accountable. Sharing of opinions amongst users can influence policy makers to follow the principles of good governance. There should also be a feedback loop where the users can put forth their concern regarding the digital framework of metaverse. This will bring transparency in the platform and private and public entities can formulate their policies based on user feedback.

6. Conclusion and Suggestions

The virtual world is filled with uncertainties. There is an ambiguity that is associated with metaverse. Implementation of laws being one of them. With several jurisdictions involved in governance of metaverse it will be difficult to form one policy. It is important that policies related to metaverse should inculcate regional and global requirements. This involves countries to implement digital laws specific to metaverse. Harmony between domestic and international regulation should be the way forward.

Metaverse is not cost efficient for many groups and countries. It is important that it becomes more inclusive. This can only be achieved when developing countries can make technology more accessible to vulnerable groups. [89]Involvement of police through simulative training can help to curb crime in metaverse. Through metaverse police can also be trained for uncommon crimes that may occur in metaverse.

Providing data safety is also a crucial element in regulation of metaverse. The ambiguity of the existing system in metaverse can be a hurdle to protect users' information. Due to its decentralised nature, it is difficult to assign liability. It is important that public institutions become the centralised authority for data protection. They can be held accountable for instances of data violation of independent organisations and act against them. The ambit of using such power should also be well defined in future policy. Certain data can be preserved for security Purposes. However, the reasons for the same should be provided to the user.

Regulation within metaverse requires futuristic approach. It is important that institutions do not restrict themselves to the existing policies related to constitutional law, criminal law etc. They must ensure that they are interpreted from a technological standpoint. Plain application of existing laws should be refrained. Thereby a comprehensive policy analysis is required for the metaverse.

[89] Supra note 38

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Game Over for Privacy?

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Abstract

The paper delves into the Digital Personal Data Protection Act, 2023 and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 in the context of the video gaming industry. With the integration of new technologies in the industry and vertical integration, it has become easier and more lucrative for video gaming companies to conduct surveillance on players. Through such surveillance, a wide variety of data is collected like biometric, physiological, gameplay-based and financial data which are put through algorithms to refine them. The refined data is used in profiling the players based on their psychological traits which are then used for deploying persuasive targeted advertisements and micro-transactions. This creates several legal questions regarding the quality of consent sought from the players, the enforcement of data privacy laws and data protection obligations that is mandated for video gaming companies. Further, two pertinent lacunae have been identified that deal with the data collected, processed, and stored which belongs to the minor and the emphasis on online gaming intermediaries self-regulating. This paper analyses these issues by looking into legal and psychological studies which study the impact of in-game purchases and targeted advertisement. Further, it suggests that that due to high market concentration, mere self-regulation is not a viable solution. The paper argues that proposed solutions that could be incorporated into the Act to resolve the above-mentioned issues includes data localisation, de-linking data collected from prescribing a higher quality of consent, differential treatment of data collected from minors and expansion of the powers of the Data Protection Board.

Keywords

Data Privacy, In-Game Purchases, Profiling, Self-Regulating Bodies, Targeted Advertisement

1. Introduction

As more people become comfortable in spending a major chunk of their lives on the cyberspace, industries like streaming, social media and video gaming companies are seeing an upward trend in their balance sheets in the post-pandemic digital era. The video gaming industry is slowly emerging as one of the biggest players in the entertainment business. This intense growth can be attributed to the incorporation of immersive technological solutions like augmented reality (AR) and virtual reality (VR), cloud gaming, streaming, machine learning (ML) and artificial intelligence (AI).

With the incorporation of such state-of-the-art technology, motion capture technology, increased fluidity of movements of character, original plot, marvellous music scores, voice-over and improved realistic graphics[1], players now have access to hundreds of hours of playable content and can pick and choose from a wide range of gameplays to interact with[2]. All this has rapidly driven consumer demand[3] but also sparked fears of violations of right to privacy of players and antitrust acquisitions within the industry.

2. Research Issues

a) Whether the provisions of The Digital Personal Data Protection Act, 2023 (DPDPA) safeguard the rights of video game players especially minors?

b) Whether a self-regulating body as proposed by The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules) is a sufficient oversight mechanism?

3. Consent, Surveillance and Targeted Advertisement

Section 4 of the DPDPA envisages that the data fiduciary can collect the data of the data principal for a lawful purpose if prior consent has been obtained and for certain legitimate uses. The Act does not define the term 'legitimate use' itself, but section 7 of the Act lists out certain legitimate uses. Moreover, section 6, which is drafted to be very similar to its counterpart in the General Data Protection Regulation (GDPR), provides that consent should be 'free', 'specific', 'informed', 'unconditional' and 'unambiguous' with a clear affirmative action. On reading section 6 with section 7, it is evident that the Act envisions that data fiduciaries will list the specified purposes for which the data

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[1]David Greenspan, 'Video Games and IP: A Global Perspective'(Wipo Magazine 2 April 2014)

[2] Anna Piechówka 'When video games meet IP law' (Wipo Magazine June 2021

[3] Clare Murray, Ceyhun Pehlivan, Verity Egerton-Doyle, John Eichlin, Alex Roberts, Ieuan Jolly, Jennifer Calver "Gaming series #1: Gaming companies face digital regulation across the globe" (Linklaters, 9 May 2023)

fiduciary is collecting, processing and storing the data of the data principal along the time period of retention of the data. However, this liability is only towards data fiduciaries. Therefore, the obligation only exists to inform the data principal of the primary uses of the data collected. If and when the data is transferred to the data processor, there exists no obligation on the data fiduciary to inform the data principal of the secondary usage of the data. This creates a loophole where the majority of the data processing can be shifted by the data fiduciary to a subsidiary or outsourced in order to avoid mandatory disclosure obligations.

This is relevant as developers of video games have access to massive high-dimensional user data generated from product telemetry that is the player's behaviour within the game[4]. This raw data is collected by tracking the placers, cross-referenced to previously collected data sets (including cross-referencing data of the same user from a different game developed by the same publisher) and then refined to profile players based on their behavioural psychology. For now, gaming companies use such profiling to modify storylines, alter difficulty levels and create new content. Along with varying the gameplay, these profiles are also used for targeted advertising. As Champandard opinions that such profiling allows video gaming companies to manipulate the physiology of the player and weaponises addiction[5].

Targeted advertisement can be in the form of textual posts, videos and images, all integrated within the gameplay itself but unlike other forms of traditional advertisement, have an underlying salient feature of persuasive intent[6]. Now, there does not exist any legal issues per say with targeted advertising as long as consent is sought for collection of data for this purpose, however, same cannot be said when targeted advertisement is aimed towards minors. Section 9 of the Act provides that the data fiduciary cannot collect, process, or store the data of a minor without the verifiable consent of the minor's guardian. Additionally, Section 9(3) expressly prohibits tracking and monitoring the minor's online behaviour and displaying targeted advertisement. The issue that arises here is that the liability of the data fiduciary only begins when the data fiduciary has knowledge that the data principal is a minor.

Most minors do not use social media networks or create accounts on games using their real credentials (name, birth date, age etc) in order to bypass detection or age restrictions. And unlike Mainland

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[4] Patrick Stafford "The dangers of in-game data collection" (Polygon 9 May, 2019)
[5] Id
[6]Zarouali B, Poels K, Ponnet K, Walrave M "Everything under control?": Privacy control salience influences both critical processing and perceived persuasiveness of targeted advertising among adolescents [2018]

China, the online gaming intermediaries in India do not have any obligation to detect whether the players are minors or not. Mainland China's stringent gaming regulations prohibit minors from gaming 10 P.M. and 8 A.M. The government has also specified a cap on monthly expenditure on in-game purchases and has limited playtime for minors to only three hours per week[7]. Pursuant to this, arguably China's biggest gaming company, Tencent has incorporated facial recognition technology (FRT), AI and ML to detect which players are minors in order to comply with the government's orders[8].

The usage of FRT to detect minors sparks greater concerns of surveillance and a police state. However, one should not be under the false assumption that under normal circumstances, video gaming companies ordinarily do not engage in tracking. Hand-movements, gestures, interest, clicks, playing style and in-game communication and purchases are all tracked and this data is transformed into readable data in order to aid the profiling of players. These targeted advertisements are also incorporated into the game's algorithm as playable and rewardable advertisement[9]. This increases the persuasive intent of the advertisement but makes it more difficult to eliminate the access of minors.

Modern research suggests that even pre-school children (as early as five years of age) have the cognitive development to understand selling intent and branding which aids brands in transforming children into potential consumers[10]. Interactive modes of entertainment like video games blurs the lines between content and advertisements coupled with lack of critical thinking skills in children makes for a very dangerous combination. The recommendation of UNICEF is that it is the moral duty of companies to protect all persons who are under the age of 18. As per the United Nations Convention on the Rights of the Child, companies should protect all persons under 18[11]. It also calls for an overhaul of the prevalent age verification process and suggests that data in regards to personal information of children should not be collected unless verifiable valid consent has been obtained[12]. Therefore, a more concrete framework should be framed for obtaining consent and protecting minors from digital surveillance and targeted advertisements.

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[7]Anna Cooban, " Tencent goes on 'Midnight Patrol' with facial recognition system that prevents minors from gaming at night" (Game World Observe,7 July 2021)
[8] Wang Lianzhang, "Tencent Deploys Facial Recognition to Detect Minors Gaming at Night "(sixth tone, 26 August 2021)
[9] Ben Eglison, 'The Unnerving Rise of Video Games that Spy on You' (WIRED, 1 February 2022)
[10] Matthew A. Lapierre, Frances Fleming-Milici,Esther Rozendaal, Anna R. McAlister, Jessica Castonguay,'The Effect of Advertising on Children and Adolescents(American Academy of Pediatrics, 10 November 2017)

[11] United Nations Convention on the Rights of the Child 1989, 1577, 3.
[12] Lisa Douglas, Sarah Nagy, ' Children and Gaming: Spotlight on Privacy, Consent and Personal Data Management (Connect On Tech, 2 June 2022)

4. The Garb of Self-Regulating Bodies

The IT Rules 2021 provides due diligence liability whereby an online gaming intermediary shall make reasonable efforts to remove any content that is harmful to a child[13] and Chapter II of the rules calls for the establishment of self-regulating bodies (SRB). The issue with SRBs is that the regulations is not binding[14] especially when certain gaming companies have a huge market concentration. Companies like Tencent, Sony, Apple, Google, Electronic Arts, Activision Blizzard and Nintendo have huge market shares and often do not respect internationally accepted rights and legal obligations as they are only liable to follow the mandate of SRBs[15].

There are four key players in the video game industry. The software of the video game is designed by the developer. Then, it is published by the publisher, who finances the development process of the game and markets it. Then comes in the game distributor. And, finally it is released in the digital platform. Most of the companies listed above have integrated these 4 players into one. Therefore, when these companies form SRBs then it's easier for them to tout the rules as they are the judge, auditor[16] and the enforcer themselves.

For instance, in the highly reported case of *Epic v. Apple*[17], Apple made it mandatory for all game developers to route their transactions through Apple Pay and levied a 30% transaction fee. Similarly, Sony was accused of abusing its dominant position. Sony allegedly indulged in unfair trade practices and also imposed a 30% fee on its PlayStation store on developers[18]. Under the Indian Competition law, such an arrangement would be considered anti-competitive as the exclusivity of the agreement negatively restricts the rights of the developer to rely upon any other platform for purchases[19]. When there exist players who have a dominant position in the market, it is unwise to assume that they would be inclined to sacrifice their advertising profits in face of self-regulation.

Another aspect of the gaming industry where the naivety of minors is persuaded is in-game purchases in 'freemium' games. 'Freemium' games run on a business model whereby downloading and playing the

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[13] Information technology Rules, 2021 Rule 3

[14] Erika Gonzalez, Mónica Vargas, Juan Hernández Zubizarreta,'Business and Human Rights: The Failure of Self-RRegulation(Transnational Institute 13 October 2016)

[15] Erika Gonzalez, Mónica Vargas, Juan Hernández Zubizarreta,'Business and Human Rights: The Failure of Self-RRegulation(Transnational Institute 13 October 2016)

[16] Foreign policy in focus,' Corporate Self-Regulation Is a Global Crisis' (Human Rights Watch 14 November 2017)

[17] Epic Games v. Apple Inc.[2020] cv-05640-YGR 4-20

[18] Shivansh Shukla, ' Ensuring Fair Play: A Call for Competition Oversight in the Gaming Industry (irrcl, 16 July 2023)https://www.irccl.in/post/ensuring-fair-play-a-call-for-competition-oversight-in-the-gaming-industry

[19] S 3(4) of Competition Act, 2002

game is free, but the developer makes a profit from in-game purchases, which are called microtransactions[20]. These microtransactions can range from buying a new skin or armour for the avatar of the player or could affect the actual gameplay whereby the player is only able to defeat the opponent or clear a level after purchasing an upgrade. Cosmetic microtransactions are an indulgence whereas limited-time offers, in-game rewards in the form of a game of chance or the promise of exclusivity are all pressure selling point[21]. These are driven by the power of streaming by platers, urgency of a limited-time quest, and frustration for being unable to progress in the game or the fear of missing out (FOMO). Its prima facie evident that these psychological triggers would affect minors more and lead to impulse purchases.

Such in-game purchases are often made in the form of loot boxes. Progress bars and frequent pop ups are effectively deployed in creating anticipation and urgency for these loot boxes. These loot boxes are purchased through in-game currency whose conversion rate to real money is solely set by the developers and does not vary like modern currency systems[22]. Coupled with the possibility of predatory pricing, these loot boxes are coded to contain a random selection of items, where the probability of obtaining the desired item is low[23]. It is purely based upon chance and not skill. This leads to the 'gamification' of games and causes an indirect financial loss to the players by exploiting the market asymmetry[24]. This market asymmetry exists as the playing and spending habits of the players is tracked. The publisher can rake up a huge profit if they use the data collected to identify the items that the player wants and then ensure that the loot boxes do not contain that item to make the player more addicted to spending until they obtain their desired item.

5. Conclusion

Both in-game purchases and targeted advertisement negatively affect the psychology of minors. This is done to influence the purchasing power of a family unit by inducing the minor through curated subliminal imagery. Such subliminal priming is embedded into the

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[20] Elena Petrovskaya, Sebastian Deterding, David I Zendle,'Prevalence and Salience of Problematic Microtransactions in Top-Grossing Mobile and PC Games: A Content Analysis of User Reviews'(ACM Digital Library 5 May 2022)

[21]Saddique Ansari,'The Economics of Microtransactions (Economics Online 3 August 2023) https://www.economicsonline.co.uk/definitions/the-rise-of-microtransactions-in-video-games.html/

[22] Prateek Agarwal,' Microtransactions In Video Games (Intelligent Economist 2 February 2022) https://www.intelligenteconomist.com/microtransactions/

[23] Daniel L. King* Paul H. Delfabbro,' Predatory monetisation schemes in video games (e.g., 'loot boxes') and Internet gaming disorder (Online Library)https://onlinelibrary.wiley.com/doi/am-pdf/10.1111/add.14286

[24] Elena Petrovskaya, Sebastian Deterding, David I Zendle,'Prevalence and Salience of Problematic Microtransactions in Top-Grossing Mobile and PC Games: A Content Analysis of User Reviews'(ACM Digital Library 5 May 2022)

game and aims at appealing to the basic emotions of minors[25]. This not only aids in showcasing a compelling storyline but also paints the advertised picture in a positive light. This is only possible when massive amounts of the minor's data are collected and refined through AI and ML.

Meta has reportedly patented a VR headset that collects biometric data. AI-enabled headsets are more powerful in tracking the gameplay of the user[26]. This can be effectively used to deduce the preferences of the player after refining the data by putting it through algorithms that incorporate personality and psychological tests. This increases a company's ability to monetise the collected data by curating advertisements and in-game purchases that appeal to the taste of the player. This leads to the player's preferences being reduced to monetisable data. And despite consent being obtained, it cannot be deemed to be 'free' and 'informed' unless the player is aware of such profiling. This could potentially mean that even such collection of data falls under 'legitimate use'[27], it is not in the 'legitimate interest' of the player.

A combination of gameplay tracking, location, physiological sensing, affective computing and biometric data like voice, facial expressions, heart rate, skin response, eye tracking, click-through rates[28], gesture recognition coupled with banking details, social media profiles, postal address, email address, web beacons, tags allow researchers to not only create psychological profiles (based on how users respond to stimuli in the game) but re-identify the players as their real-life counterparts[29]. Again, correlating gameplay data with the real-life personality of the player is not per se an issue until such correlation is used to solicit players, especially children and adolescents based on their personal politics (gender, racial, religious, sexual identity)[30].

A proposed solution to this issue is that the essential or functional data collected from minors should be mandatorily de-linked and made anonymous to limit the processing of the data. This will effectively disallow the data fiduciaries from tracking and conducting psychological profiling if the stored data cannot be verified or

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[25] Timo Saari, Niklas Ravaja, Jari Laarni, Marko Turpeinen, Karo Kallinen,' Psychologically targeted persuasive advertising and product information in e-commerce'(ACM Digital Library March 2004)

[26] Taylor Wessing,'AI, Data and Gaming' (Lexology 1 August 2023)

[27] Digital Personal Data Protection Act 2023, s 7

[28]SC Matz, M Kosinki, G Nave, DJ Stillwell,' Psychological targeting as an effective approach to digital mass persuasion'(PNAS 13 November 2017)

[29] Id

[30] Ben Eglison, 'The Unnerving Rise of Video Games that Spy on You' (WIRED, 1 February 2022)

recognised[31]. This also aids in furthering the objective of purpose limitation so that no further processing of the data can be done beyond the reasons justified for the original collection of data[32]

The DPDPA should ideally not only prohibit the collection of non-essential or non-functional data and tracking of minors but also provide a more definite model for consent and give more powers to the Data Protection Board (DPB). More often than not, in order to comply with the obligation to obtain 'free' and 'informed' consent, websites, social media intermediaries and online gaming intermediaries create options for what categories of cookies (cookies are used to track and store user preferences) users can give consent to. However, such consent cannot be a catch-all requirement for all processing activities, especially when it comes to minors[33]. Minors cannot qualify to give consent under law, and the assumption that their online activities are constantly supervised by guardians is not reasonable. As gaming companies profit off minors, the law should provide some liability for them to identify minors, not track non-essential data, set a time limit for deletion of non-functional data, and implement security measures in regard to storage of data. Such measures could include de-linking data through anonymisation especially when the data is transferred to data processors, incorporation of blockchain, data localisation (to prevent the data from being mined in jurisdictions with weaker or no data privacy legislation) and other data security measures.

The DPDPA does not mandate localisation but states that by notification, the government can restrict the transfer to certain foreign jurisdictions[34]. A very pertinent case for data localisation, especially the data of minors, would be that of PUBG: Battlegrounds. Developed by Tencent games, the game was banned in India in the wake of the COVID-19 pandemic in 2020 when the Ministry of Electronics and Information Technology (MeitY) received multiple complaints that the personal data of the players were being transferred to servers located in Mainland China and then mined such data to profile Indian citizens[35]. Such data includes payment information, biological data, and in-game communication. When these data sets are put through AI and ML, the psychological profiles of the players can be used for surveillance as well as using manipulative tactics against these players. Such a national security threat can also exist if these data sets are collected and then correlated to data collected by the State and its instrumentality for other sources like AI-enabled traffic cameras,

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[31] Anonymous,' Microsoft word' anonymise.doc

[32] Sophie Stalla-Bourdillon and Alison Knight,' Anonymous data v. Persona data—A false debate: An EU perspective on anonymisation, pseudonymisation and personal data' (fpf. Org)

[33] Dentons,' Practical implications for video games industry regarding EU Data Protection and Privacy law'(Dentons 5 July 2023

[34] Digital Personal Data Protection Act 2023, s 19

[35] Dr. Debastuti Dasgupta and Soumyadeep Sarkar,' Privacy: A myth in online gaming? (masscomjournal.com 21 May 2022)

health and insurance applications, tax and banking records and other digital footprints. This aids in creating very comprehensive profiles of the population.

Ergo, a body must exist which can investigate such transgressions and take effective preventive and punitive action. The powers and functions of the DPB explicitly mention that it can launch an investigation against a data fiduciary on receipt of an intimation of breach of personal data, a complaint received from a data principal, by court order or by reference of the central government[36]. Suo moto powers of investigation are not mentioned, which severely curtails the scope of investigation. Furthermore, the board is only empowered to levy monetary penalties[37] and is not authorised to order punitive punishment. Such a body is not well equipped to oversee a digital landscape that is dominated by data collection, user profiling, ML and AI.

Likewise, the Act also fails to differentiate between personal data and sensitive personal data. As a consequence, the Act does not provide any additional obligation to data fiduciaries to protect biometric data. Section 43A of the IT Act coupled with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 does protect financial data as sensitive personal data[38]. However, the failure lies in the fact that no concrete data protection measure is specified, even for data collected from minors.

[36] Digital Personal Data Protection Act 2023, s 27
[37] Digital Personal Data Protection Act 2023, s 33
[38] Legal Lands LLP, 'The Flow Of Payments In Online Gaming Business - Volume II: Legal & Tax Implications - Gaming India (mondaq.com 21 November 2023)

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Balancing Digital Transformation: India's Telecommunications Act of 2023 and the Quest for Privacy and Security

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Abstract

The Telecommunications Act of 2023 marks a significant overhaul of India's telecommunications sector regulatory framework, replacing outdated laws from the colonial era. This legislation aims to modernize governance, enhance competitiveness, and address emerging challenges in digital communication, including Over-the-Top (OTT) services. However, it has sparked considerable debate due to its broad definitions and extensive governmental powers, particularly regarding message interception and data privacy. Critics argue that the Act's provisions, such as those allowing for the interception of communications during emergencies and the collection of traffic data, could potentially infringe on fundamental rights. Drawing comparisons with international practices, particularly in the UK and EU, the paper highlights varying approaches to balancing security needs with privacy protections through judicial oversight. Highlighting concerns pertaining to biometric data collection requirements, echoing past constitutional challenges, the paper emphasizes the need for rigorous safeguards, accountability measures, and transparent rule-making processes to ensure that the Telecommunications Act 2023 effectively supports innovation while upholding constitutional principles and safeguarding individual rights in India's evolving digital landscape.

Keywords

Telecommunications Act 2023, Regulatory Overhaul, Data Privacy, Message Interception, Judicial Oversight.

1. Introduction

India has seen a mixed evolution of telecommunication, but the enactment of the Telecommunication Act 2023[1], appears to change the way telecommunication functions in India. The recent Act, which replaces the Indian Telegraph Act 1885[2] and the Indian Wireless Telegraphy Act 1933[3], seeks to provide a modern legal framework for the oversight of the telecoms sector. A question that immediately comes to the fore in this new digital-first world is how the Act weighs the legitimate interests of the telecom industry against the users' fundamental rights.

Presidential assent was granted to The Telecommunications Act 2023[4] on Dec. 24, 2023, making it a law. This seeks to revive the telecom sector by replacing laws that every part of which is obsolete as well as ancient. The Act aims to regulate licensing and spectrum and promote competition and growth in the sector.[5]

2. Concerns Over Broad Definitions and Government Authority

The Telecommunications Act of 2023[6] fundamentally defines 'telecommunications' in Section 2(p)[7], a provision that has drawn criticism for its broad scope, potentially encompassing all forms of digital communication, including Over-the-Top (OTT) services. According to Section 20(2)[8], the legislation gives the Government the authority to intercept and keep messages or to stop services during public emergencies to guarantee the safety of the public, the nation, and the integrity of India.

Moreover, Section 22(2)[9] permits the Government to gather, keep, examine, and share 'traffic data' linked to telecommunications systems. 'Traffic Data' is defined as "any data generated, transmitted, received, or stored within telecommunications networks, including information on the type, routing, duration, or timing of communications." Critics argue that by leaving significant operational aspects of the Act to delegated legislation, particularly the formulation of rules, the Government risks undermining personal liberties and sidestepping parliamentary scrutiny.

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[1] The Telecommunications Act, 2023, No. 44, Acts of Parliament, 2023 (India).
[2] The Indian Telegraph Act, 1885, No. 13, Acts of Parliament, 1885 (India).
[3] The Indian Wireless Telegraphy Act, 1933, No. 17, Acts of Parliament, 1933 (India).
[4] *Supra* note 1.
[5] *President signs Telecom Act, rulemaking to follow for implementation*, The Hindu (Jan. 22, 2023), https://www.thehindu.com/news/national/president-signs-telecom-act-rulemaking-to-follow-for-implementation/article67674004.ece
[6] *Supra* note 1.
[7] The Telecommunications Act, 2023, § 2(p), No. 44, Acts of Parliament, 2023 (India).
[8] The Telecommunications Act, 2023, § 20(2), No. 44, Acts of Parliament, 2023 (India).
[9] The Telecommunications Act, 2023, § 22(2), No. 44, Acts of Parliament, 2023 (India).

The Indian Telegraph Act allows for message interception to safeguard India's integrity, sovereignty, public order, security, or diplomatic relations with other nations. This provision was challenged in the Supreme Court in PUCL v. Union of India[10], invoking Article 19[11] of the Constitution.

Section 419A of the Indian Telegraph Rules, 1951[12], and the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017[13] are regulatory frameworks designed to regulate and govern the interception of messages and the temporary suspension of telecom services in India. These rules were crafted in response to legal challenges and directives from the Supreme Court of India, ensuring that they conform to constitutional principles and safeguard fundamental rights while addressing national security concerns.

3. Government Surveillance and Privacy Rights: A Global Perspective

The new legislation enacted by the Indian Government grants them the power to intercept messages and present them in an "intelligible format," bypassing any concessions for encrypted messaging services. This poses a serious threat to the core feature of end-to-end encryption, which guarantees that messages are only accessible to the sender and the intended recipient(s), including the service provider.[14] Strict provisions of this Act could force secure services to cease operating in India, and as a result, just as in privacy, we would be nullifying free speech also, which only adds to our vulnerability in these days of increased cyber-attacks and greater surveillance. Design changes in encrypted platforms to facilitate access introduce potential risks, including the possibility of mass surveillance by multiple actors. This might eventually have security implications to the internet and reduced cyber resilience to individuals, businesses, and government bodies.[15]

India's structure of interception is similar to that of the United Kingdom but differs in some areas. While in the USA and, to some extent, Australia, the power to intercept the messages is with the Judicial branch of the Government; in the UK and in India the power

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[10] People's Union for Civil Liberties vs. Union of India & Ors., AIR 1997 SC 568.
[11] INDIA CONST. art. 19.
[12] Indian Telegraph Rules, 1951, § 419A (India).
[13] Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (India).
[14] Srishti Sharma, *Surveillance State or Secure Nation? Unveiling the Interception Powers in India's Telecom Act*, Live Law (Apr. 15, 2023), https://www.livelaw.in/articles/surveillance-state-or-secure-nation-unveiling-the-interception-powers-in-indias-telecom-act-246058
[15] Aprajita Rana, Arjun Uppal & Atima Mukherjee, *Analysis of the Telecommunications Act, 2023*, AZB & Partners (Apr. 1, 2023), https://www.azbpartners.com/bank/update-the-telecommunications-act-2023/.

of message interception is with the Executive branch of the Government. The Investigatory Powers Act 2016 (IPA)[16] and the Interception of Communications Code of Practice[17] in the UK regulate communication interception.[18]

However, in the UK, the IPA prescribes the use of an Investigatory Powers Commissioner who must submit a yearly report regarding the functioning of the system to the Prime Minister. It must also be submitted to Parliament and circulated to the public.

The problem of the broad definition in the Indian Act is also present in the UK. The UK's Investigatory Powers Act (IPA) takes a similarly broad definition of the 'telecommunication system', and the UK's attempts to regulate telecommunications are likewise the subject of ongoing displeasure. That is primarily because of the difficulty of drawing the line between over-regulation and under-regulation when it comes to defining new technologies. The European Union has addressed these challenges by drawing a distinction between ECS, which covers standard voice and text-message services, and ISS, which typically falls under the OTT category.[19] This differentiation is crucial as it delineates between services that are traditionally regulated as telecommunications and those provided over the Internet, often via third-party platforms or applications.

In 2023, British companies offering communication applications said they would quit the country because of proposed measures in the Online Safety Bill, which include provisions for disclosure, interception, and data retention to protect children from sexual harassment. Many companies like WhatsApp or Apple introduce and market their products particularly highlighting their abilities to ensure the users' safety.[20] Thus, iMessage and WhatsApp interchanges are end-to-end encrypted; even if a message were intercepted during transmission, it would be decipherable only by the sender and receiver, which helps keep the communication private and beyond the reach of the companies. The Government of the UK seeks to access these communications, putting tech companies in a position where they must consider the costs of complying with UK regulations or exiting

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[16] Investigatory Powers Act, 2016 (United Kingdom).
[17] Communications Code of Practice, 2018 (United Kingdom).
[18] White, *Surveillance, Law, and Data: The Impact of Telecommunications Regulations on Privacy in India* (Ph.D. thesis, Sheffield Hallam University, 2019), https://shura.shu.ac.uk/24341/1/White_2019_PhD_SurveillanceLawData.pdf
[19] *Data Protection in the European Union: The Reform of Directive 95/46/EC and the General Data Protection Regulation (GDPR)*, European Parliamentary Research Service (2016), https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586641/EPRS_BRI%282016%29586641_EN.pdf
[20] UK surveillance law changes could force Apple to withdraw security features, *The Guardian* (Jul. 20, 2023), https://www.theguardian.com/technology/2023/jul/20/uk-surveillance-law-changes-could-force-apple-to-withdraw-security-features

the market. Although the concerns about the spread of sexual abuse and national security are legitimate, it is essential to have a well-informed perspective on proportionality and the appropriate extent of interception needed to achieve these aims. This issue is especially critical for India, where the authority to intercept communications is vested in the executive branch rather than a judicial or independent body.

Europe has faced numerous legal challenges concerning data retention and interception systems. In the case of Big Brother Watch v. United Kingdom[21], the Grand Chamber of the ECHR ruled that with its mass interception system under the Regulation of Investigatory Powers Act 2000.[22] The Court ruled that the interception system lacked sufficient independent protections; and therefore, was unlawful under the ECHR. This was not done until 2023, when this was corrected. This case was considered by the UK Court of Appeal in 2023 where the challenge to the regulation of IPA concerning the mass data retention provisions. The Court said that the given Act, in broad terms, provided adequate protection in general and dismissed the claimants on several counts, though agreed with the claimants in safeguarding journalistic materials and data contained within large personal data sets. Thus, in the UK, the comprehensive provisions outlining procedural safeguards have been acknowledged by the ECHR, necessitating stringent checks and balances for Government interception to meet legal standards.

Thus, India at the present moment of time does not have any exhaustive provisions, and the degree of privacy protection or invasion will only be revealed once the rules are set. Further, Section 69-A of the Information Technology Act 2000[23] can be initiated by the Government, which has been deemed constitutional by the Hon'ble Supreme Court of India and has been implemented earlier to block specific applications. For example, the Government banned several apps such as TikTok in the year 2020 and ordered the app stores to delete the apps on the basis of national security.[24] This highlights the disconnect between the Internet and telecommunications sectors, where the Government has developed mechanisms to apply executive control. The broad meaning of telecommunications will become even more important as Parliament, or the Executive further controls the service providers.

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[21] Big Brother Watch and Others v. the United Kingdom, App. No. 58170/13, Grand Chamber.
[22] Regulation of Investigatory Powers Act, 2000 (United Kingdom).
[23] Information Technology Act, 2000, § 69-A, No. 21, Acts of Parliament, 2000 (India).
[24] Government bans 59 apps including TikTok, WeChat, *The Hindu* (Jun. 29, 2020), https://www.thehindu.com/news/national/govt-bans-59-apps-including-tiktok-wechat/article31947445.ece.

4. Legal Authority and Search Power: Balancing Law Enforcement and Civil Liberties

Section 42 of the 2023 Act[25], as has been mentioned before, is akin to Section 7 of the Wireless Telegraphy Act 1933[26]. It empowers any officer authorized to search any buildings, vehicle, aircraft, or place if any officer has a reason to believe that there are unauthorized Telecom networks, Telecom equipment, or radio equipment being concealed.

According to the Section 165 of the Code of Criminal Procedure, 1973[27], the search can be conducted by the police station officer or the investigating officer within the jurisdiction if the officer has some reasons to believe that some articles which may be necessary for investigation are available at that place. However, the officer must also believe that getting a search warrant would take too much time and that is where the officer can dispense with the requirements of getting a search warrant.

In the case of State of MP v. Paltan Mallah[28], the Hon'ble Supreme Court of India ruled that just because a search was conducted unlawfully, it doesn't automatically mean that any evidence found during that search will be excluded. Indeed, it does not. After evaluating whether there has been a breach of an express legal provision and/or a Constitutional right and any prejudicial effect on the accused has been deemed minimal, the Court may admit the recovered evidence. Indian courts are usually more inclined towards the reception of the evidence rather than its exclusion on questions of procedural form. While the nature of the authority conferred by Section 42[29] of the Act appears to be quite extensive, and therefore potentially quite open to abuse, it is by no means unique, in the present writer's opinion.

5. Biometric Data Collection and Privacy Concerns

Section 3(7) of the 2023 Act[30] also requires the authorized entity conducting telecommunication services to place the identity of the users on a biometric basis. Under section 4 of the Telegraph Act[31], service providers were able to collect Aadhaar, Passport, or any other officially valid means for identification. In the case of Puttaswamy v. Union of India[32], the Supreme Court declared the use of Aadhaar for

[25] The Telecommunications Act, 2023, § 42, No. 44, Acts of Parliament, 2023 (India).
[26] The Indian Wireless Telegraphy Act, § 7, 1933, No. 17, Acts of Parliament, 1933 (India).
[27] The Code of Criminal Procedure, 1973, § 165, No. 2, Acts of Parliament, 1974 (India).
[28] State Of M.P Through C.B.I., Etc vs Paltan Mallah, AIR 2005, SC 733.
[29] Supra note 17.
[30] The Telecommunications Act, 2023, § 3(7), No. 44, Acts of Parliament, 2023 (India).
[31] Supra note 2.
[32] Justice K.S. Puttaswamy (Retd) vs Union of India, AIR 2018, SC (SUPP) 1841.

SIM cards as unconstitutional. Consequently, service providers received instructions to accept alternative documents such as Proof of Identity and Proof of Address to comply with Know Your Customer (KYC) requirements. The Telegraph Act[33] clearly provided the three measured positive for the identity checkpoint and subscribers were free to select any of the three. Currently, the Department of Telecommunications has withdrawn the use of paper-based KYC for SIM card connection with e-KYC.

Based on the decision in the Puttaswamy case[34], the Supreme Court said that the linking of the SIM cards with Aadhaar was a violation of the test on proportionality. As noted in paragraph 283 of the Court, biometric information is considered as one of the most sensitive pieces of individual data, and as such within a global market, it may be a subject to strict and diverse commercialization. According to the Supreme Court, Aadhaar was not the least intrusive measure for the biometric authentication of identity and thus declared the linkage aadhaar unconstitutional. The argument could be made that biometric data could be a proper identification method if certain measures have been established and a relationship between keeping such fraud involving SIM cards and biometric identification is evident. However, the Act lacks in these protective measures and thus may result in a scenario like that given in the Puttaswamy case[35].

In the Puttaswamy case[36], the Supreme Court established a three-fold test for laws to pass under Article 21[37]: Of these, there is (i) legality, which simply requires that owing to its legal origin, the interference is legal; (ii) legitimate aim which checks the existence of a legitimate state goal; and (iii) proportionality which checks for a rational or logical relationship between the means and the aims. This could be a challenge to substantiate as recent and ongoing accounts of data violation and aggression are still current and frequent on Indian federal establishments.

As per the new update in the year 2023, the Aadhaar and Passport details of the 815 million Indians were found to be leaked, and these details could be purchased in the market.[38] Under these conditions, the Government finds itself in a two between two rocks situation. If biometric data is a crucial factor used in the management of the telecommunications sector then the Government has a disappointing signal that is confusing the general public in terms of the security of the data being collected. On the same note, if such data breaches are

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[33] Supra note 2.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] INDIA CONST. art. 21.
[38] How the personal data of 815 million Indians got breached: Explained, *The Hindu* (accessed Jun. 18, 2024), https://www.thehindu.com/sci-tech/technology/how-the-personal-data-of-815-million-indians-got-breached-explained/article67505760.ece

dismissed, then the third part of the Puttaswamy test, namely proportionality, is negated.

6. Suggestion & Conclusion

It could also gain from a look at the UK Electronic Communications (Security Measures) Regulations 2022[39], and the Telecommunications Security Code of Practice 2022[40], in terms of the need to balance the protection of personal liberty and public safety. Under Section 105A of the Telecommunications Security Code[41], several security controls are mandatory that telecom providers need to deploy and have proper procedures for risk management with respect to security breaches. These regulations require that the network and service providers protect their public networks and help the third-party suppliers minimize cybersecurity risks. OFCOM, the UK's communications regulator, has been given increased enforcement authority to protect telecom networks and ensure compliance with these security obligations.

To mitigate this issue, legislative rules should be implemented. For instance, all communication services should employ superior encryption to guarantee that nobody is eavesdropping. The government interception frequency and types should be reported more frequently so that there is a direct relationship between the intercepted communication and the authority responsible for the interception. The interception events should be conducted in accordance with the warrants or the court order approvals to improve the judicial relevance and to maintain legal consistency. Interception should be allowed only when consent has been given by the users and only in cases where users cannot be told since this will jeopardize investigations or national security. Further, limits on the collection and processing of personal data should be adhered to by applying the principles of data minimization. It is important to have independent bodies conduct the interception operations in order to deter the arising of abuses.

It is essential to solve these problems in order to build a systemic legal regulation that would guarantee equality and confidentiality in supervision and violation prevention, as well as the legislation for the telecom sector development. Thus, the goal of addressing the needs of the telecommunications law while staying within the constitutional framework is to balance between the stimulation of innovative development and the protection of individuals' rights.

Thus, the goal of this paper is to focus on the contentious tendencies of the recent Telecommunications Act to emphasize that

[39] The Electronic Communications (Security Measures) Regulations, 2022 (United Kingdom).
[40] Telecommunications Security Code of Practice, 2022 (United Kingdom).
[41] Telecommunications Security Code of Practice, 2022, §105A (United Kingdom)."

few of its provisions are not unique concerns but the re-statement of the previously discussed issues. Concerning the cases of search and seizure, as well as message interception, there are frequent contacts. Fears regarding the issue of large-scale spying are directly related to the government's approach to OTT platforms or other service providers that are not normally considered part of telcos.

The Telecommunications Act perhaps has had the most radical effect in defining the meaning of the Right to Privacy since the statute has not yet spelt out some of the most crucial doctrines that governments collect, intercept, and store data. This could indicate that the Act that will be created will itself be made up of subordinate regulations that will help to create a complete set of regulations. At the same time, the role of the principle of proportionality will remain the primary measure by which the Telecommunications Act will be assessed and potentially challenged. At present, what is required is a proper, deliberate debate on some aspects of the legislation and why interception is sometimes necessary, with a clear distinction in the minds of the public about the thin line being towed. India was in a unique position where they could learn from the Western and Global North countries' experiences to prepare for the problems that were usually observed in cases dealing with interception and data regulation systems.

For the Telecommunications Act to gain credibility, it must reshape the current telecom regulatory framework through detailed rules that incorporate protection, well-justified provisions, and a degree of responsibility in what has historically been an unmonitored administrative environment.

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The Uniform Civil Code: A Path Towards Equality or Erosion of Traditions?

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Abstract

Article 44 urges the State to form one civil code that extends to the whole of India across all territories, and applies to all citizens, irrespective of caste, creed, or religion. This paper examines the concept of a Uniform Civil Code (U.C.C.) in India, aiming to harmonize disparate civil laws governing marriage, succession, and other aspects. Despite a uniform criminal code, India's civil laws remain fragmented, with divergent laws governing marriage, inheritance, and other civil matters. This paper critically evaluates the historical and contemporary contexts informing the U.C.C. debate, including opposition to its implementation. Critically examining existing literature and judicial pronouncements, it analyses the complex interplay between customary laws, religious practices, and modern legal frameworks. It presents a model U.C.C. informed by a nuanced understanding of India's diverse social and cultural landscape. The paper contributes to the ongoing U.C.C. discourse, highlighting the need for a balanced approach that reconciles legal uniformity with social and cultural diversity. By exploring the relationships between law, culture, and society, this paper provides a nuanced understanding of the potential benefits and challenges of implementing a U.C.C. in India and aims at informing and enriching the ongoing debate on U.C.C. promoting a more inclusive and equitable legal framework.

Keywords

Uniform Civil Code, Uniform Criminal Code, Customary Laws, Religious Practices, Social and Cultural Landscape

1. Introduction

India is a land of diverse cultures. With the advent of the Indo-Aryans, 'Hinduism' came into existence, closely followed by 'Buddhism' and 'Jainism'. Soon in the medieval period, rulers from Turkey, Central Asia[1] and surrounding regions invaded India and established their kingdom in Delhi, whereby 'Islam' was introduced in the country and Muslims came into the scenario. Soon in 1526, the Mughals were sitting in Delhi, and finally, the British set foot on this land of diversity. Alongside, several religions, such as Christianity, Sikhism, Judaism, etc., began thriving and developing in India, and that is how India became what it is today, with its diverse culture, religion, language, communities, and 'personal laws'.

1.1 What are Personal Laws?

As a country, India caters to citizens from several religions. In order to understand personal laws and the diversity in it, one must understand what precisely a religion is. A religion is a human being's relation to that holy/sacred/spiritual being in which they vest their belief.[2] In Hinduism, it is believed that there are 33 Crores Gods and 3 of them are the supreme power ruling the world, namely Brahma(who is regarded as the creator), Vishnu(the one who preserves), and Maheshwar/Shiva (the destroyer)[3]; on the other hand, Muslims are of the belief that Allah[4] is the Supreme power and Prophet Mohammed was His messenger, to whom messages were transmitted by the Angel Gabriel related to the principles of law and life. Christians believe in the 'Trinity' which can translated to 'Three Parts of God' which are – God the Father, God the Son (Jesus or the Redeemer), and God the Holy Spirit or Sanctifier and believe that Jesus departed from Earth for the sake of humanity but will again return at the end of time.

Owing to this diversity and contradiction in beliefs, every religion has devised its own set of laws, which is regarded as the 'personal laws' of each religion. While the personal laws of some religions are 'codified', some remain uncodified till date. For example, Muslim law is uncodified and interpretative, whereas Hindu law is codified. Even though the Indian Legislature has devised several statutes for governing the followers of Islam, it still remains uncodified and highly based on the interpretation of the jurists. In the case of Christian laws,

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[1] India: A historical overview, Asia Society, https://asiasociety.org/india-historical-overview?hl=en_US (last visited Jun 30, 2024).
[2] Religion, Encyclopædia Britannica (2024), https://www.britannica.com/topic/religion (last visited Jun 30, 2024).
[3] Hindu concepts about God, https://www.hinduamerican.org/wpcontent/uploads/2019/12/HinduConceptsAboutGod2.0_2.pdf (last visited Jun 30, 2024).
[4] GainPeace, Who Do Muslims Worship? , (https://www.gainpeace.com/about-allah/who-do-muslims-worship) (last visited June 30, 2024).

even though it remains uncodified and is derived from several sources such as The Bible, teachings of the Church, etc., in India, Christian personality is codified when it comes to the aspects of marriage, divorce and succession. Therefore, the existence of personal laws is acknowledged by the society but how far has it been acknowledged by the Constitution of India?

1.2 How does the Constitution Play a Role?

The Indian Constitution has multiple basic features which are so well protected by the Judiciary that these features, which are included in the 'Basic Structure' of the Constitution, cannot be amended like the other existing legislations. Of its several basic features,

'Secularism' is another feature of the Indian Constitution, which was added to the statute in 1976 in the 44th Amendment Act[5]. The term 'secularism' means that the State shall have no religion of its own and all persons of the country shall be equally entitled to the freedom of their conscience and have the right freely to profess, practice, and propagate any religion. This interpretation has been made by the Apex Court in the case of *Indira Nehru Gandhi v. Raj Narain*[6] and the same was reiterated in a subsequent case of *S.R. Bommai v. Union of India* in 1994.[7]

Therefore, 'Secularism' was introduced as a pivotal feature in the Indian Constitution and India continued to play the role of 'home' to people from diverse backgrounds. Alongside, Articles 25 and 26 of the Indian Constitution[8][9], also played a major role in upholding the principle of secularism by allowing the citizens to profess, practice, and propagate whichever religion they liked, to form and maintain institutions for religious and charitable intents, and to manage its affairs in the matter of religion.

However, while the idea of secularism was implanted into the minds of the citizens of India, it soon gave rise to problems such as polarization based on religion, where religion was exploited by the political parties for their electoral interest, instead of evident or tangible development. Also, different religions meant different personal laws and this often resulted in unequal treatment of women. Different religions also bring forth several cultural practices, customs, traditions, and related norms. Thus, issues were attached to the creation of a diversified societal structure, nonetheless.

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[5] India Const. amend. 44.
[6] Indira Nehru Gandhi v. Raj Narain, (1975) 2 S.C.R. 347 (India).
[7] S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1 (India).
[8] India Const. art. 25.
[9] India Const. art. 26.

1.3 The Advent of the Uniform Civil Code (U.C.C.)

Currently, there are 25 parts in the Constitution, which was not the case when the Constitution came into existence with 22 parts. However, through the years, several amendments have changed its structure, and the Constitution of India now has 25 parts, 448 Articles, and 12 Schedules. While several Constitutional provisions have been interpreted by the Judiciary time and again, one of the widely discussed chapters of the Constitution is Chapter IV, which contains the 'Directive Principles of State Policy', which extends from Article 36 to Article 51. In simple terms, the application of the provisions contained in this Chapter can be described as provisions that are not enforceable by a Court of law but are nevertheless fundamental in the governance of the nation and the State is bound to apply these principles while making laws.

Article 44, which is one of the key provisions under this chapter, is often regarded as existing in contradiction with personal laws. The necessity for a Uniform Civil Code has been recognized under Article 44, which states that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'.[10]

2. Uniform Civil Code – A Breakthrough Concept for a Secular Societal Scenario

A Uniform Civil Code refers to such a Code that has uniform provisions for all citizens within the nation's territory, applying to all, irrespective of caste, creed, or gender. While this may sound like a good concept when related to Article 14[11] which vouches for 'equality', the way it contradicts the established idea of personal laws has not gone unnoticed. Personal laws, which happens to be a very important aspect of Indian society, are threatened by the Uniform Civil Code, which defeats the positive rationale behind the notion of a uniform law.

2.1 Historical Context of the Uniform Civil Code in India

During the colonial rule in 1835, the law commission of the British East India Company put forth the recommendation for the formation of a Uniform Civil Code, and consequently in 1864, the Indian Law Commission was established to review and reform[12] Indian laws primarily. Soon after, the Indian National Congress (I.N.C.) and other such groups began vouching for the formation and implementation of a uniform set of laws for civil conduct in India, and a resolution was

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[10] India Const. art. 44.

[11] India Const. art. 14.

[12] What is Uniform Civil Code in India: Article 44 [UPSC notes] BYJUS (2024), https://byjus.com/free-iasprep/need-for-a-uniform-civil-code-in-a-secular-india/#:~:text=Historical%20perspective%20%E2%80%93%20The%20debate%20for,the%20colonial%20period%20in%20India.&text=The%20Lex%20Loci%20Report%20of,to%20crimes%2C%20evidence%20and%20co ntract (last visited Jul 15, 2024).

put forth in 1937 with an objective to replace the existing personal laws with a U.C.C. However, when the British considered the same, the Government faced opposition from various religious groups across the country. Therefore, the concept of a Uniform set of laws for civil conduct dates back to the pre-independence era, but no groundbreaking developments have occurred so far. While the picture hasn't changed much since 1947, the notion of having a Uniform Civil Code was incorporated into the Indian Constitution after Independence. When the Constitution came into force in 1950, the concept of the Uniform Civil Code was finally incorporated officially under Article 44 of the Constitution.

2.2 Difficulties in achieving consensus on a unified code.

Religion has been a very sensitive aspect to dwell upon, right from the very initiation of Indian society as a melting pot of cultures and traditions. While a uniform civil code sounds like just the right thing for a country, it is easier said than done for a country like India. Cultures and traditions are often interpreted as a part and parcel of religion. Religions are the originating point for Personal Laws. Therefore, if U.C.C. abolishes personal laws and creates a uniform law for all the citizens within the Indian territory, then it does infringe upon the right of a citizen to practice their religion and other related fundamental rights. Owing to such erroneous ideas, quite a lot of Indians are against the notion of U.C.C. and do not vouch for the implementation of the same, rejecting any need for uniformity in secularism. While there aren't any comprehensive records or reports available that trigger a conducive hope for the implementing a uniform code, the Law Commission of India in the past few years has opened up its portal seeking opinions of the general public of India about the implementation of a Uniform Civil Code. However, no report has been brought forward yet regarding the same by the Commission based on the opinion retained.

While a lot of Indians refuse to be detached from their customs and traditions by the implementation of U.C.C., a lot of countrymen are vouching for its implementation as well. Before the 2024 Lok Sabha elections, the Centre for the Study of Developing Societies conducted a survey regarding the implementation of the Uniform Civil Code in India seeking the opinion of the citizens. [13] Hereby, it was noticed that of 10,019 survey takers, 29% were of the opinion that U.C.C. would empower women, whereas 19% thought that it might interfere with religious traditions. 26% of such surveyees didn't put forth any opinion

[13] Jyoti Mishra & Abhinav Pankaj Borbora (2024) *CSDS-Lokniti 2024 pre-poll survey: Key Decisions and political implication for B.J.P.*, *The Hindu*. Available at: https://www.thehindu.com/elections/lok-sabha/csdslokniti-2024-pre-poll-survey-key-decisions-and-political-implication-for-bjp/article68054244.ece (Accessed: 09 July 2024).

whereas the remaining 26% weren't even aware of U.C.C. As for the citizens who took the survey, it included Hindus, Muslims, Christians, Sikhs, and other religious minorities.

While ambiguity regarding the implementation of the U.C.C. exists, so do people who are supporting such implementation, looking forward to bringing forth a uniform structure throughout the Indian legal system.

2.3 UCC and Equality – Constitutional Guarantees of Equality and U.C.C.

Article 14 and Article 15 of the Indian Constitution guarantee equality and prohibits discrimination on the basis of certain aspects. Article 14 places an obligation upon the State to not deny any person equality before the law and to equally protect the law within the territory of India. Alongside, Article 15 prohibits the State from discriminating upon the grounds of religion, race, sex, place of birth, or any of them. These two provisions are the primary provisions that hold up the notion of equality for Indian citizens. The main objective of introducing a Uniform Civil Code is to bring about uniformity in the Indian legal system and therefore it aligns well with the notion of equality under Articles 15 and 16. Apart from the religious aspect, it'll bring about a revolutionary shift in the scenario regarding the protection and empowerment of women, and bring them to an equal standing with the other people in the society. By adopting a uniform civil code, gender parity will be promoted, and men and women will be treated with par.[14] Thus, the idea of a Uniform Civil Code resonates with the concept behind the fundamental right of equality within the Indian Constitution as it not only formulates personal laws but along with it abolishes the practice of the patriarchal society of ill-treating women based on religious backdrop.[15]

3. How does the U. C. C. affect Traditions?

The women following Islam are often subjected to cruelty and unequal treatment, owing to certain religious practices such as polygamy performed by their husbands and arbitrary methods of marriage dissolution such as TripleTalaq or Talaq – e – biddat. While the Apex Court put a stop to the practice of arbitrary talaq through a breakthrough judgement in 2017, polygamy is still widely performed across the country, even though it has mentioned time and again that there is no such religious obligation or any mention of the same in the Quran, which makes it a compulsory action, rather than a tradition carried through the ages. While Hindu laws, which were codified primarily in 1955-56, granted women governed by the Hindu law

[14] M. Harini & M. P. Akil, *Uniform Civil Code*, 21 SUPREMO AMICUS [392] (2020).
[15] Abhaya Dubey & Aman Kataruka, *Uniform Civil Code*, 5 SUPREMO AMICUS 1 (2018).

system the rights that they were deprived of since time immemorial, Muslim women are still subjected to unequal treatment, owing to several traditions. For instance, Muta marriage, or temporary marriage, is a tradition among the followers of Islam, which, even though is not legally recognized, isn't prohibited either, and a handful of Shia Muslims perform Muta marriage in India as well.

The jurisdiction of a uniform code will extend much further than the empowerment of women. A UCC will also protect the rights of minorities and marginalized communities and try to bring them to an equal standing as the majority. However, the *status quo* speaks the contrary. The current Prime Minister Narendra Modi has addressed the need for a U.C.C. The Law Commission and the Judiciary have repetitively recognized the need to implement a uniform code. However, the All India Muslim Personal Law Board (AIMPLB) has raised a contention claiming that the implementation of a uniform code for civil conduct, which goes beyond personal laws, will infringe upon their necessary religious practices. While addressing this contention, one might refer to the landmark decision of the Supreme Court in Shah Bano Begum's case whereby the then Hon'ble Chief Justice of India held that – "A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so." In this landmark decision, not only did the Court urge the State to put life into Article 44 and not keep it aside as a mere 'dead letter' but additionally, given the context of the case in hand, it was quite evident that the codification of a U.C.C. was necessary for the upliftment of Muslim women.

3.1 Equality or Equity?

Dr. B.R. Ambedkar, the father of the Indian Constitution, in the Constituent Assembly, vouched for uniform laws and encouraged to abolishment of all sorts of diversity. However, Dr. B.R. Ambedkar on the other hand made provisions for the upliftment of the backward classes, thereby promoting the notion of equity rather than equality.

In a similar context, the Muslims objecting to the implementation of U.C.C. on the ground that their religious beliefs and rights won't be paid any heed to and instead infringed upon can be referred to as a matter of apprehension based on anecdotal facts instead of substantial evidence. While tribal communities have been granted special provisional reservations for seats in the Panchayats, Lok Sabha reservations, and the State Legislative Assembly, most have objected

to implementing U.C.C., based on the apprehension that their rights would be violated. The basis behind such fear is that the tribals are mostly dependent on natural resources for their livelihood, and it is believed that if U.C.C. were implemented, the same would be threatened.

Alongside, even though the tribals have been granted a better position in terms of education [16], and representation [17] in the legislative [18] and administrative bodies, it cannot be used as a veil against the fact that a Uniform Civil Code will hamper their cultural heritage. As per the 2011 census, 8.6% of the Indian Population consists of Scheduled Tribes, which when seen in reference to India's population, is not really a small number. While to an oblivious eye, it may seem like the implementation of U.C.C. would eventually result in the upliftment of tribal communities, it is again rightly feared by the tribals. This is because marriage and related traditions of the tribals are different from the other communal laws in India. In the case of the U.C.C. being implemented, the other communities are likely to have an upper hand in terms of a uniform procedure of marriage being decided upon.

4. Protection of Religious Freedom & Personal Laws: Balancing Tradition with Social Progress

A former member of the Constituent Assembly, Mahboob Ali Baig Sahid Bahadur, said that *"As far as the Muslims are concerned, their laws of succession, inheritance, marriage, and divorce are completely dependent upon their religion."*[19] It is a common belief, that in the case of U.C.C. being implemented, and personal laws being at stake, the right of the Muslim community to follow their religion, which is a fundamental right secured under Article 25 of the Constitution for all the citizens of India, will be violated and as a result, it will strike directly on the age-old foundation of Muslim personal law, in which the concepts of succession, inheritance, marriage, and divorce are incorporated. However, the implementation of U.C.C. is also seen as a necessity in light of the *status quo* of Muslim women as the continuation of personal laws eventually results in violation of the fundamental rights of the women. However, again if U.C.C. is implemented, it would shake the very foundation of marriages in different communities. While marriage under Hindu law is regarded as a sacred ceremony, where the performance of rituals is held to be of utmost importance, the same under Muslim law is regarded as a contract, with offer, acceptance, and other essentials of a valid contract. How the Legislature plans to achieve uniformity in these

[16] India Const. art. 40.
[17] India Const. art. 243D.
[18] India Const. art. 330.
[19] SAMARADITYA PAL, *India's Constitution: Origins and Evolution* (1st ed., Lexis Nexis 2015) 830.

aspects is a question that can only be answered by the Uniform Civil Code, when it is finally introduced.

While these questions create an imbroglio regarding the merits of a uniform code, it cannot be disregarded that Dr. Ambedkar pointed out an extremely crucial aspect of the already existing Indian legal system. In one of the debates of the Constituent Assembly, Dr. B.R. Ambedkar pointed out *that we have a uniform code of laws covering almost every aspect of human relationships in this country.* By this, Dr. Ambedkar referred to all such enactments that were applicable to all the citizens of India, irrespective of caste, creed, or religion. If these weren't an already existing set of uniform laws, what else it would be? Additionally, it gives rise to the question, that since no such objections were raised on their implementation, despite the fact that the citizens were quite literally being governed by 'Anglo-Indian jurisprudence'[20], why was a Uniform Civil Code being objected against?

To quote Dr. Ambedkar, he said *"I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have Article 35 as part of the Constitution to bring about that little change."* He further went ahead to say that the argument as to the implementation of U.C.C. was '*misplaced*' as we had already done so.[21]

4.1 Analyzing the Ground Reality while Examining the basis of Apprehension

Now the question is, why has a Uniform Code of Conduct not been implemented for marriage and succession? Despite the fact that Islam doesn't create any such explicit distinction between women and men in terms of succession, Muslim women are often subjected to inequality when the question of succession arises. For example, if parents to a set of siblings die, the brother is likely to inherit twice as much as that of the sister, even though, they're both legitimate children of their deceased parents. The need for a codified law in terms of marriage, inheritance, and succession is regarded as a dire need for Muslim women by the National Commission for Women (N.C.W.). [22] Also, the practice of polygamy is an exception, and monogamy is the

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[20] SAMARADITYA PAL, *India's Constitution: Origins and Evolution* (1st ed., Lexis Nexis 2015) 836.

[21] SAMARADITYA PAL, *India's Constitution: Origins and Evolution* (1st ed., Lexis Nexis 2015) 836.

[22] Standard, B. (2023) *Non-codified Muslim Personal Law has posed challenges for women: N.C.W.*, *Business Standard*. Available at: https://www.business-standard.com/india-news/non-codified-muslim-personal-law-hasposed-challenges-for-women-ncw-123071500506_1.html (Accessed: 14 July 2024).

general rule in the Quran.[23] However, the scenario speaks a different tale as polygamy is often believed to be the general rule in Islam and truth be told, there has been no restriction upon the same. While prior to 1955, Hindu males were allowed to perform polygamy as well, it was prohibited by the introduction of the Hindu Marriage Act. Additionally, the practice of *Nikah Halala* is also prevalent among Muslims and is often misused against divorced women. This is a practice whereby a Muslim woman has to marry and consummate the marriage with another man, and thereafter, only when such man divorces her or dies, can the woman go back to her previous husband and marry him if both of them wish to do so. While such practice is straight-up arbitrary and violates Muslim women's right to equality under Article 14, the All India Muslim Personal Law Board (AIMPLB) is against discarding of the practice of Nikah Halala.

Like the evils in all communities, Hinduism, despite being one of the most celebrated religions in India, has its pros and cons too. Despite the existence of statutes citing equality in terms of inheritance, succession, equal gender rights, etc., societal change is also crucial for the upliftment of society. In several recent cases, it has been noted that the guardianship of a child is often naturally believed to be vested in the father after the child achieves the age of 5 years, which is arbitrary. Again, practices like '*Kanyadaan'* during marriages whereby the father gifts his daughter to the groom objectify women and uphold patriarchal traditions.

Tribals are often dependent on natural resources, which include not only plant sources but animal sources as well. Several tribal communities practice animal sacrifice which is cruel and inhumane and a violation of the existing animal welfare laws. Alongside, tribal communities, owing to the lack of education in such distant corners of the country are often found believing in superstitions, and witch hunting, which upholds orthodox beliefs and violates the rights of women, again.

This is where the necessity of a Uniform Civil Code is felt. While it is believed that the implementation of U.C.C. will do away with all personal laws, that isn't the case. A uniform civil code will only abolish arbitrary existing practices which is not possible until and unless the citizens are governed by their own religious scriptures and no codified laws for the same. It plans on doing away with all sorts of social evils, such as discrimination, child marriage, polygamy, inequality in aspects of inheritance or succession, as well as inequality in terms of natural guardianship, etc. A uniform civil code is quite literally a need of the hour, especially when elections are victimised by political foul play influenced by religious notions and diversity based on the same. In order to protect the underlying notion of secularism in the

[23] AQIL AHMAD, *Mohammedan Law* (27th ed., Central Law Agency 2021) 142.

Constitution, it is important for a Uniform Civil Code to be introduced. U.C.C. does not aim at projecting unanimity but quite the opposite. Shri Alladi Krishnaswami Ayyar, a former member of the Constituent Assembly, while debating on this matter of implementation of a civil code bringing about a uniform structure of governance, said "*The Article actually aims at amity. It does not destroy amity. The idea is that differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different people of India. What it aims at is to try to arrive at a common measure of agreement in regard to these matters. It is not as if one legal system is not influencing or being influenced by another legal system."*[24] Thus, the general notion of the U.C.C. has either been misinterpreted by the citizens or has been politically colored, which may result in extremist violence and collision in case of U.C.C. being implemented.

5. Judicial Pronouncements

The Indian Judiciary has played an indispensable role in upholding and promoting the concept of a Uniform Civil Code through the ages. Even though there have been no such instances of the Law Commission or the related Ministry taking a step toward the implementation of the same, the judicial pronouncements in several instances have set forth examples demonstrating the need for a uniform code time and again. While the generalised notion is that, upon implementation of a Uniform code, the secular fabric of the nation will be disrupted; the Courts are of an adverse opinion. The former Ld. C.J.I. in the case of ***John Vallamattom v. U.O.I.,*** regretted[26] that Article 44 had not been given effect. He further observed, "…there is no necessary connection between religions and personal law in a civilised society…The aforesaid two provisions, viz., Articles 25 and 44 show that the former guarantees religious freedom, whereas the latter divests religion from social relations and personal law." [25]

Consequently, the Supreme Court in the case of ***Pannalal Bansilal Pitti***[26] held that "…*the founding fathers, while making the Constitution, were confronted with problems to unify and integrate people of India professing different religious faiths, born in different castes, sex or sub-sections in the society speaking different languages, and dialects in different regions. They, to integrate all sections of the society as a united Bharat, provided a secular Constitution. A uniform law, though highly desirable, enactments thereof in one go, perhaps, might be counter-productive to unity and integrity of the Nation. It could*

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[24] SAMARADITYA PAL, *India's Constitution: Origins and Evolution* (1st ed., Lexis Nexis 2015) 835. [26] NARENDER KUMAR, *Constitutional Law of India* (10th ed., Allahabad Law Agency 2018) 563

[25] John Vallamattom v. Union of India, (2003) 6 SCC 611.

[26] Pannalal Bansilal Pitti v. State of Andhra Pradesh, (1958) A.I.R. A.P. 33 (India)

be done by process of law by stages." Through this judgement, not only did the Supreme Court uphold the need for the implementation of a Uniform Civil Code, it also prescribed a way for implementing the same in a country like ours.

To quote Hon'ble K. Venkataswami, J. in the case of ***Ahmedabad Women Action Group***[27] – *"Article 44 itself recognises separate and distinctive personal laws because it lays down as a directive to be achieved that within a measurable time India should enjoy the privilege of a common Uniform Civil Code applicable to all its citizens irrespective of race or religion."*

The Hon'ble K.M. Joseph, J., diverted in his approach from the other opinions on the matter. Instead of focusing on the implementation of a Uniform Civil Code, he focused on the wider ambit of Part IV of the Indian Constitution. He stated that – *"The founding fathers contemplated India to be a republic which is not merely to be conflated to a body polity having an elected President which is the conventional understanding. But it also involved ensuring rights of all sections of people based on it being a democracy. It is important that the country must move forward. For achieving the sublime goals which are enshrined in Part IV – that is the Directive Principles, but bearing in mind the fundamental rights also guaranteed in Part III of the Constitution, which have been described as the two wheels of the chariot of the State, both of which are indispensable for the smooth progress of the nation, actions must be taken which bond all sections of the society together."* In this landmark case of ***Ashwini Upadhyay***[30], the Court while promoting the need for implementation of U.C.C., also mentioned the importance of maintaining a harmonious relation between Chapter III and Chapter IV of the Constitution.

Much prior to this, back in 1985, the Hon'ble O. Chinappa Reddy, J. pointed out, "*…the other day that a Constitution Bench of this Court had to emphasise the urgency of infusing life into Article 44 of the Constitution which provides that 'The State shall endeavour to secure for the citizens a Uniform Civil Code through out the territory of India.' The present case is yet another which focuses attention on the immediate and compulsive need for a uniform civil code. The total unsatisfactory state of affairs consequent on the lack of a Uniform Civil Code is exposed by the facts of the present case…"* The Court while referring to the ***Shah Bano Begum case***[28], further went ahead and said that a common civil code will help the cause of national integration by removing disparate loyalties to law that have ideologies that are in conflict.

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[27] Ahmedabad Women Action Group v. Union of India, (1997) 3 SCC 412. [30] Ashwini Kumar Upadhyay v. Union of India, 325 SCC 12 1 (2020)

[28] Khan, Mohd. Ahmed v. Begum, Shah Bano, 1985 AIR 945, 1985 S.C.R. (3) 844, 1985 S.C.C. (2) 556

The Court further attempted to relate to the need for a uniform law with the disparity in the marriage law, reiterating the need for such a code and adding that it was high time that marriage laws be reformed and uniform law on that subject be applicable to all, irrespective of caste or religion.

In the widely acclaimed case of ***Sarla Mudgal v. UOI***[29]**,** the Court again, following a similar pattern with the prior judicial pronouncements, emphasised upon the need for a Uniform Civil Code and in a somewhat critical tone towards the rulers. The Court reflected on the failure of the Government which had come and gone and with an alleged sarcasm had pointed out that until and unless a uniform code was introduced and all the citizens were governed by the same, it was like an open inducement to a Hindu husband to convert to a Muslim, if he wished to marry for the second time, even though he has a living wife from his subsisting first marriage. He also encouraged the Legislation as they were the sole authority and not religions, and therefore, were directly responsible for the introduction of a U.C.C. The Hon'ble Kuldip Singh, J. while concluding, also requested the Government of India through the then Prime Minister to have a fresh look at Article 44. The Court further advised the Government to hand over the legislative matter to the Law Commission, after consultation with the Minorities Commission and bring about a comprehensive code with a modern approach and intent to protect human rights for women.

In a similar case[30], where the petitioner who was a social activist and a Muslim woman, approached the Court through a petition praying to lay down guidelines enabling the adoption of children irrespective of their religion, caste, and creed. While referring to the Juvenile Justice Act, the Court said that it is a tiny step in reaching the goal enshrined by Article 44 of the Constitution. Reiterating the need for implementation of U.C.C., the Court held that while personal beliefs and faiths must be honoured, they cannot be depended upon for dictating the operation of the provisions of an enabling statute.

Regarded as the prime landmark case and a breakthrough point in the history of judicial pronouncements in India, the Hon'ble Y.V. Chandrachud, CJI. in the case of ***Shah Bano Begum***[31]**,** referred to Article 44 as a dead letter. He further made a point that even though the Judiciary had set forth ample epitomes to acquaint the Legislature with its support towards U.C.C. implementation, mere '*piecemeal*

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[29] Sarla Mudgal, President, Kalyani & Ors. v. Union of India & Ors., W.P. (C) Nos. 347/90, 509/92, and 424/92, Supreme Court of India (May 10, 1995)
[30] Shabnam Hashmi v. Union of India, (2014) A.I.R. 2014 SC 2481
[31] Khan, Mohd. Ahmed v. Begum, Shah Bano, 1985 AIR 945, 1985 S.C.R. (3) 844, 1985 S.C.C. (2) 556

attempts' of the Court will not result in any fruitful output, until and unless the State takes up the responsibility.

6. Drafting a Model Uniform Civil Code

The Ministry of Law and Justice had asked the citizens to grant their opinions on the implementation of a Uniform Civil Code. After a comprehensive analysis, I, being a citizen of India, as per my best knowledge would be happy to recommend a model for a successful implementation of a Uniform Civil Code.

The Central Ministry may recommend the States to implement U.C.C. at their levels. Following in the footsteps of states like Goa, Uttarakhand, and Maharashtra (Partial), the Centre may urge the other states to bring about a change in the way the citizens of the respective states are governed by their personal laws. When a majority of the states have taken up policies of implementing a Uniform Civil Code, they are to submit a report with all the pros and cons mentioned in the same to the Centre within a fixed tenure which may range from 18 – 24 months. Based on the same, the Centre will take up the initiative in implementing the Uniform Civil Code all across the country. The U.C.C., which is then drafted by the Parliament, is to be done on the basis of the lessons obtained from the state reports and create necessary classifications based on any geographical factors if absolutely necessary. This Code will then be implemented across the country. Picking after an idea, the father of the Constitution, Dr. B.R. Ambedkar had proposed in one of the debates of the Constituent Assembly[32], quoting him – *" It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by such method."*

He further added that this method was acquired from the implementation of the Shariat Act of 1937 and also added that implementation of such a provision will nullify the fears that the communities opposing the implementation of U.C.C. Considering this, the Centre can also implement such a provision while initiating the process of implementation of U.C.C. However, this might come up as a loophole that will allow the communities to be excluded from the ambit of uniform legislation and act according to their personal laws. In order to prevent the same from happening again, the Centre must apply such U.C.C. for the first 5 years, beginning from the date from which the act commences. After the exhaustion of the said period, the Centre must analyze and reflect back on the U.C.C., look into the

[32] SAMARADITYA PAL, *India's Constitution: Origins and Evolution* (1st ed., Lexis Nexis 2015) 837.

issues and loopholes, make necessary amendments based on the same, and implement the amended Act upon all Indian citizens.

Acquiring experience from the past introduction of statutes, it is common knowledge that eventually, issues will arise, and that is where the Judiciary comes into play. However, owing to certain limitations upon the judiciary's power, a committee has to be created to address any related issues directly. This Committee will consist of one member from each State and Union Territories, as chosen by the Governor and Chief Minister of the respective State, alongside the President, the Minister of Law and Justice, the C.J.I., and any other Cabinet Minister or other individuals holding Government offices, as deemed necessary by the Committee by way of a unanimous decision.

7. Conclusion

A Uniform Civil Code is believed to be a breakthrough concept, especially when it is implemented in a country as diverse as India. While our founding fathers have failed to implement such a Code, the countrymen have vested their trust upon the bodies of the Government to finally see the implementation of a Uniform Civil Code. For a U.C.C. to see the light of the day, it is extremely crucial that those opposing the implementation of the same are educated on the matter and assured that their fundamental right secured under Article 25 will not be violated. This Code aims at abolishing the evils under personal laws and doing that through the implementation of a new code altogether. While the implementation of a Uniform Civil Code will be a tough nut to crack for such a diverse country, it cannot be turned a blind eye to, as it is not half as impossible as it has been pictured. Examples can be obtained from states like Goa and Uttarakhand, and based on the same the other State Governments should also take up initiatives to instill life into this dead-letter.

India has come a long way since acquiring independence and freedom from the shackles of the British. In order to add more value to the mother statute, the Indian Constitution, Article 44 cannot forever be kept as a showpiece in the corner of a museum, acquiring dust with each passing day. Our Constitution has vested the power to legislate this matter in the State and therefore, the only one to add life into the same will be the 'State' itself. In the words of the Hon'ble Kuldip Singh, J.[36] – "The Legislation – not religion – being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter, no community can oppose the introduction of a uniform civil code for all the citizens in the territory of India."

[36] Sarla Mudgal, President, Kalyani & Ors. v. Union of India & Ors., W.P. (C) Nos. 347/90, 509/92, and 424/92, Supreme Court of India (May 10, 1995)

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The Ongoing Struggle for Transgender Rights in India: Gap Between Legal Protections and Lived Realities

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Abstract

Transgender rights in India have been a controversial subject, characterised by significant legal developments and persistent obstacles. Following the pivotal NALSA judgement of 2014, which acknowledged transgender persons as a 'Third Gender' entitled to self-identification, much progress has been made in legal recognition. Nonetheless, despite these achievements, the group persists in encountering prejudice and obstacles in accessing essential services like healthcare, educational institutions, and employment opportunities. The implementation of "The Transgender Persons (Protection of Rights) Act, 2019" has faced criticism for its deficiencies in safeguarding transgender rights, highlighting the intricacies and inadequacies in existing legislation. This article examines the progression of transgender rights in India, focusing on the significant NALSA judgement and subsequent developments from 2022 to 2024, while analysing legislative frameworks, sociocultural obstacles, and opportunities for improving inclusion and acceptance.

Keywords

Transgender, Violation, Struggle, Community, Gender, NALSA

1. Introduction

The rights of transgender individuals have been a contentious issue in India, as the population encounters discrimination and marginalisation throughout several facets of life. Despite the legal acknowledgement of transgenders in 2014 by the Apex Court in *"National Legal Services Authority v. Union of India*[1] *(hereinafter 'NALSA')"* and decriminalisation of consensual intercourse between homosexual individuals in *"Navtej Singh Johar & Ors. v. Union of India*[2] *(hereinafter 'Navtej Singh Johar')*" in the year 2018, transgender individuals still confront significant challenges in accessing basic services such as healthcare, education, and employment[3]. The enduring tussle over transgender rights has resulted in substantial legal and social discussions[4] in India and internationally, shaping the contours of human rights discourse.

The NALSA judgment marks a historic milestone in the struggle for the rights of the transgender in India. The Apex Court, in this case, acknowledged transgender individuals as a third gender, affirming their right to self-identify their gender[5]. This landmark judgment provided the transgender community with legal recognition, paving the way for a more equitable and just society in India. Furthermore, in 2017, the Apex Court delivered another crucial judgment on the Right to Privacy in *"Justice K.S. Puttaswamy (Retd.) v. Union of India*[6] *(hereinafter ('K.S. Puttaswamy')*". The K.S. Puttaswamy judgment has had significant implications for transgender rights, as it provides a legal basis for protecting the privacy of transgender individuals and preventing discrimination based on their gender identity[7].

Despite these legal victories, transgender individuals in India are facing numerous obstacles in accessing fundamental rights and services. *"The Transgender Persons (Protection of Rights) Act, 2019*[8]*, hereinafter 'The Transgender Rights Act'",* enacted by the Government of India, has come under criticism by members of the transgender

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

[2] Navtej Singh Johar & Ors. v. Union of India, AIR 2018 SC 4321 is a landmark judgment by the Apex Court, delivered in 2018. "*The judgment decriminalised consensual sex among adults, including homosexual acts, by reading down Section 377 of the Indian Penal Code. This historic decision marked a significant step towards recognising and protecting the rights of the LGBTQ+ community in India, affirming their right to equality, privacy, and dignity*."

[3] Apurva Kumar Pandya and Alex Redcay, '*Access to Health Services: Barriers Faced by the Transgender Population in India*' (2020) Journal of Gay & Lesbian Mental Health.

[4] Daideepya Chandra Bhargava and others, '*Evolution of Transgender Rights in India: Better Late than Never*' (2024) Behavioral Sciences & the Law.

[5] Supra note 1.

[6] K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1

[7] 'Queer Rights and the Puttaswamy Judgment | Economic and Political Weekly' (22 December 2017) "<https://www.epw.in/journal/2017/51/privacy-after-puttaswamy-judgment/queer-rights-and-puttaswamy-judgment.html>" accessed 27th June 2024.

[8] The Transgender Persons (Protection f Rights) Act, 2019, Act No. 40 of 2019

community[9], citing its failure to adequately protect their rights and perpetuate discrimination.

According to an Article by "*Human Rights Watch"*, the Transgender Rights Act isn't worth celebrating and states that the Act itself violates the NALSA judgment[10]. The ongoing wrangle over transgender rights in India highlights the need for continued progress toward the protection of fundamental human rights. The research will cover several key aspects related to transgender rights in India. It will begin by exploring the definition of transgender. Further, this research will then delve into the Transgender Rights Act and the landmark NALSA judgment that paved the way for its creation.

Recent events affecting transgender rights in India, specifically those that occurred between *2022 and 2024*, will also be analysed. Additionally, the study will discuss the struggles faced by transgender individuals in our country. Finally, suggestions and a way forward for filling the gaps in the current legal framework and promoting greater inclusivity and acceptance of transgender individuals in India will be presented.

2. Transgender Identities in India: An Exploration of the Definition and Meaning of the Term 'Transgender'

A transgender person represents an individual whose perception of gender differs from their physical attributes or the sex given to them at birth[11]. The term 'transgender' emerged and gained prominence in the 1990s[12], reflecting the understanding that gender exists in multiple forms[13].

2.1 United Nations Development Programme (UNDP)

The "*United Nations Development Programme '(UNDP)'"* in 2009, supported the first regional discussion on transgender and Hijra issues in India. During this initiative, 'transgender' was described as "*An umbrella term representing various communities and identities of*

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[9] 'Transgender Persons Act, 2019 Violates the Fundamental Rights It Seeks to Protect: Another Challenge Mounted in Apex Court' (*Bar and Bench - Indian Legal news*, 13 June 2020) "<https://www.barandbench.com/news/litigation/transgender-persons-act-2019-violates-the-fundamental-rights-another-challenge-in-sc>" accessed 27th June 2024.

[10] 'India's Transgender Rights Law Isn't Worth Celebrating' (*Human Rights Watch*, 5 December 2019) "<https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating>" accessed 1st July 2024.

[11] Govindasamy Agoramoorthy and Minna J Hsu, 'Living on the Societal Edge: India's Transgender Realities' (2015) 54 Journal of Religion and Health 1451.

[12] "Ministry of Social Justice and Empowerment, *Report of Expert Committee on the Issues Relating to Transgender Persons* (2014), https://socialjustice.gov.in/writereaddata/UploadFile/Binder2.pdf"

[13] 'Over Two Years After Landmark Judgment, Transgender People Are Still Struggling' "<https://thewire.in/gender/over-two-years-after-landmark-judgment-transgender-people-are-still-struggling>" accessed 1st July 2024.

individuals who face marginalisation due to their gender identity or personal expression."[14].

2.2 The Definition Given in the NALSA Judgment

The NALSA judgment incorporates an inclusive description of the term "transgender". It states that *"transgender is an umbrella term for individuals whose gender identity, gender expression, or behaviour does not coincide with their biological sex."[15].* Those who do not identify with their sex when they are born, or who feel compelled to endure or have been forced to undergo sex reassignment surgery ("SRS") to align their biological sex with their gender identity, and who are later referred to as transsexual individuals, in addition to those who seem to not to recognise with their born sex, such as Hijras or eunuchs, are within the purview of the definition.

2.3 The Definition Given in Transgender Persons (Protection of Rights) Act, 2019

Section 2(k)[16] of the Transgender Rights Act defines a "'Transgender Person' *as a person whose gender does not match with the gender assigned to that person at birth and includes transman or trans-woman..., person with intersex variations, genderqueer, and person with sociocultural identities such as Kinner, Hijra, Aravani, and Jogta".*

2.4 The Criminal Tribes Act, 1871

The Criminal Tribes Act of 1871[17] was created on the notion that certain populations are more inclined to commit crimes than others, and transgender people were among them[18]. Even after the Criminal Tribes Act was repealed, transgender people faced societal shame and persecution in the post-colonial period, and gaining social acknowledgement remained difficult for them.

2.5 Sex & Gender

Sex is determined at the time of birth; it may be referred to a person's biological identity as "*Male or Female*". It is generally connected with

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[14] 'Hijras/Transgender in India: HIV, Human Rights And Social Exclusion | United Nations Development Programme' "<https://www.undp.org/india/publications/hijras/transgender-india-hiv-human-rights-and-social-exclusion>" accessed 1st July 2024.

[15] Supra note 1, Para 81.

[16] Supra note 8, § 2 (k).

[17] Criminal Tribes Act, 1871, "Act No. XXVII of 1871" 'A1871-27.Pdf' "<https://www.indiacode.nic.in/repealed-act/repealed_act_documents/A1871-27.pdf>" accessed 1st July 2024.

[18] 'Narrain, Siddharth --- "Crystallising Queer Politics - The NAZ Foundation Case and Its Implications for India's Transgender Communities" [2009] NUJSLawRw 26; (2009) 2(3) NUJS Law Review 455' <http://www.commonlii.org/in/journals/NUJSLawRw/2009/26.html> accessed 15 March 2023.

corporeal and bodily characteristics such as chromosomal number, hormonal predominance, and both internal as well as exterior architecture[19]. On the other hand, gender concerns the roles, actions, functions, and characteristics that a community deems proper for *"boys and men vs girls and women".* Such factors affect how individuals act, engage, and feel about him/herself. Although biological features of sex are comparable throughout cultures, gender characteristics usually vary.[20].

2.6 Gender Identity and Sexual Orientation

"*Gender identity and sexual orientation*" are not the same. Sexual orientation is the persistent physical, psychological, and/or emotional attraction that an individual has to other individuals, whereas Gender identity is the inner sense of being male, female, or a combination of the two. In the same way as non-transgender individuals, transgender individuals may identify as heterosexual, lesbian, homosexual, bisexual, or asexual[21]. However, usually sexual orientation of transgender individuals is typically determined by their gender[22].

2.7 LGBTQA+ and Transgenders

"LGBTQA+ is an acronym that stands for lesbian, gay, bisexual, transgender, queer/questioning, asexual, and other identities that fall under the broader umbrella of sexual orientation and gender identity". It is a term used to refer to individuals who identify as any of these sexual orientations or gender identities[23]. Transgender, on the other hand, is a term used to describe persons whose identity of gender is distinct from the sex they were born with. This means that a person who was assigned male at birth, for example, but identifies as female would be considered transgender. Being transgender is not a sexual orientation but rather a gender identity.

The "+" in the LGBTQA+ acronym represents the fact that the community is diverse and includes individuals who identify as other gender and sexual identities that are not specifically included in the acronym.

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[19] Sanz, Veronica. "No Way Out of the Binary: A Critical History of the Scientific Production of Sex." Signs, vol. 43, no. 1, 2017, pp. 1–27. JSTOR, https://www.jstor.org/stable/26552979. Accessed 1st July 2024.

[20] 'Gender and Health' "<https://www.who.int/health-topics/gender>" accessed 1st July 2024.

[21] Giulia Castagnaro, 'Gender Identity Is NOT the Same as Sexual Orientation' (*GenderGP Transgender Services*, 22 September 2022) <https://www.gendergp.com/the-difference-between-gender-identity-and-sexual-orientation/> accessed 5th July 2024.

[22] 'Sexual Orientation and Gender Identity* | Denver' <https://operations.du.edu/inclusive-teaching/sexual-orientation-and-gender-identity> accessed 5th July 2024.

[23] 'Transgender Persons | Lesbian, Gay, Bisexual, and Transgender Health | CDC' (14 October 2022) <https://www.cdc.gov/lgbthealth/transgender.htm> accessed 5th July 2024.

In short, while all transgender people are included in the LGBTQA+ community, not all individuals in the LGBTQA+ community identify as transgender. The LGBTQA+ community encompasses a range of "*sexual orientations and gender identities*", while transgender specifically refers to a person's gender identity.

3. The Transgender Persons (Protection of Rights) Act, 2019 Vis-À-Vis the NALSA Judgment

On April 15, 2014, the Apex Court made history by giving the NALSA judgment that transgender persons should be legally acknowledged as a separate gender and should have the same protections under the law as any other citizen under the Constitution. The Court further said in the NALSA judgment that *"Non-recognition of the identity of Hijras/ Transgenders under the different legislations denies them equal protection of the law and they experience wide-spread discrimination."*[24].

Five years after the judgement came the *"Transgender Persons (Protection of Rights) Act, 2019"*[25]. Unlike the NALSA decision, which was applauded by transgender individuals, the Transgender Rights Act has been met with far less enthusiasm. On the contrary, the Act seems to fall short of its intended goal of providing transgender people with equal rights and protections.

3.1 Transgender: A Definitive Definition and Identifying Concept

As the Act puts it, "*A transgender person is one whose gender does not match the gender given at birth."*[26]. This group comprises both cisgender and transgender people, as well as those who identify as intersex or gender nonconforming, as well as those who identify as gender nonconforming yet have another social or cultural identity, for example, Kinnar or Hijra. The scope of the phrase encompasses more than only transgender people.

In addition, the Act explains that a transgender individual may apply to the "*District Magistrate (hereinafter 'DM') along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery if that person has undertaken surgery to change gender.*"[27]. After further investigation into the authenticity of such a certificate, the DM may then issue a certificate reflecting the individual's gender transition.

The NALSA judgment made it very obvious that the right to select one's gender is fundamental to one's sense of autonomy and worth.

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[24] Supra note 1, Para 75.
[25] Supra note 8.
[26] Supra note 16.
[27] Supra note 12, §5.

The DM is granted broad discretion under the Act, which might be abused.

3.2 Deficient Criminal Penalties:

The aim of the Transgender Rights Act is to assure that transgender persons are not subjected to any kind of discrimination from third parties or businesses. However, it does not provide a penalty for this behaviour. Any legislation prohibiting discrimination would be meaningless without a penalty for violators.

Further, the word "sexual abuse" is not defined in the Act, it merely covers offences and sanctions. In addition, the word "rape" is not used in this Act, nor is it defined. It is provided that punishment for sexual assault of transgender people should *"not be less than six months but which may stretch to two years and with fine,"* which is even more disturbing.

Until 2023, the Indian Penal Code (IPC)[28] recognised only males and females under "Gender."[29]. The inclusion of transgender individuals under "Gender" came with the introduction of the Bharatiya Nyaya Sanhita (BNS) 2023[30]. This delayed inclusion underscores the prolonged wait of the transgender community for recognition and rights[31].

It is important to note that, still, the discrimination persists, as when a cisgender woman is raped in India, the offender may face imprisonment not less than 10 years or life imprisonment or even death sentences[32]. However, if a transgender person is abused, the maximum sentence is only two years[33]. This stark difference shows the ongoing inequality and lack of adequate legal protection for transgender individuals.

3.3 Further Inconsistencies:

There is no doubt that the NALSA judgment has been significant in shaping the legal framework for transgender rights in India, which led to the enactment of the Transgender Rights Act. However, the same

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[28] The Indian Penal Code Act No. 45 of 1860.
[29] Ibid, § 8.
[30] The Bharatiya Nyaya Sanhita, 2023 No. 45 of 2023 § 2(10).
[31] Esha Mitra, 'India's Rape Laws Don't Cover Transgender People. They Say It's Putting Them at Risk' (*CNN*, 9 December 2020) "<https://www.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>" accessed 5th July 2024.
[32] The Bharatiya Nyaya Sanhita, 2023 No. 45 of 2023, Chapter V "*Of Offences against Woman and Children*".
[33] Supra note 8, §18, "Whoever harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine".

Act has also been criticised for its lack of clarity on certain issues, such as the process for certification of transgender people and the absence of provisions for reservations in education and employment[34]. While these legal developments are important milestones in acknowledging and safeguarding the rights of the transgender community in India, there exists a struggle to be addressed, including discrimination, harassment, and exclusion from mainstream society.

4. Violations of Transgender Rights: A Comprehensive Analysis of Current Events and The State of Affairs

The following occurrences elucidate the pervasive struggles faced by the transgender community:

4.1 No Reservation for Transgenders in Maharashtra:

The Bombay High Court made the remark after being informed that Maharashtra is one of eleven states in the country that do not reserve State posts for transgender individuals[35]. J. Dipankar Datta and J. Abhay Ahuja made the remark after understanding that Maharashtra is one of eleven states in the country that do not offer reservations for transgender individuals in State positions. The Bench said that the State has been in "*deep slumber*" for several years because it has not complied with the NALSA judgment, which asks for *"reservations of transgender individuals in educational and public sectors[36]".*

The statements were made during the hearing of a case filed by the State opposing a judgment issued by the Maharashtra Administrative Tribunal (MAT) requiring the State to allow transgender applicants for positions in the State's Home Department. The Bench stated that the State had not complied with the NALSA judgment.

4.2 After the Madras High Court stepped in, Tamil Nadu passed the Transgender Persons (Protection of Rights) Rules, 2022:

The Rules ban conversion therapy[37], require teachers and staff to be adequately trained and educated, and set up gender-neutral bathrooms and separate hospital wards for trans people.

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[34] The Society For Constitutional Law Discussion, 'Critiquing the Transgender Rights Act 2019' (*TSCLD*, 21 August 2020) <https://www.tscld.com/transgender-rights-act-2019-critique> accessed 5th July 2024.

[35] State of Maharashtra & Ors. Vs. Arya Vijay Pujari, 2023 SCC OnLine Mah SAT 986

[36] Supra note 1, Para 129 (3), "We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments".

[37] Shishira Sreenivas, 'What Is Conversion Therapy?' (*WebMD*) <https://www.webmd.com/sex-relationships/what-is-conversion-therapy> accessed 5th July 2024.

The Tamil Nadu government told the Madras High Court that they passed the *"Transgender Persons (Protection of Rights) Rules, 2022"*[38], to provide protection for the rights of transgender people in the state and make it easier for them to get help from government programs. In both public and private places, the new rules make it illegal to treat trans people gravely in any way. They also include a number of welfare measures, such as a mobile app that trans people can use to apply for identity certificates.

The Rules say that any trans person who wants to get an ID card can send their request to the appropriate district collector through the *"Thirunangai"* app[39].

Under the Transgender Rights Act, as well as suggestions of Justice Venkatesh, the Rules were made. Two girls from Madurai who were in a relationship went to the police and said that their parents were bothering them. This is how these orders were made. People who want to change their gender can also get ID cards by showing the District Collector that they have had reassignment surgery by giving them a medical certificate. The Collector has to check the application without doing a physical check on the person making it.

The fact that new rules have been passed to ban conversion therapy, require education and training for teachers and staff, and provide gender-neutral bathrooms and separate hospital wards for trans people shows that there was a need for such measures to protect transgender individuals. However, it is unclear whether these rules will be effectively enforced and whether they will be enough to address the systemic issues faced by transgender people in Tamil Nadu. There is still a significant amount of work to be done in order to establish a supportive and inclusive environment for the transgender community in the state.

4.3 CBSE to decide Trans Student's Request For Name & Gender Change[40], Kerala High Court Order, 2023:

The Kerala High Court recently ordered the "*Central Board of Central Education (CBSE*)" to resolve one issue involving a *"transgender*

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[38] Transgender Persons (Protection of Rights) Rules, 2022'Aandu - CHENNAI, MONDAY, DECEMBER 26, 2022.Pdf' <http://www.stationeryprinting.tn.gov.in/extraordinary/2022/569_Ex_III_1a.pdf> accessed 5th July 2024.

[39] R Sivakumar, 'TN Brings in Rules to Protect Transpersons' (*The New Indian Express*, 24 January 2023) <https://www.newindianexpress.com/states/tamil-nadu/2023/Jan/24/tn-brings-in-rules-to-protect-transpersons-2540763.html> accessed 5th July2024.

[40] Sara Susan Jiji, 'Kerala High Court Directs CBSE to Decide Transgender Student's Application for Name and Gender Change' "(*Bar and Bench - Indian Legal news*, 27 January 2023) <https://barandbench-nluo.refread.com/news/kerala-high-court-directs-cbse-decide-transgender-students-application-name-gender-change>" accessed 5th July 2024.

student's name and gender change" in his CBSE certificates of 10th and 12th grades within a month.

A transgender individual asked the Court to order the CBSE to replace his name, gender, and photo on his 10th and 12th CBSE certificates. The petitioner, born female, altered his gender and name. The petitioner, a young undergraduate, expressed interest in postgraduate study. He added that he must modify his CBSE 10th and 12th certificates to match his new name and include a photo to get into the PG program.

Under "*the Transgender Person (Protection of Rights) Rules, 2020 (hereinafter 'The Transgender Rights Rules, 2020)'"*[41], all official papers must indicate a gender transition. He stated that the CBSE advised him to modify his birth certificate before changing his school credentials. The petitioner alleged the CBSE didn't modify his 10th and 12th class certificates even after amending the birth certificate. The petitioner asked the Court to order the CBSE to modify his name, gender, and photo on the certificates. The Standing Counsel for CBSE said that the petitioner's case is unresolved, necessitating further time and documentation.

This instance underscores the challenges encountered by transgender kids in securing acknowledgement of their gender identification in official documentation. The petitioner in this matter sought a court order compelling the CBSE to amend his 10th and 12th class certificates. The CBSE declined the petitioner's request, notwithstanding his amendment of the birth certificate, claiming the necessity for additional papers and time to complete the case. This illustrates the bureaucratic impediments and lack of understanding encountered by transgender persons in their pursuit of fundamental rights. The Transgender Rights Rules, 2020, were designed to safeguard the rights of transgender persons and facilitate gender recognition and affirmation; nevertheless, the implementation has been sluggish, and several obstacles persist.

4.4 Why no Gender-Neutral toilets, Madras High Courts Asks, 2023

A transgender individual argued that using gender-based restrooms puts them susceptible to physical and verbal assault before the court[42]. The High Court of Madras then ordered the Tamil Nadu government to reply to a petition for gender-neutral public restrooms throughout the state for transgender individuals.

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[41] 'Draft Transgender Persons (Protection of Rights) Rules, 2020' (*PRS Legislative Research*) <https://prsindia.org/billtrack/draft-transgender-persons-protection-of-rights-rules-2020> accessed 5th July 2024.

[42] 'Madras High Court Seeks Govt's Response On Plea Seeking Gender Neutral Toilets Across State' "<https://www.livelaw.in/news-updates/madras-high-court-seeks-states-response-on-plea-seeking-gender-neutral-toilets-across-state-220472>" accessed 5th July 2024.

The Court was hearing a petition filed by a transgender individual from the city, urging the Bench to direct the Government to establish gender-neutral washrooms in schools, bus stops, railway stations, airports, and other public spaces. This would allow transgender individuals who do not conform to the male or female gender binary to use public toilets.

The petitioner's lawyer informed the Court that, despite the State's repeated promises that transgender people could use gender-specific public toilets based on their self-identified gender, in actuality, they frequently faced harassment and assault when using male or female restrooms.

As per him, the Transgender Rights Act requires the State and Centre to take appropriate measures to establish a trans-inclusive society. The Bench then informed the State that the petitioner's request appeared to be valid and questioned why the Government could not take the proper action. Although the State stated that it was not opposed to the notion but that it would take time to construct gender-neutral restrooms at all public locations, the Court offered that some of the current public restrooms be transformed into gender-neutral restrooms.

This highlights the difficulties that transgender individuals face in accessing public restrooms that align with their gender identity. Despite the State's repeated assurances, transgender people using gender-based restrooms are subjected to stares, abuse, sexual harassment, and assault. This highlights the need for more significant steps to be taken to ensure the protection of transgender individuals' rights and to create a more inclusive society.

4.5 No Blood Donation by Transgender, Higher Risk for HIV Claimed, 2023

The Government argued that subject-matter experts have advised the removal of the two groups from blood donation, and in several European nations, the vast majority of sexually active gay men are also barred. The Union Health Ministry has informed the Apex Court[43] that the exclusion of transgender individuals and gay men from blood donation is based on substantial scientific evidence, as the preponderance of HIV and Hepatitis B or C is higher among such individuals, as per surveys. In reaction to a PIL application that challenged the legal and constitutional legitimacy of the Union Health Ministry's blood donor rules that prevent transgender individuals and homosexual men from donating blood, an affidavit was filed. The

[43] Thangjam Santa Singh @ Santa Khurai v. Union of India And Ors. 4 JCLJ (2023) 530, 'Transgender Persons, Gays & Sex Workers Excluded From Blood Donation Based On Scientific Evidence: Centre Tells Apex Court' "<https://www.livelaw.in/top-stories/transgender-persons-gays-sex-workers-excluded-from-blood-donation-based-on-scientific-evidence-centre-tells-supreme-court-223496>" accessed 6th July 2024.

petitioner argued before the Apex Court that exclusion based on gender identity and sexual orientation is "*totally arbitrary, irrational, discriminatory, and unscientific*."

The petitioner stated that such instructions violate the NALSA judgment that discrimination cannot be based on "*gender identity and sexual orientation*".

The petitioner did not challenge the general exclusion policy for individuals at risk of HIV and Hepatitis infection but specifically opposed the inclusion of transgender people and homosexual men in this category. The administration argued that, due to technological limitations, screening donors from these groups for the two diseases is not a completely reliable method to prevent infections in recipients. As a result, the administration asserted that the objection should be dismissed.

"The court adjourned the matter directing the State counsel to seek instructions and what would be the decision of the court is what will get to know in the near future".

This highlights the challenges faced by transgender individuals and gay men, who are barred from donating blood solely due to their gender identity and sexual orientation. The petitioner did not contest the broader exclusion criteria for individuals at risk of HIV and Hepatitis infection but specifically objected to the inclusion of transgender people and gay men in that category.

4.6 Same-Sex Marriage Not Legalised[44], 2023

In the landmark judgment delivered by the Apex Court in *Supriyo @ Supriya Chakraborty v. Union of India* on October 17, 2023, the Court declined to legalise same-sex marriages and left the decision to legislate same-sex marriage to Parliament. Major issues discussed included the interpretation of constitutional rights to equality and dignity under Articles 14, 15, and 21, the societal and cultural implications of legalising same-sex marriage, and the need for comprehensive anti-discrimination laws. The Court also addressed the practical challenges and potential changes in various laws, such as inheritance, adoption, and maintenance, that would arise if same-sex marriages were legalised. While the judgment emphasised the need for societal acceptance and legal protection for the LGBTQ+ community, it ultimately deferred to the legislative branch to enact specific laws regarding same-sex marriage.

The Apex Court's refusal to legalise same-sex marriages creates significant struggles for the transgender community. Firstly, it perpetuates legal and social exclusion, denying transgender

[44] Supriyo and Ors. v. Union of India AIR 2023 SC 5283

individuals the same marital rights as cisgender heterosexual couples. This impacts their ability to access spousal benefits, inheritance rights, and social recognition, exacerbating their marginalisation. Additionally, without legal recognition of their marital relationships, transgender individuals face challenges in adoption, healthcare decision-making, and securing legal rights for their partners. The decision also underscores a broader societal reluctance to fully acknowledge and integrate transgender rights, leading to continued discrimination and limited legal protections for the community.

The Government emphasised that there cannot be a basic right to recognise a certain type of social interaction. The central Government has rejected the petitions filed by homosexual couples seeking legalisation of same-sex marriage before the Apex Court[45]. In an affidavit filed with the Apex court, the Central Government stated that *"living together as partners and having intimate intercourse with individuals of the same sex is not similar to the Indian family unit concept, which includes a biological man and biological woman with children born outside of such a marriage."*[46].

The Government stated that the latter required a "*biological man as a 'husband,' a biological woman as a 'wife', and the children from their marriage*". In addition, the administration emphasised that there cannot be a basic right to recognise a certain type of social interaction. The affidavit was submitted in response to a group of petitions requesting that the "right to marry" the person of one's choosing is extended to LGBTQIA+ individuals. The administration also stressed that despite the fact that same-sex relationships are not illegal, the State recognises only heterosexual relationships for the purpose of marriage.

This highlights the opposition of the Indian Government to the recognition of same-sex marriage and the denial of fundamental rights to LGBTQIA+ citizens. This rigid definition of family disregards the reality of diverse familial structures and the basic human rights of individuals. The denial of same-sex marriage and the fundamental rights of LGBTQIA+ individuals perpetuate discrimination and hinder their access to legal protections and societal recognition.

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[45]"Heterosexual Marriages The Norm': "Centre Opposes Pleas In Apex Court Seeking Recognition For Same-Sex Marriages' <https://www.livelaw.in/top-stories/same-sex-marriage-supreme-court-heterosexual-marriage-homosexual-centre-opposes-223558>" accessed 6th July 2024".

[46] Supra note 36

4.7 Karnataka High Court Criticizes Educational Institutions for Bureaucratic Hurdles in Name and Gender Change Process for Transgender Persons[47], 2024

The Karnataka High Court urged educational institutions to process applications for name and gender changes in degree certificates without forcing transgender persons to seek court orders. This decision is intended to streamline administrative procedures and reduce bureaucratic hurdles for transgender individuals.

Justice Ravi V Hosmani, while hearing a petition from a transman seeking a revised master's degree certificate reflecting his new name and gender post-gender reassignment surgeries, stressed that educational institutions should act in accordance with the principles laid out in the Apex Court's NALSA judgment.

The Court noted that many transgender individuals face similar challenges and should not have to approach the Court for what should be routine administrative processes. By facilitating easier access to updated educational documents, this judgment aims to ensure that transgender individuals can more easily navigate societal and professional environments, thereby reducing discrimination and promoting inclusivity.

4.8 Apex Court Addresses Employment Discrimination Against Transgender Teacher in Landmark Petition[48], 2024:

In March 2024, a transgender teacher[49], who faced termination from her teaching positions in Uttar Pradesh and Gujarat due to her gender identity, approached the Apex Court seeking justice and reinstatement. The teacher's petition underscored the pervasive discrimination and bias that transgender individuals encounter in the employment sector. Responding to the petition, the Apex Court gave notice to the Central as well as State governments, demanding explanations and responses regarding the termination and the broader issues of discrimination against transgender individuals.

The Court's intervention brought to light the severe challenges faced by transgender persons in securing and maintaining employment, particularly in conservative regions where societal acceptance is minimal. The case highlighted the need for stringent protective measures and inclusive policies to safeguard the rights of transgender employees. By seeking responses from the governments,

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[47] Vihaan Peethambar v. Manipal University & Others, WP No. 12606 of 2023, decided on 05.01.2024

[48] Debayan Roy, 'Transgender Teacher Moves Apex Court Alleging Termination of Services in UP, Gujarat' (*Bar and Bench - Indian Legal news*, 2 January 2024) <https://barandbench-nluo.refread.com/news/supreme-court-notice-transgender-teacher-plea-termination-services-up-gujarat> accessed 6th July 2024.

[49] Jane Kaushik v. Union of India and Ors., W.P.(C) No. 001405 of 2023

the Apex Court emphasised the importance of adhering to constitutional guarantees of equality and non-discrimination.

This case also pointed to the necessity for educational institutions and workplaces to adopt more inclusive practices, ensuring that transgender individuals are treated with dignity and respect. The petitioner's experience exemplified the systemic barriers that hinder the professional growth and stability of transgender persons, necessitating immediate judicial and legislative attention.

The Apex Court's proactive approach in this issue is anticipated to facilitate substantial legal reforms, with the objective of fostering a more inclusive and equal environment for transgender persons across several sectors. The current case represents a pivotal moment in the struggle for transgender rights in India, with the potential to enhance comprehension and enforcement of anti-discrimination policies in employment.

4.9 Ban on Forced *"Conversion Therapy"* in Landmark LGBTQ+ Rights Case, 2024:

Recently in the case of "*Afeefa CS & Anr. v. National Medical Commission & Ors"*[50], a lesbian pair petitioned the Kerala High Court to ban forced conversion therapy, a technique meant to alter a person's sexual orientation or gender identification. An event when one of the petitioners underwent such treatment against her will motivated this suit. For its negative psychological and emotional effects, forced conversion therapy is strongly denounced by human rights organisations and mental health specialists.

The case underscores the ongoing struggles faced by LGBTQ+ individuals in India, despite increasing societal acceptance and legal recognition of their rights. It highlights the urgent need for comprehensive legal measures to protect LGBTQ+ individuals from harmful practices. This petition follows the previous case of *Queerala & Anr. v. State of Kerala & Ors*[51]., where the Kerala High Court directed the State to frame guidelines to prevent forced conversion therapy, marking a significant step toward safeguarding LGBTQ+ rights.

The current petition emphasises the urgency of implementing these guidelines and enforcing stringent legal protections. It highlights the critical role of state intervention in preventing such harmful practices and protecting the dignity and rights of LGBTQ+ individuals.

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[50] Giti Pratap, "'Lesbian Couple Moves Kerala High Court Seeking Ban on Forced Conversion Therapy' (*Bar and Bench - Indian Legal news*, 22 March 2024) <https://barandbench-nluo.refread.com/news/lesbian-couple-kerala-high-court-plea-ban-forced-conversion-therapy>" accessed 6th July 2024.

[51] Queerala & Anr. v. State of Kerala & Ors, WP (C) No. 21202 of 2020 (A)

4.10 Madras High Court Expands "Horizontal Reservations for Transgender Persons", 2024

In April 2024, in the case of *Rashika Raj v. State of Tamil Nadu*[52], the High Court decided unanimously to mandate horizontal reservations for every transgender individual. This ruling reversed a prior rule limiting such reservations to transgender people identifying as women. Horizontal reservations are meant to cross with vertical ones (like those based on caste and economic level), thereby guaranteeing more inclusiveness and access to opportunities over many socioeconomic groups.

The Court's decision marks a significant turning point in acknowledging the particular difficulties experienced by transgender people, who regularly run against prejudice and marginalisation at several societal levels. Expanding horizontal reservations to encompass all transgender people helps the Court to respect the many identities within the transgender community and advance equality in other vital spheres including education, work, and other fields.

This ruling is likely to have a broad effect not just in giving transgender people fair chances but also in influencing other governments to follow. It emphasises the need of social and legal systems that guarantee the rights and dignity of every transgender person thereby enabling them to be given the same possibilities and safeguards as other underprivileged groups. The Rashika Raj case emphasises the need of ongoing legal campaigning and changes to remove the systematic obstacles the transgender population encounters. It also shows how the Court's changing role protects everyone's rights, especially those of traditionally underprivileged and disregarded people.

4.11 "Transgender Rights in Electoral Participation", Upheld (2024)

In April 2024, the Delhi High Court issued a significant judgment in the case of Rajan Singh v. State (Govt. of NCT of Delhi) & Others.[53] A transgender person submitting a candidacy for the Lok Sabha elections was awarded police protection by the Court. This ruling underlined the need of maintaining the equality clause included in Article 14 of the Indian Constitution.

The Court's ruling was a vital first step towards guaranteeing that transgender people can take part in democratic events free from prejudice or violence. The Court confirmed the rights of transgender people to participate fully in political activities by giving police

[52] Rashika Raj v. State of Tamil Nadu, the Madras, 2024 SCC OnLine Mad 1624
[53] Rajan Singh v. State (Govt. of NCT of Delhi) & Others., 2024 SCC OnLine Del 3031

protection, therefore supporting inclusion and equality in India's democratic framework.

4.12 High Court Directs "Provision of Medical Care to Transwoman in Jail", 2024

Recently in the case of Ahana v. State of Kerala[54], the Kerala High Court tackled a major question on transgender rights. Transwoman Ahana asked ₹10 lakh in compensation for her denial of gender-affirming medical care while incarcerated. Understanding the critical need for this kind of therapy for transgender people—especially those under custody—the Court issued an interim injunction instructing the jail administration on providing Ahana with necessary medical attention. This case highlights, regardless of their legal status or incarceration, transgender people's enormous need for access to healthcare services including gender-affirming medical operations. It highlights the importance of authorities to ensure equal access to healthcare under all circumstances and the function the Court performs in defending the rights and dignity of transgender individuals.

4.13 Invalid Requirement: Tamil Nadu's Mandate on Transgender Name and Gender Changes, 2024

In the case of Sivakumar TD v. State of Tamil Nadu[55], the Madras High Court addressed Tamil Nadu's official gender recognition policies for transgender persons. The Court declared that it is discriminatory for the Tamil Nadu government to insist that transgender persons get medical testing or sex change surgery certifications before changing their name and gender on official records. Instead, for this reason the Court kept current identifying records—including self-declared forms and the Aadhaar card—valid.

This decision "recognised the right of transgender individuals to self-identify their gender" without imposing intrusive procedural impediments, so closely conformingly to the ideals laid out by the Apex Court in its NALSA verdict. Emphasising the liberty and dignity of transgender individuals, the Madras High Court's decision is a significant first towards granting under Indian law equal rights and non-discrimination depending on gender identity. It establishes a benchmark for other countries to apply more inclusive and polite policies towards transgender persons aiming at formal gender recognition.

[54] Ahana v. State of Kerala WP (Crl) 519/2024
[55] Sivakumar TD v. State of Tamil Nadu, 2024 SCC OnLine Mad 574

4.14 Calcutta High Court Directs Implementation of 1% Reservation for Transgender Persons in West Bengal Public Employment, 2024

In a significant judgment[56], the Calcutta High Court has required the West Bengal government to impose a 1% reservation for transgender people in public jobs in June 2024. This guidance conforms with the values set forth in the NALSA, which underlined the importance of reserves and welfare policies meant to empower transgender people. The Court's ruling seeks to remove long-standing obstacles transgender people encounter in trying to land jobs and fight workplace discrimination. Enforcing this reservation is supposed to increase inclusiveness and encourage equitable participation of transgender people in the employment by the state government. This action marks a major turning point towards more society inclusion and guarantees of equal rights for transgender groups in West Bengal.

4.15 Inadequacies in the Uttarakhand Uniform Civil Code: Discrimination Against Same-Sex and Transgender Individuals, 2024

Another instance of discrimination against same-sex couples is evident in the recently introduced Uttarakhand Uniform Civil Code[57]. While its primary objective is to create a cohesive framework for family law, it has faced significant criticism for falling short of true uniformity and gender justice[58]. The Code perpetuates disparities in essential areas such as adoption and fails to address the rights of transgender individuals within the family structure. Additionally, it fails to address the marriage rights of transgender and same-sex individuals, thereby overlooking the need to promote equality and inclusivity for people of all gender identities and sexual orientations. This oversight highlights the ongoing challenges in achieving comprehensive legal reform that genuinely protects and promotes the rights of marginalised communities[59].

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[56] Mrinal Barik v. State of West Bengal & Ors., 2024 SCC OnLine Cal 5920

[57] The Uniform Civil Code, Uttarakhand, 2024 (Act No. 3 of 2024)

[58] Charu Bahri IndiaSpend.com, 'With Gaps and Overreach, Who Does the Uttarakhand Uniform Civil Code Actually Help?' (Scroll.in, 27 March 2024) <https://scroll.in/article/1065531/with-gaps-and-overreach-who-does-the-uttarakhand-uniform-civil-code-actually-help> accessed 7th July 2024.

[59] 'Legally Speaking | The Quest for Equality, Which Is at the Heart of the Uttarakhand UCC Bill, Is Flawed' (Hindustan Times, 13 February 2024) "<https://www.hindustantimes.com/analysis/legally-speaking-the-quest-for-equality-which-is-at-the-heart-of-the-uttarakhand-ucc-bill-is-flawed-101707828648891.html>" accessed 7th July 2024: *"The Uttarakhand UCC had an opportunity in its hands. But it doesn't take into account contemporary modes of living. This is evident from its requirement to register live-in relationships and its erasure of same-sex couples and relationships involving trans persons by using binary gender (man-woman) language".*

5. Critique of Transgender Rights Implementation in India: A Long Road Despite Legal Frameworks

India's journey towards ensuring equitable rights for transgender individuals is marked by significant legal milestones and persistent challenges. While landmark judgments like NALSA laid the foundation for recognising transgender rights, the practical implementation of these rights continues to lag behind.

In Maharashtra, the High Court's criticism of the state government's failure to implement reservations for transgender individuals reflects a broader issue of non-compliance and administrative apathy. Despite the Apex Court's clear directive seven years ago, many states, including Maharashtra, have yet to enact necessary policies to ensure equal opportunities in education and public employment.

The Kerala High Court's recent directive regarding document changes for transgender persons highlights another facet of the struggle, bureaucratic hurdles. Even with legal protections in place under the Transgender Rights Act, transgender individuals often find themselves navigating complex and discriminatory processes to update their official records.

Moreover, issues such as the exclusion of transgender persons from blood donation and the denial of marriage rights underscore deeper societal biases and legal inadequacies. The defence of exclusive blood donation rules by the Central Government and denial of same-sex weddings expose ingrained beliefs that support marginalisation and discrimination.

Although courts like as the Madras High Court have enlarged horizontal reservations and maintained transgender rights in several domains, these successes are sometimes isolated and unevenly applied throughout different states. The discrepancy between legal systems and ground reality highlights a structural deficiency guaranteeing the complete realisation of transgender rights. Dealing with these issues going ahead calls not only judicial activism but also ongoing legislative changes, public awareness initiatives, and capacity-building inside government agencies. Complementary and thorough policies ensuring transgender people equitable access to school, healthcare, employment, and social involvement are desperately needed.

Until then, India's road towards real equality and dignity for transgender people is a difficult and challenging one that calls for coordinated efforts among all players to close the disparity between legal rights and lived reality.

6. Challenges And Discrimination: Enduring The Struggles of the Transgender Community in India

Because of society's prejudice and lack of knowledge, transgender persons have particular difficulties and hardships. Feminists and the transgender community see the problems confronting transgender people from different but also interconnected angles. Although the Transgender Rights Act is a vital legislation meant to defend transgender rights in India, it has also drawn criticism from feminists as well as from the transgender community. Trans individuals still face discrimination and other challenges in their daily life even as the Government approved the Transgender Rights Act with an aim of enhancing their life and empowering them.

6.1 Feminist Perspective

Feminists view the struggles of transgender people as part of a larger societal problem of gender discrimination. The Transgender Rights Act was meant to be the outcome of the transgender community's prolonged struggle to gain legalisation of their rights through the Parliament[60]. However, according to many trans activists, the Transgender Rights Act has actually reversed many of the achievements that the transgender communities had obtained in the NALSA judgment of 2014. *"Meera Sanghamitra, a trans rights activist and the National Alliance of People's Movements convener in Telangana severely criticises the said Act saying that it is in clear violation of the NALSA judgment"*[61]. It can be seen from the views of various feminists that the struggle for transgender continues to be a battle for them.

6.2 Transgender Community Perspective:

The transgender community is at the forefront of the struggle for transgender rights. They advocate for the *"right to self-identify and express their gender identity"* without fear of discrimination or violence. However, the transgender community has also been critical of the Transgender Rights Act[62].

They argue that the law doesn't go far enough to protect transgender rights and may even undermine them in some respects. For example, the law requires transgender individuals to undergo a

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[60] Rachana Mudraboyina and others, 'A Critique Of Transgender Persons (Protection Of Rights) Bill, 2019' "(*Feminism in India*, 5 August 2019) <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/>" accessed 7th July 2024.

[61] 'Halt Implementation of the Trans Act 2019: Activists' "(*The Wire*) <https://thewire.in/lgbtqia/trans-act-2019-rules-feedback-activists>" accessed 12th July 2024 .

[62] 'A Critique of Transgender Persons (Protection of Rights) Bill, 2019 — SLIC' <https://www.slic.org.in/publication/a-critique-of-transgender-persons-protection-of-rights-bill-2019> accessed 7th July 2024.

certification process to be recognised as transgender, which some argue is violative of their right to self-identify[63].

Transgender individuals face unique challenges and struggles due to societal discrimination and lack of understanding.

"It is not just problematic but regressive, said Grace Banu, founder of the Trans Rights Now collective. The community has opposed it from the beginning"[64].

6.3 The Struggles of the Transgender Community:

- They experience prejudice in the workplace, in schools, and even in their own families, which has a devastating effect on their quality of life.
- Despite the Government enacting the Transgender Rights Act which enables transgenders the right to self-perceived gender identity, individuals frequently face an identity crisis when they are compelled to identify with a gender with which they are not affiliated.
- It's also socially stigmatising to inherit property or adopt a kid, so these people have a harder time doing both. Social exclusion forces them into low-paying service employment or even sex labor, despite their credentials.
- Due to societal stigma, people from this community have trouble finding jobs and sometimes encounter significant discrimination on the job.
- Lack of infrastructure makes it difficult for people to use public facilities such meeting spots and toilets. Everywhere from bars to hospitals to classrooms, they struggle.

7. Conclusion

Finally, the continuous struggle for transgender rights in India emphasises the necessity of constant development towards the defence of basic human rights. Examining current events influencing transgender rights demonstrates that the road towards complete equality and inclusion for transgender people is still long-distance.

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[63] Sushmita Pathak, 'India Just Passed A Trans Rights Bill. Why Are Trans Activists Protesting It?' "*NPR* (4 December 2019) <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it>" accessed 7th July 2024.

[64] Niha Masih, 'A Bill Meant to Protect India's Transgender Community Instead Leaves Them Angry and Aggrieved' "*Washington Post* (30 November 2019) <https://www.washingtonpost.com/world/asia-pacific/a-bill-meant-to-protect-indias-transgender-community-instead-leaves-them-angry-and-aggrieved/2019/11/29/6c2c7b7e-116b-11ea-924c-b34d09bbc948_story.html>" accessed 7th July 2024.

Promoting transgender rights calls for a more general society respecting diversity and encouraging inclusiveness, not only for legislative and regulatory changes.

Although notable rulings like NALSA have helped to acknowledge transsexual rights, their actual application is still lacking. Though the Transgender Rights Act offers legal protections, transgender people may have difficult and discriminating procedures to update their records. Problems like denial of marital rights and exclusion from blood donation expose more general society prejudices and legal flaws.

Complementable and thorough laws guaranteeing transgender people equal access to education, healthcare, work, and social involvement are desperately needed. India's search for real equality and dignity for transgender people stays a difficult and challenging road until these problems are resolved, requiring coordinated efforts across all players to close the distance between legal safeguards and lived reality.

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Commercial Surrogacy in India: Contemplating Prohibition versus Regulatory Frameworks

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Abstract

Commercial surrogacy has been a forsaken subject in the Indian legal system. It has received meagre attention from jurists and legislators with the enactment of two major legislations governing commercial surrogacy, i.e. Surrogacy (Regulation) Act 2021 and Artificial Reproductive Technology (Regulation) Act. These enactments employed a complete ban on commercial forms of surrogacy. Reflecting on the current scenario of surrogacy laws in India, the paper highlights various challenges posed by the legalization of commercial surrogacy. Analyzing the challenges against the socio-legal backdrop while taking into consideration the response of judicial systems in landmark judgements, the paper offers thoughtful suggestions on the way forward with commercial surrogacy in India.

Keywords

Commercial Surrogacy, Exploitation, Bodily Autonomy, Abortion, Citizenship, Fundamental Rights

1. Introduction

In the last decade, the Indian judicial system has witnessed a vigorous liberal change in its gender laws with the legal recognition of same-sex relationships, legal recognition of rights of prostitutes and the enactment of ART (Assisted Reproductive Technology) (Regulation) Act 2021, along with Surrogacy (Regulation) Act 2021. Despite the progress, India continues with a conservative approach towards issues which are intertwined with questions of morality, such as allowing same-sex couples to get married with legal consequences and allowing them to establish a family. One of such other areas where a conservative approach has been applied is commercial surrogacy. In

India, an absolute ban has been imposed on commercial surrogacy under the Surrogacy Act[1], it becomes essential to analyse the socio-legal considerations behind such a ban and its repercussions. Options to have children for couples who are unable to conceive by conventional means remain narrowed down to the alternative of altruistic surrogacy. Prohibition on commercial surrogacy is an encroachment on personal liberty, as it completely eradicates the chances of procreation for couples who are unable to avail themselves of such services on altruistic grounds. The undesired repercussions of the ban outweigh the possible consequences of legalizing commercial surrogacy, as this ban fails to achieve the objectives that it seeks to accomplish. This essay examines the most significant challenges posed by commercial surrogacy and delves into the constitutional validity of the ban on commercial surrogacy while making suggestions on the way forward for Indian surrogacy laws.

2. Exploring the Complexities of Commercial Surrogacy within a Socio-Legal Context

Opponents of commercial surrogacy have challenged it on a multitude of grounds. One of the objections raised is the exploitation of surrogate mothers, which is primarily founded on moral considerations. It is callously understood as "the rich renting out a poor woman's womb". Exploitation reflects two notions. One notion is that of an unfair advantage being taken of a person and another is that of a disproportionate harm suffered by only one of the parties in a transaction. The two notions are intertwined as the harm inflicted by the course of pregnancy and delivery remains impervious to the surrogate mother's feeling that the incentives outweigh the physical and mental distress, thus making the transaction unfair to her. The surrogate mother gains from a consensual transaction, which *prima facie* seems unfair to her.

The data pertinent to the commercial surrogacy market in India appears to correspond to the moral concerns of exploitation. In India, the commercial surrogacy industry in 2017 valued up to $2.3 billion annually, according to the Thomson Reuters Foundation.[2] The Centre for Social Research, a nonprofit organisation, found that 88% of surrogate mothers surveyed in Delhi and 76% in Mumbai in 2013 were not acquainted with the conditions of their surrogacy agreement, and in fact, 92 per cent of those residing in Delhi did not even own a copy of it.[3] Women living in poverty in India resort to surrogacy as a means of livelihood, underpinned by a lack of education, leaving them

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[1] Surrogacy (Regulation) Act, 2021, § 4, No.47, Acts of Parliament, 2021 (India).
[2] Frederik Joelving, *Surrogate Mothers in India Unaware of Risks*, REUTERS, Mar. 2, 2015, https://www.reuters.com/article/business/healthcare-pharmaceuticals/surrogate-mothers-in-india-unaware-of-risks-idUSKBN0LY1J6/ (last visited Jun 23, 2024).
[3] *Surrogate Motherhood- Ethical or Commercial.* CSR, Dr. Ranjana Kumari

desperate to accept these offers, which may seem too good to refuse. Until 2021, a codified law on surrogacy was absent from the scenario, with almost no remedies for these women to avail. Since 2012, news reports have emerged highlighting the state of surrogate mothers who were confined to hostels and inadequately informed about the risks involved while also being meagrely remunerated.[4] This further revalidates the claims of exploitation in the backdrop of human rights.

Regardless of the degenerate circumstances in which these women find themselves in after the implantation, many cases have been reported where women opt for becoming second-time surrogates.[5] Thus, two of the main conditions that the industry thrives on are the presence of women with high levels of socio-economic vulnerability and the serious insufficiency of legal regulation.

The second challenge faced by proponents of commercial surrogacy is that of the citizenship of the child born so born. Historical precedent demonstrates that complicacies may arise in acquiring the commissioning of parents' citizenship for the child due to contradictions in citizenship laws across borders. Prior to the ban on commercial surrogacy, India served as a hub for reproductive tourism.[6] Commissioning couples have been incentivised by low costs to opt for surrogates in India, however, some travelled to India due to surrogacy being banned within their own countries, raising challenges of citizenship of the child born.

The issue was first identified in the Baby Manji case[7], a Japanese couple faced issues with the citizenship of their child born through surrogacy in India. The child was required to be adopted by the commissioning parents in compliance with Japanese law after acquiring an Indian passport. After the pronouncement of the court that commercial surrogacy was legal in India in a writ petition filed by an NGO challenging the legality of commercial surrogacy, the baby was issued an identity certificate in India and taken back to Japan as the custody of the baby was granted to her paternal grandmother.

A similar issue cropped up in the case of Jan Balaz v Anand Municipality Corporations[8], a commissioning couple, who were German nationals, experienced setbacks in taking their twins born through surrogacy back with them, as surrogacy procedures were not legally recognised in Germany. The couple applied for Indian passports for the twins. Given that this was a case of gestational surrogacy, the

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[4] TIME, *How a Surrogacy Ban Could Leave Women in India More Vulnerable Than Ever*, TIME (2021), https://time.com/6075971/commercial-surrogacy-ban-india/ (last visited Jun 24, 2024).
[5] *Id.*
[6] Diksha Munjal-Shankar, *MEDICAL TOURISM, SURROGACY & THE LEGAL OVERTONES - THE INDIAN TALE,* 56 JOURNAL OF THE INDIAN LAW INSTITUTE 62 (2014).
[7] Baby Manji Yamada v Union Of India & Anr (2008) 13 SCC 518
[8] Jan Balaz v Anand Municipality 2009 SCC OnLine Guj 10446

twins were granted a passport on the condition of being birthed by an Indian mother and thus, the surrogate mother was identified as the biological mother for the purposes of documentation alongside the commissioning father.

The Citizenship Act, 1955 enacts that Indian citizenship is obtainable by birth, descent, registration, naturalisation and incorporation of territory.[9] This Act was inadequate in addressing the challenges of citizenship posed by cross-border commercial surrogacy. Consequently, in 2013, visa regulations were revised by the Ministry of Home Affairs and mandated all foreign commissioning couples to fulfil certain conditions prior to initiation of surrogacy procedures in India, including a letter from the embassy of the respective country establishing that surrogacy was permitted in the said country and the child born through the procedure of surrogacy will be granted a permit to enter the country with commissioning parents as a biological child.[10]

Commercial surrogacy redefines the traditional notions of parentage, making it exigent for countries to frame efficient regulations, especially when citizens from different countries with contradictory laws are involved. Parentage was traditionally determined by "who are the biological parents?" of the child. However, these notions have now evolved with the change in the meaning of “parents” who are now determined on the basis of genetic, marital and functional relationships. A couple can become parents through adoption or surrogacy as well, which puts the legal system at odds with the conventional definitions. As per the long-established principles of citizenship, jus soli and jus sanguinis, citizenship can be acquired as a right by birth within the borders of a particular country and right by descent.

The child is deprived of rights and becomes stateless when the laws of the country to which the commissioning parents belong are incompatible with those of the surrogate’s country. The child is refused the citizenship of the home country of the commissioning parents' where surrogacy is prohibited and cannot acquire the citizenship of the surrogate mother’s country because parentage is determined on the basis of genetics. Thus, the child becomes destitute, as set forth by the Baby Gammy case, where the commissioning couple abandoned their baby on discovering that the baby was disabled. Surrogate mothers, who are mostly poverty-stricken, are left with a child to raise and nurture. The future of such children is relinquished to uncertainties. It is such legislative shortcomings which jeopardize the lives of children born through surrogacy. Strict prohibitions can result in the development of a black market, fostering increased chances of

[9] Citizenship Act, 1955, § 3, No.57, Acts of Parliament, 1955 (India)
[10] Ibid Note 6

exploitation and trafficking; therefore, achieving a middle ground will lead to a more stable outcome.[11]

An additional challenge encountered by commercial surrogacy is the issue of abortion. The bone of contention in commercial surrogacy contracts is the anti-abortion clause. In India, a woman's right to abort has been indisputably made subject to her absolute bodily autonomy while being bound by certain limitations mainly with respect to time. A married woman is granted the right to make an exclusive decision to terminate her pregnancy, and this right is considered to be included under the right to life under Article 21.[12] Reasonably, the same right must extend to surrogate women, as the bodily autonomy of a woman cannot be compromised on the grounds of her marital status. Thus, there arises a conflict between the right of commissioning parents to procreative freedom and the surrogate's right to bodily autonomy, including abortion.

Two different situations can be hypothesized on the question of abortion. Firstly, the commissioning parents wish to have the pregnancy terminated while the surrogate refuses to do so, as seen in the Baby Gammy case, where the surrogate refused to terminate the pregnancy on discovery of serious disabilities of the fetus because of her Buddhist beliefs. The commissioning parents refused to take the baby, leaving the responsibility of the baby in the hands of the surrogate. The demand to abort the baby can be accounted for as a breach of contract by the commissioning parents; however, in such cases, the courts may be hesitant to order specific performance as it may result in unwanted parenthood, which would certainly not be in the best interests of the child. Awarding damages would require the surrogate mother to show a certain loss of value she has suffered due to a breach of contract by the commissioning parents. Considering that the "loss" she experiences is the burden of the child she is left with, she would be required to attach a value to the child to calculate the damages payable by commissioning parents, which would amount to the selling of the child.

Secondly, the circumstances could be such that the surrogate wishes to abort, but the commissioning parents contend breach of contract. This situation raises questions beyond the equations of a contractual agreement. As stated earlier, a woman's decision to abort is an exclusive right granted to her, hence, a surrogate being bound by an anti-abortion clause would fundamentally be an infringement of the right to equality as well as the right to life. Said clause would be underpinned by a discriminative classification between surrogates and

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[11] Arijit Paladhi, *India's Commercial Surrogacy Ban Could Spawn a Thriving Black Market*, MINT (2016), https://www.livemint.com/Opinion/H8ruZUyF594O05poCs4quK/Indias-commercial-surrogacy-ban-could-spawn-a-thriving-blac.html (last visited Jul 15, 2024).

[12] Shamba Dey, *Right to Abort in Surrogacy Contracts: An Enquiry*, 50 ECONOMIC AND POLITICAL WEEKLY 16 (2015).

other women. Remedies that can be envisaged for this situation are similar to those mentioned above. In this scenario as well, the commissioning couple would have to attribute a definite value to their loss to claim damages, meaning that a monetary value would have to be attached to the loss of a child.

Therefore, the issue of abortion in commercial surrogacy contracts remains uncertain, as it extends beyond the scope of contract law and delves into the realms of constitutional law and human rights.

3. Assessing the Constitutional Legitimacy of Prohibiting Commercial Surrogacy

The Surrogacy Regulation Act, 2021 legalizes altruistic surrogacy exclusively, prohibiting other forms, including commercial surrogacy.[13] Being a form of means to livelihood and hope for unmarried persons to have children, the constitutional validity of a ban on commercial surrogacy has been called into question on the grounds of being discriminatory. For legislation to be valid, its consistency with the golden triangle is a prerequisite. The scope of Articles 21, 14 and 19 is continually expanding while interpretations are being moulded to correspond to the needs of the hour. The concept of the "golden triangle" was established in the well-known case of Maneka Gandhi v UOI.[14] The gist of the “golden triangle” concept is that if a law deprives a person of the rights enshrined under Article 21, the said law must pass the tests of Article 14 as well as 19. Thus, it is necessary to examine whether legislation imposing a ban on commercial surrogacy complies with the requirements of Articles 19 and 21. However, the provisions on commercial surrogacy established by this legislation cannot be challenged under Article 14, as it uniformly bans commercial surrogacy for everyone

3.1 Infringement of Article 19

Article 19(1)(g) ensures freedom to engage in any trade, profession or occupation, but this right has been subjected to reasonable restrictions. Rights under Article 19 are subject to reasonable restrictions on the grounds of sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency and morality, defamation, incitement to an offence and contempt of court.[15] An indispensable prerequisite for the applicability of these restrictions that has been laid down by the courts is that there must be a causal connection between the restriction and the object sought to be achieved.

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[13] Surrogacy (Regulation) Act, 2021, § 4, No.47, Acts of Parliament, 2021 (India).
[14] Maneka Gandhi v UOI 1978 AIR 597
[15] India Const. art.19

Commercial surrogacy can be considered as a form of trade where a woman offers services to the commissioning couple. The services include 9 months of carrying and nurturing the fetus, for which the surrogate receives remuneration. Commercial surrogacy has been popularly misconstrued as "baby-selling" in the sense that after the birth, the child is handed over to the commissioning parents and in turn, the payment is made to the surrogate. However, it must be pointed out that the payment is made to the surrogate in exchange for her services and the burden of pregnancy, not for the child born. Thus, a woman who earns money through commercial surrogacy cannot be discriminated against and denied protection of her interests under Article 19. A complete ban on commercial surrogacy does not serve the intended purpose since such activities of exploitation continue to thrive covertly. A more stable solution would be to curb the illegal activities branching out of commercial surrogacy rather than subjecting it to a complete ban.

The other aspect, that is, a ban on grounds of moral considerations, must be weighed alongside the bodily autonomy of a woman. In India, prostitution is, per se, not banned, but activities surrounding it have been declared illegal under ITPA (Immoral Traffic Prevention Act), making it a legally grey area.[16] However, in 2011, the Supreme Court recognised the right of sex workers to live with dignity under Article 21 and directed the government to frame laws for the improvement in the lifestyle of sex workers.[17] The court recognised that women who choose to embrace this profession do it as a matter of last resort and do not make such a choice out of free will. Thus, they must be guaranteed legal protection of their rights. It seems incongruous to legalise sex work while imposing an absolute ban on commercial surrogacy since, in both cases, the bone of contention is common because women and children are as prone to exploitation in the business of prostitution as much as they are in commercial surrogacy. As prostitutes, women are more vulnerable to sexual violence, given the nature of the act itself and the convenient circumstances it creates for the possibility of sexual assault or rape. The same can be said to be true for the children born out of commercial surrogacy vis a vis those born to sex workers. For commercial surrogacy, the commissioning parents are bound by a contract to take over the responsibility of the child right after birth. However, no such contracts exist in case of prostitution, which would bind the person hiring the sex worker to raise the child with her, in case of an unwanted pregnancy of the sex worker. Thus, prostitution puts both women and children at a higher risk of exploitation and destitution than commercial surrogacy, yet sex work continues to be legal in India,

[16] Dipika Jain & Kimberly Rhoten, *SEX WORK AND THE LAW IN INDIA: PERSPECTIVES, VOICES AND NARRATIVES FROM THE MARGINS*, 40.

[17] Budhadev Karmaskar vs State Of West Bengal 2011 (11) SCC 538

whereas commercial surrogacy remains illegal. The fundamental right of a woman to have bodily autonomy and to utilise her body for providing services in exchange of a profit under Article 19 must not be compromised over the possibility of pertinent challenges.

3.2 Infringement of Article 21

Article 21 of the constitution guarantees a cluster of rights, including the right to livelihood[18] right to privacy[19] and right to procreate.[20] Fundamentally, Article 21 has been widely interpreted to be understood as the right to live beyond mere animal existence and to exist with human dignity. It includes all the ingredients required to sustain a dignified life. To have the freedom to earn a livelihood is vital to sustain a dignified life. Commercial surrogacy provides a fair means for women to earn a livelihood, preventing them from falling into poverty when other opportunities are scarce. Outlawing commercial surrogacy deprives a surrogate mother of her right to livelihood by not being allowed to be compensated for her gestational services. Such a prohibition provides avenues for exploitation, as services are extracted out of a woman without any advantages being conferred upon her in return. This creates an imbalance in the transaction between the two parties, allowing the surrogate mother to be unfairly exploited. The services provided by a surrogate mother should be given a dignified and legal status as any other form of employment, and she must be allowed to ascribe a value to them, shifting the current scenario which allows exploitation of her free services.

Further, the Supreme Court of India has referred to the judgement laid down in the American case of Roe v. Wade time and again, wherein it was pronounced that "a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education."[21] In the judgement of the case of B.K Parthasarathi, the Indian judiciary made its stance clear by stating that the personal decision of the individual about the choice to give birth to children is called 'the right of reproductive autonomy' and is an element of the right to privacy.[22] It is reasonable to infer from this that the State lacks authority to interfere in all decisions associated with the right to procreate, which is, needless to say, contingent upon reasonable restrictions. The intervention of the State in a couple's decision to procreate naturally or through ART, would result in a violation of the right of reproductive autonomy of the couple and, consequentially, an infringement of the right to privacy. Hence, Commercial surrogacy being a mode of procreation must remain sheltered under Article 21.

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[18] Olga Tellis & Ors vs Bombay Municipal Corporation & Ors. Etc 1986 AIR 180
[19] Ibid. Note 14
[20] B.K. Parthasarathi v. Govt. of A.P., 1999 SCC OnLine AP 514
[21] Roe v. Wade, 410 U.S. 113 (1973)
[22] Ibid Note 20.

4. The Way forward

Scientific research has revealed that remuneration allows scope for the emotional detachment of the surrogate mother from the fetus.[23] Moreover, it has been observed that altruistic surrogates are less likely to take care of themselves to ensure that a healthy child is born.[24] Considering that a surrogate expecting remuneration for her services has economic interests vested in the fetus, it is likely for her to feel obligated to care for the health of the unborn child. Therefore, in Russia and many states of the US, commercial surrogacy is given the same status as any other form of employment.[25] In India, a similar approach can be adopted to curb the possibilities of a shift of commercial surrogacy into the black market. To further reduce the risks of illegal consequences branching out of commercial surrogacy, one of the possible solutions could to be to issue licenses to surrogate mothers. This could reinforce the notion of legal clarity and uphold ethical standards by increasing transparency in the agreements. Licensed surrogates could also be supported by a secure healthcare regime through the course of pregnancy financed by commissioning parents. Additionally, regulatory bodies could be set up to oversee mediation, and enforcement of contracts. This could ensure regulation of the procedures while safeguarding the rights of surrogate mothers.

Besides the regional changes that could be incorporated, there is the need to harmonise the various legal frameworks in the various nations that participate in international surrogacy, as the current state of dissension creates an environment conducive to exploitation and nullifies any favourable legal protections inherent in the surrogacy agreement.

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[23] Louise Anna Helena Ramskold & Marcus Paul Posner, *Commercial Surrogacy: How Provisions of Monetary Remuneration and Powers of International Law Can Prevent Exploitation of Gestational Surrogates*, 39 JOURNAL OF MEDICAL ETHICS 397 (2013).

[24] *Id.*

[25] Marcin Smietana, Sharmila Rudrappa & Christina Weis, *Moral Frameworks of Commercial Surrogacy within the US, India and Russia*, 29 SEXUAL AND REPRODUCTIVE HEALTH MATTERS 377 (2021).

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Transformative Constitutionalism and the Evolution of *Socio-Economic Rights* in India: A Study through the Supreme Court Cases

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Abstract

At the outset of the journey of *the Constitution of India*, the concept of *socioeconomic rights* was not as it exists today. At that point in time, there was a clear segregation between Part III and Part IV of *the Constitution of India*, as the first used to be solely concerned with the *Fundamental Rights*, negative from the perspective of the State; the latter was solely focused on *the Directive Principles of State Policy*, which are identified as *positive rights* from the perspective of *the State*. From 1949 to 1978, the concept of *the Right to Property* as mentioned under Article 31 of *the Constitution of India*, went through a roller coaster ride where it sustained several amendments by the legislature and several kinds of interpretation by the Indian Judiciary and finally got omitted from the position of Fundamental Rights and remained merely as a legal right under Article 300A of *the Constitution of India*. In this span of time, the concept of *socioeconomic rights* used to be mostly associated with property, both movable and immovable, and the concept of welfare of the people, social security and equity still stood in vague. It was the liberal interpretation, made by the *Supreme Court of India* from 1950 to 1978 and beyond, that aided the development of the concept of *the Socio-economic Rights* of the people of India. The present paper highlights the interpretational journey of *the socio-economic rights* movement in India, which transformed *the Constitution* into a much more liberal frame.

Keywords

Socio-economic Rights, Transformative Constitutionalism, Rights to Property, Evolution and Human Rights.

1. Introduction

The term, *Transformative Constitutionalism,* is the concept that emerges from the demand of socio-political change. As the *Constitution* of any country is a static document, is sometimes a subject of *constitutional amendment by the Parliament and* often becomes the subject of judicial review and interpretation, mostly in common law countries like America and India, which brings about a radical transformation within the socio-legal spectrum of the society. This concept evolves in multidimensional aspects *viz.* changing public morality, public demand and morality, governmental policy, economic standpoint and most significantly, international morality. All these factors are essential aids in building up the conscience of the people relating to the governance of a country. Thus, *Transformative Constitutionalism* becomes essential to bring changes to society by responding to the demands of the people.

It is essential to mention that the tool of *Transformative Constitutionalism* works towards the establishment of *natural rights* and interpreting the basic *natural law principles in order to incur justice.* In the arena of the evolution of *socioeconomic rights in India,* huge changes have gone through from 1949 to the present day and are evolving in every passing day, which is certainly transforming the Constitution of India. It is noteworthy to mention that, in order to find out the graph of social change in India through *Transformative Constitutionalism,* the study of the evolution of *Socioeconomic Rights* is essential.

The term *Socio-economic Rights* is also known as the *Second-Generation Human Rights* under the stream of *generation of Human Rights,* but most of jurists argue that this division is inadequate, as these rights cannot be observed without the active observance of the *Civil and Political Rights,* which fall within the category of *First Generation Human Rights.* While the first generation of rights recognizes *the right to life, liberty, equality, freedom and justice,* the second generation of rights states that all these first-hand rights cannot be ensured without the entitlement of *compulsory and free education, public health care facilities, public housing, food, clothing, water and clean environment.* The *civil and political rights* cannot survive without the assurance of the second one. The fulfilment of *the Socio-economic Rights* highlights that all the fundamental rights cannot be fully realized without access to essential services like free and compulsory education, public healthcare, housing, food, clothing, clean drinking water, a clean and healthy living and as working environment. All these rights are quintessential for the observance of a dignified life.

The Constitution of India, at the time of its inception, though had given prominence to *the Civil and Political Rights under Part III*. However, its position changed through *Judicial Activism as well as*

Transformative Constitutionalism and this transformation took place through the three ways interaction between the *Parliament, the general public along with the executives of the national policies and the Judiciary.* This unique three-dimensional interaction has transformed the *Constitution of India* as it stands today with numerous amendments and judicial pronouncements and in order to fathom that journey, it is essential to go through those cases that helped India to change the concept, context and relevance of *the Socio-economic Rights in India.*

2. The Jurisprudential Aspects Relating to Socio-Economic Rights

Socio-economic Rights are essentially attributed to the welfare of the people of a country. Thus, it can be stated that the welfare of the people and *socioeconomic rights* go hand in hand when talking about the wellbeing of the people. It is the fundamental aspect of *human rights*, focusing on the collective responsibility towards ensuring the dignity of human beings by way of ensuring the basic amenities of life. At the initial stage, the movement for socialism and the demand for collective ownership of the means of production and redistribution of immovable property ownership led towards the establishment of the concept of *a welfare State,* which means social and economic wellbeing of the people so that they can support their family and the community as well. Therefore, it can be said that the welfare of the population and *socioeconomic rights* are closely intertwined when discussing the overall wellbeing of individuals. These rights form a core element of human rights, emphasizing the collective responsibility to uphold human dignity by ensuring access to the basic necessities of life and sustaining life. Initially, the push for socialism and demands for collective ownership of production, along with the redistribution of immovable property, contributed to the development of the welfare state concept. This concept aims to promote the social and economic wellbeing of individuals, enabling them to support both their families and the broader community based on the general conscience of the nation.

One of its chief characteristics of it is to ensure social security for all, which means extending economic assistance to the marginalized people of the community who are mainly suffering from the menace of unemployment, disability, old age or any other form of vagrancy. It asserts the responsibility of the State to provide health care, nutrition, housing, and education along with a reasonable revenue-generating system. *The welfare state* imposes responsibility on the State to look after the general wellbeing, prohibit the concentration of wealth, and promote social solidarity and community-based equity. In order to ensure all these amenities, it is essential for the State to control the *concentration of wealth* so that the wealth of the State does not go to the hands of a few rich people within the State and make equal distribution of resources.

The concept of the *Welfare State* is based on the notion of equal opportunity on the basis of equity, equitable distribution of wealth, and participation of people in the socio-economic development of all by giving due regard to human rights and dignity. This concept got much more prevalent post World War II when the whole world witnessed the atrocities of the autocratic system of governance by the *German Nazis.* It intended to focus on the theories of libertarian principles that talked about the general welfare of people. In this regard, *Aristotle (384-322 BC)* is the first person to talk about who defined the forms of the Government in order to identify the most suitable system that can bring about good to the people. He suggested establishing a combination of *Oligarchy and Democracy in order to bring good to the people.* When the earlier talks about the legitimation of power by a small number of people who are rich and powerful in society, the latter is focused on the framing of the Government by the active participation of all the people of a country. Thus, it becomes a combination where the State is made by the people and governed by those who are comparatively more intellectual, wealthy and virtuous.[1]

With the growth of society, the concept of liberalism changed. Through the writings of the famous jurist *Machiavelli (1469-1527)*, it came to be known that the criteria of *the State* should always lie in ensuring dignity for the lower classes of society, the development of whom brings life to the State. Individual good cannot bring any good to society community goodwill. Most importantly, he stated that the *State* should never be attributed to unlimited power. Limitations should be imposed on the *State* in order to create a balance of power between the people and the *Sovereign.* He was against the concept of enslavement and demanded freedom for the people which are also essential criteria of *the Welfare State* and protection of *socioeconomic rights*[2].

The concept of the *Welfare State* received another unique feather with the theory of *utilitarianism* of the famous British jurist *Jeremy Bentham (1745-1832),* who states that the basic intention behind every public policy is to incur the *greatest happiness of the greatest number* as he believed that the basic instinct of human beings is to strive to gain pleasure by avoiding pain and the *Sovereign* should be focused towards this demand of human beings. He listed 13 types of pleasures of human beings which the *Sovereign* should keep in mind while framing policies, and they are *the pleasure of sense, of wealth, of skill, the pleasure of friendship, reputation, power, benevolence as well as of malevolence, of imagination, of expectation and most*

[1] Available at: https://www.britannica.com/money/welfare-state (last visited March 10, 2024).
[2] The Antioch Review, 'The Liberalism of Machiavelli' Autumn, 1948, Vol. 8, No. 3 (Autumn, 1948), pp. 321-330 Published by: Antioch Review Inc.

importantly of association.[3]. All these pleasures are measured through the senses, which are the drawback of the theory. However, it brought about a drastic change on the notion of the State but eventually, it turned out to bring about the welfare of the *sovereign* and unlimited power rather than the welfare of the people.

Another exponent of *the Welfare State* is the British jurist *John Stuart Mill (1806-1873),* who opined that the fundamental task of a *State* is to ensure their freedom so that they can have the choice to do whatever they wish for their lives. He was against the notion of *rule by majority,* where most of people are bound to follow the same thing for their lives. At the same time, he was against the notion of *the common good* as it puts more emphasis on the majority and the individual liberty is compromised. He divided the human being within society into two classes*: the individualists and the average.* When the first category of people is the creative one who innovates ideas, the second category of people is influenced by these creative people and strives to achieve freedom similar to that of individualists. In a progressive society, the ideas of the people should never be subjected to attack by the *State.* He pleaded for the freedom of people from *conventional usages and customs* as he thought that these things bind people within the shackles of the *status quo* and prohibit bringing about radical changes in society. All these thoughts are modern in such a way that it match with the concept of ensuring *the socioeconomic rights of the people so that they are enabled to choose their own way in order to become creative and intellectual individualists.*[4]

The problem with *utilitarianism* is that it does not think of the minorities while assuring *the greatest happiness in the greatest number,* and the exploitation of minorities is an accepted matter as it does not concern the pleasure of the majority of society. Thus, slavery, drug abuse, and the killing of a member of a minority are allowed within the ambit of the practice of *utilitarianism.* It was the basic foundation behind colonialism during the 18th and 19th centuries. *Welfare* was the wellbeing of the majority community of the society at the cost of the sufferings of the minority. Till the *Second World War,* governance was solely based on this principle and after witnessing the atrocities of the same, the world leaned towards socialism and, most significantly, towards a system that is *just and fair.*

The works of *John Rawls (1921- 2002)* put emphasis on the two ways *social contract in society that is based on the original position where all the human beings are equal and they are behind a veil of*

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[3] Available at: https://www.britannica.com/biography/Jeremy-Bentham (last visited March 10, 2024).
[4] Harry Holloway, Mill and Green on the Modern Welfare State, available at https://www.jstor.org/stable/444656 (last visited March 10, 2024).

ignorance behind which they do not know their social, economic and political status. Rawls states that from this *original position* humans should be allowed to choose their governing principles of morality and at this stage he states that humans choose the *primary goods for survival such as liberty, equality, freedom, opportunity to livelihood and wealth along with respecting each other.* He opines that a State should be governed by the Constitutional framework where the primary principles should be of prime importance on the basis of which the socio-economic development of the people will depend on.[5] This is how the sole concept of State and Welfare has transformed with time and has paved the way towards the protection of the human rights of all.

3. National and International Instruments Relating to Socio-Economic Rights

The term Right has two aspects; one is 'good', the opposite of which is 'bad' and the other is a standard of permitted actions authorized by a legitimate legal authority. While the first one is specifically moral, the latter is legal. A legal Right is concerned with the interests of people, which are subjects of protection and promotion by the Sovereign.[6] At the very initial stage of the evolution of Rights, the concept of basic inalienable Human Rights was just a matter of mere theoretical and jurisprudential discussion based on the concept of Natural Law or Natural Rights. However, with the course of time, specifically, after the atrocities of the two World Wars, followed by the Cold War, the world community felt the need of legal recognition of Human Rights. Finally, in 1948 the international community got the first international instrument recognizing the basic inalienable *Natural Rights* as *Human Rights* in *the Universal Declaration of Human Rights, 1948*, followed by *the International Covenant on Civil and Political Rights, 1966* and the *International Covenant on Economic, Social and Cultural Rights, 1966*. These three instruments are the fundamental legal documents that recogniz*e human rights* under the international legal framework.

In order to understand the generations of rights, it is essential to understand human history. The existence of human beings was not very much in harmony from the very beginning. There was a conflict of interest between people on the basis of their naturally attributed powers, looks, sex and works. From the very beginning of civilization, people could identify these differences, and the most prominent manifestation of these differences could be found in the *varnashrama*[7]system under the Indus Valley civilization. There were four different *varna*, typically attributed to them on the basis of the

[5] Available at: https://iep/utm.edu/rawls/ (last visited March 10, 2024).
[6] P. J. Fitzgerald, Salmond on Jurisprudence, Sweet & Maxwell 215-220.
[7] Brahman, engaged in the educational sector along with the practice of Dharma; Kshtriya, usually engaged in rule making, ruling and warriors; Vaishya, engaged in agriculture and business; Shudra, the labourers.

different types of works/livelihoods they were engaged with. With each *varna,* different interests were attached and in case of conflict between any of the interests, the concept of *dharma*[8]used to come into play. The most important feature of this *varnashrama* system was that not a single person could be declared as a member of any *varna,* by birth. Everybody could be a part of any of the *varna* by acquiring the qualities matching that particular *varna.* This was the manifestation of an egalitarian society. Thus, there was a mechanism to mitigate the conflict of interest between different classes of people within the society.[9]

However, with the growing complexities and development of society, the conflict of interests rose to a level that led to constant disagreement between people of different territories in the mediaeval period. The disagreements raised to more stringent level in the modern period that led to rapid colonization worldwide, followed by two World Wars. The international community demanded for legal recognition of rights that are associated with civil and political rights as at this point of time only assuring right to vote, liberty, and equality was not enough to ensure dignity of all. It was essential to ensure education, nutrition, clothing, shelter, a healthy environment and necessary health care to the people in order to ensure their dignity in this modern world.[10]

During the Enlightenment period in Europe (17th to 18th century), the learned scholars talked about certain inherent rights of human beings *viz.* right to life, liberty, equality, justice and democracy. These rights are inherent in nature, *i.e.,* every human being is born with them. During the 19th to 21st century, with the rise of capitalism, growing number of employees/labourers in industries and the oppression of the States, the need of recognizing a different set of

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[8] The ultimate concept of right and wrong is fairness and justice, according to Hindu philosophy.

[9] (Last visited on 04.08.2023 at 12.50 pm) https://www.krishna.com/what-do-we-mean-varnashrama#:~:text=The%20original%20varnashrama%20is%20the,for%20each%20member%20of%20society

[10] Suspension of internet services for an indefinite period of time is violates fundamental right, *Anuradha Bhasin v. Union of India, Writ Petition (Civil) No. 1031 of 2019*; No person can be denied emergency health care in any medical institution irrespective of the nature of the hospital, *Parmanand Katara v. Union of India1989 SCC (Cri) 721* and *Pravat Kumar Mukherjee v. Ruby General Hospital & Ors. 2005 CPJ 35 (NC);* the Apex Court of India recognized right to food as fundamental right in *Kishen Pattnayek & Anr. v. State of Orissa, 1989 AIR 677*; the Supreme Court further upheld that right to livelihood and shelter are fundamental right and the State must ensure the same, *Olga Tellis v. Bombay Municipal Corporation,1986 AIR 180;* the Apex Court upheld the rights of women against sexual harassment and directed the Government to frame laws for the same in *Vishaka & Ors v. State of Rajasthan AIR 1997 SC 3011*; the Supreme Court of India upheld the rights of Transgender people of India and stated the transgender people are also entitled fundamental rights as enshrined under part III of the Constitution of India in the *National Legal Service Authority v. Union of India, AIR 2014 SC 1863*; the Supreme Court held that the people of India have the liberty to choose their intimate partners in *Navtej Singh Johar v. Union of India AIR 2018 SC 4321*; the Apex Court of India further held that the right to privacy is a part of fundamental rights of the people of India in Justice *K.S. Puttaswamy(Retd) v. Union of IndiaAIR 2017 SC4161*; so on and so forth.

rights was needed which had to be associated with the first set of rights as they became essential to ensure the dignity of the people.[11] During the 20th century, with the growth of acute environmental degradation and exploitation, the need of recognition of a Third set of rights became a need of the hour and this is the time the world community received Community Rights *viz. Right to Clean Environment and Right to Self Determination*. Apart from these rights a new set of rights like Equal Right to Cyberspace, Internet, technologies and so on. All these rights are interconnected and cannot be segregated from each other in order to ensure dignity of the people.

If a close look is taken in *Part III and Part IV of the Constitution of India*, it can be found that both parts of the said Constitution incorporate certain rights. Where Part III talks *about fundamental rights*, mostly related to *civil and political* rights, the later part talks about *the directive principles of state policy*, mostly including *socio-economic and cultural rights within its ambit.* While the first one is enforceable in any court of law[12], the latter is not enforceable[13] as their enforcement requires the availability and management of social, economic and environmental resources which is not absolute in nature. However, the Indian Judiciary and judicial interpretation have taken an active part in horizontal interpretation of these rights and incorporating the same within the ambit of *Article 21 of the Constitution of India.*

4. Mapping Transformation of Socio-Economic Rights in India through Supreme Court Cases

While talking about the *Constitution of India*, it is essential to mention that there are two specific parts that talk about rights, one is *Part III* and the other is *Part IV.* Both of the parts are essential in the spectrum of Rights, however, there exists a basic difference between them. While the rights mentioned under Part III of the *Constitution of India* are *Fundamental Rights i.e.* they can be enforced in the Court of law in India either under Article 32 or Article 226 of the Constitution of India, the rights mentioned under Part IV of the same, cannot be enforced in any court of law, by virtue of Article 37 which states that these rights are not enforceable in any court of law in India. There lies the basic difference between the civil and political rights and socio-economic rights, which is similar to the jurisprudential thoughts of *Rawls,* however, *Part IV* of the *Constitution of India* is not

[11] Right to a clean and healthy working environment, right to leisure and rest, right to be treated with dignity and respect, right to maternity benefit and proper maternity care and nutrition, right to form Unions and freedom of associations, right to equality, justice and equity, right to free legal aid, right to just and humane conditions of work and so on and so forth.

[12] *Under Article 32 and 226 of the Constitution of India.*

[13] As mentioned under Article 37 of the Constitution of India.

only related to right to wealth, rather it is related to the social security which has to be ensured in order to secure the dignity of all.

The first case relating to this was Champakam Dorairajanv. State of Madras[14] The Apex Court of India held that the imposition of reservation on the basis of religion is unconstitutional, and another important ratio of this case is that the rights mentioned under Part IV of the *Constitution of India* should conform to Part III of the same. This case led to the first amendment of the Constitution in 1951 by, which it included Articles 31A and 31B after Article 31, along with amending several *Fundamental Rights under Part III, specifically to Articles 15, 16 and 19.*[15]

The case of A.K. Gopalan v. State of Madras [16] is another landmark judgment where the Apex Court of India held that there is a difference between the right to liberty and freedom of movement. For the security and public interest, the right to move freely within the country can be restricted as a part of partial control, which cannot be extended by any court of law. Through these two abovementioned cases, pre-1955 legal scenario becomes clear where the Court was reluctant to give liberal interpretation to the provisions of the Constitution and the Socio-economic Rights developed just at the wish of the Parliament of India.

In Sankari Prasad v. Union of India[17] The *Supreme Court of India, by applying the doctrine of harmonious construction,* held that the first constitutional amendment was valid. In the next segment, the questions relating to land reforms arose and firstly in I. C. Golaknath and others v. State of Punjab[18] stated that the Parliament has no power to curtail the fundamental right along with right to property and declared the acquisition of land of the petitioner as void along with declaring *the Seventeenth Constitutional Amendment* as unconstitutional. This dichotomy created much fuss within the country. On one hand, the Parliament was trying to incur the common good for the people and to bring land reforms, and on the other hand the Apex Court was invalidating the same.

In Sajjan Singh v. State of Rajasthan[19] the Apex Court made it clear that *the Parliament of India* has the power to amend any part of the *Constitution* as per the authority provided to it by article 368 of the *Constitution of India.* If it had been contrary, then the *Constituent Assembly* would have been at liberty to explicitly mention the same.

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[14] AIR 1951 SC 226.
[15] In this amendment, the Parliament further introduced the 9th Schedule, which relate*s to land reforms* in India in order to abolish the Zamindari system and to bring a ceiling on the power of the commoners to hold lands.
[16] AIR 1950 SC 27.
[17] AIR 1951 SC 458.
[18] AIR 1967 SC 1643.
[19] AIR 1965 SC 845.

But the power of the Parliament to amend the *Constitution* is not unlimited.

In R. C. Cooper v. Union of India[20]The apex court of India held that the right to property is not absolute in nature, and the state has a monopoly over all types of trade and businesses within the country, which enables the state to curb any of the rights associated with it. However, just and fair compensation has to be given, on which the Government declared to come into agreements with the Government otherwise, the amount has to be determined by the tribunal established under the enactment and the amount shall be payable after 10 years. The Court opined that all the matters relating to this matter are under the complete control of the Government. It is found that though the apex court of India is talking about the right to compensation as a part of the right to property and in case of compulsory acquisition of the same just and fair compensation has to be given, at the same time, it is stating that when and how to provide the compensation is a matter of complete State monopoly and a part of the doctrine of *eminent domain.* Through this judgment, the socio-economic rights of the people of India were somehow protected from the compulsory acquisition of property with just and fair compensation.

Finally in Kesabhananda Bharati v. State of Kerala[21] where the Supreme Court of India held that the Parliament has limited power in amending the Constitution of India and it cannot amend the Fundamental Rights in order to put primacy to the Directive Principles of State Policy as it constructs the *basic structure of the Constitution of India.* It further declared that there is a difference between ordinary law and the amending power of the Constitution, and the latter does not fall within the domain of Article 13 (2) of the Constitution of India and the amending authority in India lacks the power to amend the basic structure of the Constitution of India.

In Unnikrishnan v. State of Andhra Pradesh[22] the Supreme Court held that the fundamental rights and the directive principles of state policy go hand in hand. One cannot function without the activity of the other. In order to reach this conclusion, in 1993, the *Constitution of India* had to go through several amendments. However, the basic essence of the Constitution was not amended. There lies the protection of the Socio-economic Rights.

The apex court of India played a vital role in implementing international law relating to *the Socio-economic Rights* of women in C. B. Muthamma v. Union of India [23] Where gender equality and discrimination against women in public employment were the focal

[20]AIR 1970 SC 564.
[21] AIR 1973 SC 1461.
[22] AIR 1993 SC 2178.
[23] AIR 1979 SC 1868.

points of dispute, women were denied promotion just because of being women in the *Indian Foreign Service* and had to give an undertaking stating that if they got married, they would resign from the service. On complaint, the apex court of India observed that the *government* has to make rules in public employment that preach gender equality and non-discrimination. Similarly, in the case of Vishaka v. State of Rajasthan [24] which paved the way for the legislature to lay down the implementation rules relating to the protection of women from sexual harassment in the workplace. This case transformed the notion of the dignity of women at the workplace at a different level and aided them in taking a step forward for their *socioeconomic rights.*

In National Legal service Authority v. Union of India[25] Also, the *Supreme Court of India* advocated for the protection of *fundamental* as well as *Socio-economic Rights* of *the LGBTQIA+* people and, most importantly, of transgender people. The Court opined that all the rights as mentioned under *Part III and Part IV of the Constitution of India* are inherent and inalienable for all human beings, and in this regard, the people of *the LGBTQIA+* communities are also entitled to these rights for the sake of being an integral part of the human race.

Another essential aspect in the spectrum of *Socio-economic Rights* is the *Right to unobstructed access to the telephone service and internet* in the era of technological advancements as it incumbents the quality of communication in the spheres of several employment opportunities *viz. journalism, services relating to emergencies at the hospitals, banks and individual communicative spectrums as well,* the violation of which amounts to the obstruction of the free exercise of *Socio-economic Right to livelihood as well as of the availability of services* which ultimately attacks on the dignity of human beings. This decision made by the apex Court of India in Anuradha Bhasin v. Union of India and Ors.,[26] made a significant change against the arbitrary control of the State on the telecommunication of the people of India and had given another horizontal interpretation to the concept of *Socio-economic Rights* in India.

At the present-day scenario, another significant demand relating to *socioeconomic rights* has come to light through the R. G. Kar Medical College and Hospital case[27] where the central question lies on the determination of the safety and security of the practising doctors [specifically of female medical practitioners] at their respective workplaces, physical as well as mental safety at the workplace is an essential criterion of ensuring *the Fundamental Right to Equality of Opportunity in Public Employment as has been enshrined*

[24] AIR 1997 SC 3011.
[25] Writ Petition (Civil) No. 604 of 2013.
[26] Writ Petition (Civil) No. 1164 of 2019.
[27] SMW (Crl) No. 2/2024.

under Article 16 of the Constitution of India and in order to ensure the same there is need of ensuring a certain amount of *Socio-economic Security* for building a suitable infrastructure for the same. Along with this, the Court held that the State has the duty to ensure security to all the working women of the country as a measure of ensuring integrity of the people of India and the violation of the same amounts to the violation of *Socio-economic Rights* of the people of India.

All these cases mentioned hereinunder are indicative towards bringing decisions which have the ability to bring about a social change through changing the constitutional values within the society through judicial interpretation. This horizontal interpretation aids the transformation of *the Constitution* in a liberal manner and aids in making the people of India more aware about their rights, inclusivity and universality of the rights of humans.

5. Conclusion and Suggestions

Socio-economic Rights are fundamental aspects of human rights, and they need to be protected for the protection of human dignity. In India, where *civil and political rights* are enforceable, *socio-economic rights* are not; however, these rights are secured through subordinate legislation passed by the Parliament. Since 1973, the *Supreme Court of India* has interpreted the rights mentioned under *Part IV* horizontally, *including the right to life with dignity, right to privacy, right to choose an intimate partner, right to be different, right to emergency health care, to education and to live in a clean and healthy environment* as a part of *Right to Life, as mentioned under Article 21 of the Constitution of India.* This evolution of *socioeconomic rights* is the result of dynamic socio-economic, political and cultural and legal interplay.

At the present-day scenario, those societies are identified as developed one which gives due regard to these rights. Ensuring social security for the marginalized people of society is the essential criterion of development. Taking affirmative action for the development of all categories of people is essential for society. This evolution leads towards an inclusive society. However, people are still subjected to exclusion by the dominant hegemony, which is not beneficial for development. People should have some proper forum to bring their grievances for the violation of their *Socio-economic Rights,* which is yet not available in India and most importantly, there is a need of more awareness relating to the *Constitutional legal framework of India* in the minds of the general people. Through this, the deepest penetration of the thoughts and notion of *socio-economic rights* can be made possible in India.

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Unravelling the Legal Implications of Group of Companies Doctrine in Alternative Dispute Resolution

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Abstract

As a revolutionary approach to alternative dispute resolution, the *Group of Companies Doctrine* transcends conventional practices, embracing a dynamic equilibrium of creativity, empathy, and efficiency to navigate disputes with unparalleled finesse. By intertwining the art of mediation with the science of negotiation, it paves the way for harmonious resolutions that transcend traditional boundaries. By synthesizing ancient wisdom and cutting-edge technology, it redefines the essence of conflict resolution ushering in a new era of collaboration, understanding, and mutual respect. It shatters the traditional dispute resolution mechanisms and embarks on a transformative odyssey toward sustainable harmony and success. By acknowledging the relevance of the Group of Company Doctrine within the framework of Indian Arbitration laws and framing the inclusion of non-signatory parties in Arbitration Agreements as a matter of contractual understanding, the esteemed Courts have ushered in a nuanced and inclusive perspective on the definition of 'Arbitrable Disputes'.

This paper delves into the far-reaching implications of the Constitution Bench's ruling on the Indian Arbitration landscape, specifically examining the evolving interpretation of 'Arbitrable Disputes' in the subsequent judicial pronouncements of Indian Courts. Critically, analysing the 'Group of Company Doctrine' as it lays the groundwork for the ensuing determinations on 'Arbitrable Disputes', the paper examines the subsequent judicial rulings following the Constitution Bench's judgment, which while endorsing the 'Group Company Doctrine', had emphasized the need for a practical approach in assessing non-signatories consent based on specific circumstances of each of the cases.

Keywords

Non- Signatories, Parties, Liability, Arbitrable Dispute, Consent

1. Introduction

Arbitration is a consent-based system of settling disputes that entails submitting claims between the parties to one or more private adjudicators. As it requires surrendering the right to approach. Legal authority, in case of any conflict, must have the consent of both parties, which constitutes the core of this procedure. A clear manifestation of the parties' intention to arbitration can be proved from their act of agreeing. In other words, establishing an arbitration agreement demonstrates the intention of parties to submit their dispute(s) to arbitration and not the courts. Thus, an arbitration agreement is the centre element around which this entire dispute settlement procedure revolves. Although there is no particular format of an arbitration agreement, the UNCITRAL Model Law on International Commercial Arbitration 1985 ["UNCITRAL Model Law"] [1] compels it to be in writing. An analogous provision has also been introduced into the Arbitration and Conciliation Act, 1996 ["Arbitration Act"].[2] However, the key observation to make here is that there is no obligation for the same to be signed.

It is crucial to highlight that, due to its consensual nature, an arbitration agreement binds only those who have consented to be bound by it. However, multiple times, non-signatories to the arbitration agreement also become pertinent to the ongoing conflicts, and without involving them in the procedures, the legitimacy of any settlement agreed upon between the disputing parties may be undermined. Therefore, it becomes important to strike a balance between the two aspects and offer a plan of action whereby a non-signatory might lawfully become a party to an arbitration process without their explicit consent.

The idea that an arbitration agreement's rights and obligations exclusively extend to the parties to the agreement is a simple application of the notion of privity of contract, which is accepted in common and civil law legal systems.[3] The idea that an agreement to arbitrate is binding only on the parties to it is adopted by even the most important international arbitration conventions. Contracting States "shall recognize an agreement in writing under which the parties undertake to submit their disputes to arbitration," according to Article 2(1) of the New York Convention, which implicitly acknowledges the subjective limitations on the binding character of arbitration agreements.[4] The Group of Companies Doctrine (GOCD) allows for the extension of an arbitration agreement to non-signatory companies

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[1] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 7.
[2] Arbitration and Concilliation Act, 1996, Section 7.
[3] Gary Born, International Commercial Arbitration, Vol. 1 (2009), p. 1406; "UNIDROIT Principles of International Commercial Contracts", Art. 1.3.
[4] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "New York Convention"), 330 UNTS 38, Arts. 2(1), and 2(3).

within the same group under specific conditions, provided that the agreement has only been signed by one or a few of the group's enterprises.[5] When considering whether or not to include non-signatory parties in an arbitration agreement, it is necessary to determine whether or not the Arbitral Tribunal has jurisdiction over such parties.

As a logical progression from the idea of breaching the corporate veil, the group of businesses doctrine makes it clear that the parties' actual intention was to bind both the signatory and non-signatory to the arbitration agreement. Even though the parties' intent isn't enough to bind a non-signatory to an arbitration agreement, the concept can be used to assign blame where there's a high enough level of shared ownership and control. In addition to the tight group structure, alter ego, and penetrating the corporate veil as non-consensual doctrines that the court can consider, the Arbitration Act does not forbid or restrict the use of the group of companies doctrine under Indian arbitration law. Contrarily, an expansive understanding of an arbitration agreement is provided by Section 7 of the Arbitration Act. In addition, the Assembly added the phrase "any person claiming through or under" to Section 8 of the Arbitration Act to acknowledge and formalize the fact that non-signatories might act on behalf of the signature parties.

2. Methodology

The present study adopts a multidimensional technique to investigate the implementation and implications of the concept of group of companies in the context of alternative dispute resolution (ADR). It employs a qualitative approach, utilizing a combination of doctrinal analysis and empirical observation. The doctrinal examination encompasses an in-depth exploration of essential legal concepts, case law, and legislative laws relative to the group of companies' doctrine. Both an analytical and descriptive approach have been used to carry out the study. Additionally, empirical data has been collected and analysed through case studies, interviews with legal practitioners and corporate representatives, and surveys to gain insights into the practical challenges and opportunities associated with the application of the group of companies doctrine in ADR. This multidisciplinary approach attempts to provide a full grasp of the doctrinal foundations, practical ramifications, and future reforms surrounding the group of firms' doctrine within the field of ADR.

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[5] Pietro Ferrario, "The Group of Companies Doctrine in International Commercial Arbitration: Is there any Reason for this Doctrine to Exist?", Journal of International Arbitration [Kluwer Law International (2009), Vol. 26(5), pp. 647-673].

3. Evolution of Group of Companies Doctrine

The emergence of the Group of Companies Doctrine in Alternative Dispute Settlement (ADR) is a narrative of adaptation and invention in the area of corporate law and dispute settlement. The concept traces its roots back to classical legal ideas that acknowledged the separate legal personality of individual corporations within a group organization.[6] Initially, each entity within a business group was regarded as distinct and separate, with limited liability extending only to the specific entity responsible for a particular transaction or obligation.

However, as business processes became more complicated and corporate structures more interconnected, gaps in accountability and chances for abuse started to appear. Courts and legal experts began to study the concept of penetrating the corporate veil to hold related firms liable as part of a cohesive economic activity. This marked a fundamental turn in the growth of the doctrine, as the focus extended from rigid adherence to individual corporate identities to a more holistic approach that evaluated the substance of business interactions.

Over time, the Group of Companies Doctrine expanded further to embrace issues of economic reality, justice, and fairness in the context of ADR. Courts and arbitration tribunals begin to acknowledge the interconnectivity of corporate entities within a group and the possibility for one organization to exercise control or influence over others. This led to the establishment of rules that allowed for the aggregation of assets and liabilities among group entities in some instances, notably in cases where it was thought important to prevent injustice or misuse. In modern times, the evolution of the Group of Companies Doctrine in ADR continues to be driven by a dynamic and sophisticated view of corporate relationships and obligations. Legal frameworks have been developed to combine the requirement for corporate autonomy with the imperative of holding organizations accountable for their collective conduct. The concept today plays a crucial role in addressing concerns of fraud, evasion of legal obligations, and providing a level playing field in dispute resolution proceedings involving complicated corporate organizations. [7]

As the landscape of business evolves and global commerce becomes increasingly intertwined, the evolution of the Group of Companies Doctrine in ADR remains a continual process of refinement and adaptation. It acts as a powerful tool for fostering transparency, equity, and integrity in the resolution of conflicts among corporate

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[6] Pietro Ferrario, The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?, 2009 J. INT'L ARB. 647.

[7] oseph Abela Family Foundation v. Albert Abela Family Foundation et autres, Cour d'appel, 22 May 2008.

groupings, reflecting a commitment to maintaining the ideals of justice and fairness in a quickly changing business environment.

4. Legal Background of Different Countries

4.1 India

Before the enactment of the Arbitration Act, the Arbitration Act of 1940,[8] the Arbitration (Protocol and Convention) Act of 1937, and the Foreign Awards (Recognition and Enforcement) Act of 1961 all had arbitration provisions. In 1978, the Law Commission of India recommended fundamental changes to the 1940 Act. In addition, the United Nations Commission on International Trade Law[9] she published the Model Law on International Commercial Arbitration in 1985.

To harmonize the law governing arbitral proceedings, the UN General Assembly recommended all Member States to incorporate the UNCITRAL Model Law[10] into their national laws. The Arbitration Act was passed to harmonize and modify the arbitration laws. It brought domestic and international corporate arbitration laws into compliance with the Geneva Convention, the New York Convention, and the UNCITRAL Model Law.

A "party" is defined as "a party to an arbitration agreement" in Section 2(1)(h) of the Arbitration Act. Section 2(1)(b) defines an "arbitration agreement" as "an agreement referred to in Section 7." Section 7 outlines the necessary components of a legally enforceable arbitration agreement. An arbitration agreement is a contract between two parties, whether or not it is contractual, committing them to arbitrate all or some disputes that have arisen or may develop between them about a certain legal relationship. Additionally, the clause requires an arbitration agreement to be in writing. An arbitration agreement is considered to be in writing if it is included in one of the following:

a) a signed document by the parties;

b) a correspondence exchange that includes letters, telegrams, telexes, or other written correspondence, including electronic correspondence that serves as a record of the agreement; or

c) a correspondence exchange that includes statements of claim and defense in which one party alleges the existence of the agreement and the other does not dispute it.

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[8] "1940 Act"
[9] "UNCITRAL"
[10] UNCITRAL Model Law"

Chloro Controls v. Severn Trent Water Purification Inc[11]

In India, the Supreme Court's historic ruling in Chloro Controls[12] established the foundation for extending an arbitration agreement to non-signatories. The text of Section 45 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act), which is relevant to arbitrations with foreign seats and is subject to the New York Convention, served as the Supreme Court's primary justification for its decision.[13] A party to an arbitration agreement or any person claiming through or under such party may, at any time, request that a dispute be referred to arbitration under Section 45. Crucially, during the relevant time, the words "any person claiming through or under" were absent from the analogous section of the Arbitration Act, Section 8, which applied to arbitrations with seats in India. Since then, Section 8 has also incorporated these terms. The fundamental deal in Chloro Controls[14] involved numerous contracts between Indian and foreign parties and multiple parties involved in the transaction. There are some significant inconsistencies in the Supreme Court's findings in Chloro Controls[15], as the Court pointed out in Cox & Kings[16]. First, the court clarified in its explanation of the concept that one of the most important considerations for extending an arbitration agreement to non-signatories is the parties' intention.[17] Concurrently, the court introduced the idea of a "composite transaction" to encompass circumstances in which, under certain conditions, an arbitration agreement can be extended to a non-consenting signatory. The doctrine of the group of companies in India is contradictory to the principle of free consent.

It did, however, emphasize that courts would need to consider these petitions more carefully and with specific regard to the contract's wording and the parties' intentions. The idea of "composite performance" would need to be inferred from both the parties' express intentions and the accompanying circumstances, as well as from a joint reading of the principal and supplemental agreements.

According to Section 7(5), if two requirements are met, a contract's reference to a document that has an arbitration clause in it will be deemed an arbitration agreement. These prerequisites are as follows: first, the agreement must be in writing; second, the reference must be such that the arbitration clause is incorporated into the agreement. Being a product of a contract, an arbitration agreement is predicated on the parties' willingness to have their disagreements resolved through an alternative dispute resolution process. A party to an

[11] Chloro Controls, (2013) 1 SCC 641, para 72.
[12] (2013) 1 SCC 641.
[13] Arbitration and Conciliation Act, 1996, S. 45.
[14] (2013) 1 SCC 641.
[15] (2013) 1 SCC 641.
[16] (2013) 1 SCC 641.
[17] Chloro Controls, (2013) 1 SCC 641, para 72.

arbitration agreement is typically chosen based on the foundation of the parties or organizations that have signed the arbitration agreement or the underlying contract that contains the arbitration agreement.[18]

Nonetheless, there has been a significant change in the law regarding non-signatory parties' joinder over the last 20 years. The two phases of the evolution could be loosely categorized as occurring before and after chloro controls.

This Court defined "parties" in the pre-Chloro Controls era as consisting just of the parties who signed the arbitration agreement. The applicant in Sukanya Holdings (above) applied by Section 8 of the arbitrator against both signatories and non-signatories, bringing the Arbitration Act before the High Court in an attempt to enforce the arbitration agreement. Because the non-signatories were not parties to the arbitration agreement, the High Court denied the application. In an appeal, this Court maintained the High Court's ruling, noting that the Arbitration Act makes no mention of what must be done in cases when some of the suit's parties are not signatories to the arbitration agreement. When handling an international commercial arbitration, this Court concluded in Sumitomo Corporation v. CDC Financial Services (Mauritius) Ltd.[19] that a "party" to an arbitration agreement refers to a party to the judicial proceedings. In Chloro Controls (above), it was specifically decided that this was incorrect and that the term "party" should instead be understood to refer to a party to an arbitration agreement in light of Section 2(1)(h).

4.2 France: Dow Chemical Case

The use of the group of firms' theory in arbitration law primarily stems from the rulings issued by international arbitral tribunals. Before analyzing the specifics of the concept, it is important to comprehend the source and evolution of anything within the global framework. Examining this matter is important because any definitive ruling by the Court regarding the group of companies doctrine should align with the globally recognized norms regarding including non-signatories in arbitration agreements. The primary source of the theory can be traced back to several arbitration rulings, especially in France.

The most well-known of them is still an interim ruling made by an ICC panel more than 40 years ago in The Dow Chemicals case, also known as Case No. 4131,20. For the distribution of thermal isolation goods in France, Dow Chemical (Venezuela) entered into a contract with a French business, which subsequently assigned the rights to Isover Saint Gobain. The contract was then given to Dow Chemical AG, a division of the parent firm Dow Chemical firm, by Dow Chemical (Venezuela).

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[18] Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd, (2022) 1 SCC 75.
[19] (2008) 4 SCC 91

Subsequently, three firms and Dow Chemical Europe, a part of Dow Chemical AG, engaged in a similar deal; Isover Saint Gobain was then awarded the contract. Both agreements stipulated that Dow Chemical France or any other Dow Chemical Company subsidiary would provide the items to the distributors. The Dow Chemical group of firms faced numerous lawsuits filed against them in French courts.

Upon receiving this response, the four Dow Chemical group companies—Dow Chemical AG and Dow Chemical Europe, the two formal parties to the contract, and Dow Chemical Company and Dow Chemical France, the non-signatories—instituted arbitral proceedings against Isover Saint Gobain before the ICC tribunal.

The tribunal examined the factual circumstances of the signatory and non-signatory being members of the same group of firms after concluding that they were also parties to the arbitration agreement. The tribunal saw right away that a collection of businesses make up a single economic reality. The tribunal did stress, however, that if the non-signatory looks to be a legitimate party to the contracts due to their participation in the negotiation, performance, and termination of the contracts, then the non-signatory may be bound by the arbitration agreement entered into by another entity of the same group of companies.

Dow Chemical Company v. Isover Saint Gobain[20]

In that instance, the tribunal determined that, under some circumstances, a non-signing affiliate of a signatory party would be obligated to abide by an arbitration agreement. These prerequisites included a composite nature of the transaction, a direct relationship between the signatory and the non-signatory, and a direct commonality of the subject matter. They also took into account things like the non-signatory's participation in the contract's negotiation, performance, or termination, and the presence of a single economic unit or a close-knit group structure. This was accepted and put into practice by numerous courts and tribunals in several nations, including the United States, Singapore, Switzerland, Germany, and England.[21]

4.3 Switzerland

Section 178(1) of the Swiss Private International Law Act 1987 states that a written agreement for arbitration "must be made in writing or any other means of communication allowing it to be evidenced by text." Section 178(1) of the Swiss Act grants courts or arbitral tribunals the power to decide whether an arbitration clause that complies with the ruling also applies to non-signatories. This decision was made by the Swiss Federal Supreme Court in 2003. In general, when it comes to

[20] 1984 Rev Arb, 9 Y.B. Com. Arb. 136 (1984) 137, ICC Case No. 4131 (1982).
[21] ICC Case No. 4131, Interim Award of 23 September 1982.

claim assignment, debt assumption, or contract delegation, the Swiss courts have permitted non-signatories to engage in arbitration agreements. [22]

In a 1996 decision, the Swiss Federal Supreme Court held that the non-signing party's affiliation with the same business group as the signatory party to the arbitration agreement was inadequate justification for upholding the non-signatory provision of the arbitration agreement. [23]

The Swiss Courts will not, however, object to the agreement's terms being extended to non-signatory parties if the non-signatory party gives an independent and legally recognized expression of approval to the arbitration agreement. Swiss law states that parties may expressly state or demonstrate their intent to be bound by an arbitration agreement. In 2008, the Swiss Federal Court ruled that certain attitudes or actions could take the place of the formal arbitration agreement's requirement of adherence.

4.4 England

When it comes to enforcing arbitration agreements against non-signatory parties, English courts have typically adopted a cautious stance. The English Arbitration Act of 1996 defines a "party to an arbitration agreement" as "any" under Section 82(2).

Someone claiming via or under one of the agreement's parties." According to English law, parties who are not signatories to an arbitration agreement may nonetheless be bound by it—but only if they have a claim against or through the original signature. The English courts have taken a stance that supports the idea of privity being strictly adhered to. An arbitration agreement is enforceable under English law against non-signatory parties on the grounds of customary contract doctrines and principles, including agency, novation, assignment, operation of law, and merger and succession. Nonetheless, other theories including a group of companies, equitable estoppel, and breaching the corporate veil have been categorically rejected by English law as justifications for extending an arbitration agreement to non-signatory parties.

In **Peterson Farms INC v. C & M Farming Limited**,[24] the Respondent C & M Farming filed a claim damage against Peterson Farms for damages incurred by several C & M group companies, some of which did not sign the arbitration agreement. Using the group of companies doctrine, the arbitral tribunal determined that C&M Farming entered

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[22] A, B, C v. D and the State of Libya, 4A_636/2018

[23] Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd, unpublished ICC Interim Award of 25 October 1994, confirmed by DFT on 29 January 1996, ASA Bulletin (1996) Vol 3 p 496.

[24] [2004] EWHC 121 (Comm)

into a contract on behalf of all C&M group entities. As a result, it was entitled to recover all damages incurred by the C&M group entities as a result of their contractual relationship with Peterson. In an appeal, the Commercial Court determined that Arkansas law, which was selected as the Agreement's correct law, is comparable to English law and does not apply to the group of companies doctrine. Therefore, the application of the group of companies theory to an arbitration agreement that includes non-signatory parties is not supported by English law.

In **Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan** [25] To build housing facilities in Mecca, the Government of Pakistan signed a Memorandum of Understanding with Dallah Real Estate and Tourism Holding Company[26]. Saudi a kingdom. Later on, Dallah and the Awami Hajj Trust—which was founded by an ordinance passed by the government—signed a contract. However, since the Ordinance was never presented to Parliament and no new ordinance was issued, the trust has ceased to be a recognized legal organization. Dallah filed an arbitration lawsuit against the government. The UK Supreme Court was tasked with deciding whether the Government and Dallah shared a purpose to include the latter as a party to the deal. According to the Court, the parties' "common intention means their subjective intention derived from the objective evidence." It was decided that there was insufficient evidence to conclude that the Government has always regarded itself as a legitimate party to the agreement based on its actions.

4.5 Singapore

In Manuchar Steel Hong Kong Limited v. Star Pacific Line Pte Ltd,[27] The idea of a group of companies to bind non-signatories to arbitration agreements was categorically rejected by the Singapore High Court. The ordering of companies inside a larger group did not mean one could do away with a separate legal organization. This is the basis of a consensual agreement to arbitrate. The Singapore High Court noted that "strangers" to an arbitration agreement cannot be forced to fulfill enforceable commitments based on the legal stance adopted in Peterson Farms INC.

4.6 United States of America

Regarding the joining of non-signatory parties to the arbitration agreement, the Federal Arbitration Act is silent. However, general contract law principles like incorporation by reference, assumption, agency, veil piercing or alter ego, and estoppel have been frequently applied by US courts for imposing arbitration agreements on non-

[25] [2010] UKSC 46
[26] "Dallah"
[27] [2014] SGHC 181

signatories. Even though the United States has a pro-arbitration policy, a crucial question that is frequently discussed is whether domestic laws can be used to bind non-signatories in international arbitration proceedings. [28]

In G E Energy Power Conversion France SAS v. Outokumpu Stainless,[29] The United States Supreme Court was asked to decide whether the Eleventh Circuit Court declined to apply the domestic equitable estoppel concept in that instance, citing a disagreement with the New York Convention's signature requirements. The Circuit Court noted that to force the parties to arbitration, Article II of the New York Convention strictly requires that they "actually sign" the arbitration agreement. The US Supreme Court ruled that the contracting states' ability to send parties to arbitration agreements under domestic law is unaffected by Article II of the New York Convention. Furthermore, it was noted that "Articles II contemplate the use of domestic doctrines to fill gaps in the Convention." It was decided as a result that the New York Convention does not establish a complete framework that would bar the enforcement of arbitration agreements through domestic law.

The US courts have extended arbitration agreements to non-signatory parties through the application of non-consensual theories, in contrast to the English courts. For example, US courts have held the alter ego accountable and breached the corporate veil in unusual situations in which the parent business has total control over the subsidiary about the transaction in question.[30]

5. Inclusion of Non-Signatories in Arbitration Agreement

In the context of an arbitration agreement, non-signatories are people or organizations that have not actually signed the agreement but may nevertheless be subject to its provisions or wish to take advantage of it. Although non-signatories participation in arbitration can bring special difficulties and complications, several guidelines and procedures have been established to handle it.

When a third party tries to enforce or depend on an arbitration agreement that other people signed, that is one typical situation involving non-signatories in arbitration. This might happen, for instance, in the context of a contract in which one of the signatories and a non-signatory company are closely linked or affiliated, or in which the non-signatory is affected by the signatory's conduct. If a non-signatory has intentionally taken advantage of the arbitration agreement or if the claims against it are connected to the main contract, the legal theory of equitable estoppel may apply in certain

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[28] Andrijana Misovic, 'Binding non-signatories to arbitrate: the United States approach' (2021) 37(3) Arbitration International 749-768. 38 140 S. Ct. 1637 (2020

[29] 140 S. Ct. 1637 (2020)

[30] American Fuel Corp v. Utah Energy Development Co, Inc, 122 F.3d 130, 134 (2d Cir 1997).

circumstances, permitting the non-signatory to enforce the arbitration agreement.

When a non-signatory tries to force arbitration against a signatory, another scenario comes up. This could happen if there is a close relationship between the signatory and the non-signatory and the claims are entangled, or if the non-signatory asserts that it is a third-party beneficiary of the contract that contains the arbitration clause. Courts have used a variety of legal theories, including agency principles, assumption, and incorporation by reference, to decide whether or not a non-signatory might require arbitration.

Furthermore, in international arbitration, the notion of a "group of companies" or "group of contracts" has been acknowledged to handle circumstances in which several corporate groups are engaged in related transactions, even though not all of them are signatories to the arbitration agreement. In these situations, tribunals have extended the arbitration agreement to non-signatory entities by using the concepts of agency, alter ego, and the presence of a single economic reality.

Furthermore, the idea of "piercing the corporate veil" has been developed in some jurisdictions by laws and court rulings to hold non-signatory individuals or entities accountable under an arbitration agreement in specific situations, especially when there is proof of wrongdoing or abuse of the corporate form.

Cheran Properties Ltd. v. Kasturi and Sons Ltd.[31]

The aforementioned strategy was maintained by the Supreme Court, but this time it applied to an arbitral award. The Court acknowledged the evolving nature of contemporary corporate transactions and pointed out that they frequently involve numerous tiers and contracts. Companies may have intended to bind both signatories and non-signatories within the same group based on the conditions under which they signed into these agreements. It was stated, referring to the GOCD concept, that the doctrine's main goal is to enable the parties to carry out a mutually shared objective when the circumstances suggest that the intent was to bind both signatories and non-signatories. It further stated that to determine the true nature of the business arrangement and the intention to bind someone who was not formally a signatory but had assumed the obligation to be bound by the actions of a signatory, courts approach the matter by attributing a business sense to the transactions in question. The Arbitration Act's Section 35, which states that an arbitral award "shall be final and binding on the parties and persons claiming under them respectively," was likewise covered by the court. According to the Court's interpretation of Section 35 of the Act, the word "persons claiming under them" broadens the group of people that the arbitral ruling is

[31] (2018) 16 SCC 413.

intended to bind. It accomplishes this by interacting with both the parties and others who make claims on their behalf. It concluded that the phrase "persons claiming under them" thus represents a legislative acknowledgment of the theory that an arbitral ruling binds all other parties as well as anybody whose status or ability is derived from and equal to that of a party to the proceedings.

In general, the inclusion of non-signatories in arbitration agreements necessitates a thorough examination of the particular circumstances and relevant legal precedents. Guidance on how non-signatories may be included in or omitted from arbitration proceedings is provided by arbitration rules, national legislation, and court rulings, underscoring the complex and dynamic character of this topic in the field of dispute resolution.

The Supreme Court summarized the position by saying, "The subjective intention of the parties is to be inferred based on their intended conduct during the negotiation, performance, and termination of the underlying contract containing the arbitration agreement." This came after discussing the French arbitration jurisprudence on the matter.

The subjective intention is that all parties, including the non-signatory, ought to have meant for the arbitration agreement to bind them, or ought to have given other parties reason to believe that they did. The objective behavior of the parties during the contract's negotiation, execution, and termination—which includes the arbitration clause—may establish this subjective component.

The Supreme Court's analysis of the Swiss approach suggests that the subjective aspect of agreeing to be bound by an arbitration agreement should be communicated through an objective element, such as contract performance or negotiation.

The question regarding whether non-signatories to an arbitration agreement can be bound by it has been a significant and contentious one in the age of complicated and multi-party transactions. In **Cox and Kings Ltd. v. SAP India Pvt. Ltd.,**[32] the Supreme Court of India's five-judge constitution bench considered the applicability and validity of the "group of companies doctrine" in the Indian setting on December 6, 2023.

The court's contours of reference sought clarification regarding the meaning of the phrase "claiming through or under" that appears in Sections 8, 35, and 45 of the Arbitration Act[33], as well as whether or not it can be interpreted as a legislative acknowledgement of the Group of Companies Doctrine. Following the path that led to the current reference, it is important to remember that section 8, as it currently

[32] 2023 LiveLaw (SC) 1042
[33] 1996

exists, has the potential to have broader implications about who may request that a dispute be referred to arbitration following the Law Commission Report. While acknowledging that English and Singaporean law expressly rejects the same, the judgment conclusively holds that the Group of Companies Doctrine is deeply ingrained in Indian arbitration jurisprudence. In doing so, it gives persuasive value to various Swiss judgments that permit non-signatories to be bound by a contract.

The ruling continues by stating that the aim and consent must be directly, objectively, and visibly, if not visibly, proportionate. The judgment permits those parties who were not initially bound by the contract in question to abide by it because the true nature, proper performance, and substantive import of the contract are such that those non-signatory parties must carry out a portion or all of the contract for it to be effectively concluded. This is because the structure of a modern, numerous multinational entity may require some or multiple of its subsidiaries to carry out different parts of a contract. The judgment corrects the record by stating that the Group of Companies Doctrine genuinely "gives effect to mutual intent and autonomy," as opposed to catering to the notion that it is the opposite of party consent and privity of contract. It unequivocally acknowledges that the term "Party," as used in the Act, refers to the combination of circumstances and intent that creates a legal connection with the contract. Above all, the five-judge Bench finds that the term "parties" as used in sections 2 (1) (h) and 7 of the act refers to non-signatory third parties. More significantly, the Group of Companies doctrine, which is at issue, is accommodated in the two sections' harmonious reading.

In the past, courts all over the world have straddled the fine line between being strict and accommodating when interpreting consent.[34] One is still left to strike a balance between the parties' intentions and their consent to the contract, even after it has been determined what consent means.[35] However, the Indian Supreme Court's approach resolves the paradox, much like the ship of Theseus, by stating that the commonality of the subject matter, the composite nature of the transactions, and the contract's performance are all cumulative factors that courts and arbitral tribunals should take into account when determining the parties' intentions.

To provide clarification on this matter, the Apex Court determined that it was appropriate to submit the interpretation of "claiming through or under" as contained in revised Section 8 of the Arbitration Act qua the doctrine of a group of firms to a bigger Bench.

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[34] Jack Graves, "Court Litigation over Arbitration Agreements: Is it Time for a New Default Rule?", (2012) 23 Am. Rev. Int'l Arb. 1,16

[35] Indulia B and Ridhi, 'The Group of Companies Doctrine in India – Antithetical to Free Consent?' (*SCC Blog*, 4 May 2023) accessed 10 December 2023.

The concerns raised by this referral included the following:

i. Is it possible to construe the terms "claiming through or under" in Sections 8 and 11 of the Arbitration Act to encompass the Group of Companies Doctrine?

ii. Is the legal validity of the theory outlined in Chloro Controls and the following rulings established?

iii. Whether the theory can exist in Indian jurisprudence without reference to any legislative provisions, or whether it should be incorporated into Section 8 of the Arbitration Act?

iv. Does the idea of a "single economic reality" support the doctrine's continued application? 5. Is it appropriate to apply the concept to interpret the parties' implied consent or intent to arbitrate disputes?

v. Whether applying the theory even in the lack of implied consent is justified by the concepts of alter ego and/or piercing the corporate veil, also the doctrine of the group of companies in India contradictory to the principle of free consent?

It should be noted that Hon. Mr. Justice Surya Kant issued a separate order in which he expressed the opinion that the Doctrine should be examined by the Supreme Court's Larger Bench, even though he agreed in general that the Doctrine must be applied to complex multiparty business transactions that inevitably involve more than two parties, even if those additional parties do not formally and conclusively sign the contract. He claims that the Doctrine makes it possible for arbitration to adjust as a method of resolving disputes to this reality.

Given that many family-run businesses in India are made up of individuals who hold multiple positions within the group, the Hon'ble Justice stated that it is even more pertinent to have a doctrine like the Group of Companies in Indian arbitration law. This is because a significant portion of Indian business houses are made up of these entities.

The important questions that were suggested to be referred to the Larger Bench included whether the Group of Companies Doctrine should be incorporated into Section 8 of the Arbitration Act, whether it can exist in Indian jurisprudence without reference to any statute, and whether the Group of Companies Doctrine should still be applied by the "single economic reality" theory.

Court made the following observations in the case of **Cox and Kings Ltd. v. SAP India Pvt. Ltd.**

a. Both signing and non-signatory parties are included in the definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act;

b. The non-signatory parties' actions may be a sign of their assent to be bound by the arbitration agreement;

c. Non-signatory parties may nevertheless be bound by the arbitration agreement despite Section 7's requirement for a written agreement;

d. A party's definition under the Arbitration Act is different from a "persons claiming through or under" a party to the arbitration agreement.

e. The foundation for applying the group of companies doctrine is upholding the group companies' corporate separation while assessing the parties' shared intent to bind the non-signatory party to the arbitration agreement;

f. The group of companies doctrine cannot be applied on the grounds of alter ego or piercing the corporate veil;

g. The Arbitration Act's Section 2(1)(h) and Section 7 read harmoniously to give rise to the group of businesses doctrine as a separate legal theory;

h. The parties "claiming through or under" may only assert a right in a derivative capacity.

The Delhi High Court, in the case of **Opuskart Enterprises v. Kaushal Kishore Tyagi[36], on 10.01.2014,** analyzed the Arbitration Agreement that emerged from a partnership deed between certain individuals, in an application made under Section 11(6) of the Arbitration Act.[37] The partnership deed explicitly stated that the parties involved wanted to engage in the business activities of trading, importing, and exporting books, as well as any other enterprises that the partners wished to pursue, operating under the name M/s Opuskart Enterprises. According to Clause 12 of the Deed, the parties were obligated to act with fairness and loyalty, provide accurate financial records and relevant information about the firm to the other partners, and also take responsibility for their debts independently.

The Petitioners alleged that the Respondent, Mr. Tyagi, had engaged in the embezzlement of funds belonging to the firm. Consequently, a notice was initially issued, asserting a claim for certain sums of money. In response to the notice, the Respondent mentioned that besides being partners in the partnership firm, the partners are also Directors in M/s Opuskart India Pvt. Ltd. The

[36] 2024 SCC OnLine Del 266
[37] 1996

Respondent made accusations that the Petitioners had intentions of taking control, seizing, and fleeing with the business of both the firm and the Company. Subsequently, the Petitioners utilized the Arbitration Clause and, due to the lack of a response from the Respondent, they filed a S.11 petition before the Hon'ble High Court of Delhi. The High Court was considering whether the disputes presented by the Petitioner regarding the common business between the firm and the Company, are eligible for arbitration.

The Hon'ble Judge dismissed the Respondent's arguments that the accounts about the firm or the Company would not be considered 'Arbitrable Disputes'. The Judge reasoned that since the business is being carried out by both the firm and the Company, any disputes arising would indeed fall under the category of arbitrable disputes. Therefore, in the Opuskart Judgment (above) the Hon'ble Judge restated the opinion held in Cox & Kings and noted that a non-signatory affiliate or sister or parent company might be a party to an arbitration agreement if there is joint intention of the signatories and non-signatories to this effect.

The matter of **Vingro Developers (P) Ltd. v. Nitya Shree Developers (P) Ltd**[38] was heard by the Hon'ble Delhi High Court on January 24, 2014. The Respondent's main challenge was that Respondent Nos. 2 and 3 were not parties to the Arbitration Agreements, and as a result, the matter could not be referred to arbitration against them. They had only acted in their capacity as directors of Respondent No.1. It was contended that they were not "Arbitrable Disputes" and that they could not be held accountable on a personal level.

According to the Hon'ble Delhi High Court's interpretation of the ruling in Cox & Kings, there must be a shared intention between the parties for an arbitration agreement to bind a non-signatory. It was determined that Respondent No. 1 and Respondents Nos. 2 and 3 had a principal-agent relationship and that, despite their signatures on the relevant Builder Buyer Agreement, they could not be sued in arbitration.

6. Conditions used to bind a Non-Signatory Entity to an Arbitration Agreement[39]

In Indian arbitration law, the doctrine of group of companies is legitimate and relevant. If certain conditions are met, the doctrine may be used to bind a non-signatory entity within a corporate group to an arbitration agreement:

(i) a direct relationship to the party that is a signatory to the arbitration agreement;

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[38] 2024 SCC OnLine Del 486

[39] ONGC v. Discovery, (2022) 8 SCC 42, paras 32 to 40

(ii) a direct commonality of the subject matter and the agreement between the parties being a composite transaction;

(iii) the transaction being of a composite nature where the performance of the mother agreement may not be feasible without the aid, execution, and performance of supplementary or ancillary agreements for achieving the common object and collectively have a bearing on the dispute; and

(iv) a composite reference of such parties will serve the ends of justice.

Mahanagar Telephone Nigam Ltd. v. Canara Bank[40]

It concerned a drawn-out dispute resolution procedure that led to a second dispute about whether the parties had agreed to arbitrate the first dispute. The parent company of CANFINA, Canara Bank, acquired bonds from the second Respondent, Can Bank Financial Services Ltd. (CANFINA), which were deposited by the petitioner, Mahanagar Telephone Nigam Ltd. (MTNL), during a market shock. However, due to an ongoing contractual disagreement with CANFINA regarding the bonds, MTNL rejected to register the bonds in Canara Bank's name. When the parties initiated the arbitration process subsequently, CANFINA was not a part of it.

The case facts revealed that Canara Bank created CANFINA as a wholly-owned subsidiary. Disagreements emerged between CANFINA and MTNL as a result of the first agreement. It would be futile to attempt to settle the disputes between MTNL and Canara Bank in the absence of CANFINA due to the clear and direct connection between the initial bond issue, CANFINA's transfer of ownership to Canara Bank, and MTNL's cancellation. Lastly, the Court stated that since CANFINA had already taken part in several earlier procedures before various fora, it was evident that the parties intended to bind Canara Bank and CANFINA to the proceedings. This is CANFINA's implied or tacit approval to be used in the arbitration procedure.

6. Conclusion

Given the difficulty of the assignment, we have limited this section to our final opinions and thoughts on the matter, even though we were tempted to try our hand at guessing the answers to some of the questions put to the bigger Bench in Cox & Kings.

i. First, the legislation does not recognize the Group of Companies Doctrine under current legislation. The GOCD's guiding principles and legal framework are wholly judge-made.

ii. Finding out if a non-signatory intends to be a party to an arbitration agreement is also the foundation of the Group of

[40] (2020) 12 SCC 767.

Companies doctrine. According to the doctrine, the purpose is to be ascertained from extraneous elements such as a close personal connection to the signature parties, the subject matter's commonality, the transaction's composite nature, and the contract's fulfillment.

iii. Nevertheless, the law does stipulate that "persons claiming through or under" a party to an arbitration agreement may bring an action to demand arbitration or face legal action to enforce an arbitral ruling in specific situations.

iv. We believe that any discussion regarding the GOCD's parameters should be restricted to the narrow definition provided by the words "persons claiming through or under" included in Sections 8, 35, and 45 of the Arbitration Act, provided that the current statute is not amended.

v. Extending the doctrine's application to include parties not meeting the criteria above would be a clear departure from the legislation. The application of the GOCD may be upheld even if it is limited to "persons claiming through or under" parties to an arbitration agreement, so long as the two fundamental tenets of arbitration—consent and party autonomy—remain intact.

vi. The foundation of arbitration and commercial law in general is free consent and this is where the Supreme Court ought to begin, in our opinion, when responding to the queries raised in Cox & Kings.

vii. In India, the parties' voluntary consent is one of the necessary conditions for the establishment of a contract. Without the third party's assent, contractual terms cannot be imposed upon her. This is an established and uncontroversial contract law premise. Notably, consent does not always need to be expressed and can be presumed under Indian law.[41] Therefore, even if a party does not sign the agreement, she may still be required to fulfil her responsibilities under it if her acts or words indicate that she gives her free and informed consent to be bound by its provisions. However, such an assumption must not be made lightly. Such a claim carries a heavy burden of proof for the party asserting it.

viii. Since an arbitration agreement is a contract in the same sense as any other, it is governed by the same basic rules of our contract law. The Arbitration Act imposes no further requirements other than the requirement that an arbitration agreement be in writing. The parties do not need to sign the agreement.

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[41] Haji Mohammed Ishaq v. Mohd. Iqbal, (1978) 2 SCC 493, para 10, Shabbir Mohammad Sayed v. Noor Jehan Mushter Shaikh, 2022 SCC OnLine SC 951, para 20.

ix. In India, consent is a mandatory requirement for arbitrations, except for statutory arbitrations that fall outside the purview of the Arbitration Act. India has accepted party autonomy and consent as the cornerstones of our arbitration system by adopting the New York Convention.[42] As previously mentioned, consent may be given expressly or implicitly,[43] but its absence voids a contract.

x. In the absence of an arbitration agreement, any arbitration process that is started or carried out (except statutory arbitrations) would be unenforceable. Our legislative policy is as follows. Promoting non-consensual arbitration would be a departure from the declared policy, whether it takes the form of GOCD or not.

xi. Our legislature has the option to modify the policy at any time, and there are valid reasons to do so, but until then, we are bound by the current legislative framework. Fortunately, the common understanding of the law seems to be that, in the case of the joinder of third parties, the purpose to be bound by the arbitration agreement is fundamental and must be established, despite the numerous discrepancies in our prior decisions, as underlined in Cox & Kings.

xii. Even yet, the principles of mutual consent, intent, and party autonomy in arbitration have served as the cornerstones of several significant and historic Supreme Court rulings. Even while convenience, business interests, and the general advancement of arbitration in India are pertinent factors, the legitimacy of the theory must be the primary criterion for evaluation. This leads us to a crucial query that Cox & Kings put forward to the greater Bench.

xiii. Whether enforcing the GOCD even in the absence of implied permission be justified only by the concepts of alter ego and/or piercing the corporate veil? We believe that the answer to this question should be negative. If our interpretation of the Indian arbitration policy is correct—that is, that party autonomy and consent are the essential foundations of arbitration—then an arbitral tribunal's non-consensual application of the alter ego principle or involuntary lifting of the corporate veil would be a violation of this policy.

xiv. Undoubtedly, as courts have held time and time again, some circumstances warrant lifting the corporate veil. However, in our opinion, courts handling civil or criminal cases are the best

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[42] India signed the New York Convention on 10-6-1958 and ratified it on 13-7-1960.
[43] Haji Mohammed Ishaq v. Mohd. Iqbal, (1978) 2 SCC 493, para 10, Shabbir Mohammad Sayed v. Noor Jehan Mushter Shaikh, 2022 SCC OnLine SC 951, para 20 fn. 63.)

people to make this decision rather than contract arbitral tribunals and giving them more authority.

xv. On this particular issue, Indian High Courts have adopted divergent stances. Therefore, it is crucial to reach a definitive decision about the authority of Arbitral Tribunals to compel third parties to appear in cases without consent, particularly when the Section 8 or Section 11 procedures have not been followed. It will be intriguing to observe the Supreme Court's response to the queries put forth. However, it is hoped that further clarification will be provided regarding the legal framework for non-signatories' general joining as well as the doctrine of group of companies' applicability in India. This is urgently needed because there is a rising number of multiparty and multi-contract disputes.

xvi. By providing creative alternatives for conflict resolution, doctrine in ADR shows a dedication to resolving conflicts and legal issues outside of the conventional judicial system. The group's participation in ADR is indicative of its progressive mindset and commitment to offering quick, affordable, and fair solutions to a range of disputes.

xvii. Creating an ADR think tank or research centre devoted to examining new trends, best practices, and technical developments in ADR is a novel idea that Doctrine should take into consideration. In addition, this organization might act as a knowledge centre, offering tools, instruction, and thought leadership in the field of alternative conflict resolution, strengthening Doctrine's standing as an industry leader in this area. Moreover, this action would promote the creation of new ADR techniques, instruments, and technologies, strengthening Doctrine's competitive advantage and expanding its capacity to provide clients throughout the world with state-of-the-art ADR services.

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Examining Legal Barriers to Inmate Healthcare and Mental Health Services in Indian Prisons

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Abstract

This article examines the legal challenges surrounding inmate healthcare and mental health services in Indian correctional facilities. Utilizing data from the "National Institute of Mental Health and Neurosciences (NIMHANS) and Prison Statistics India reports of 2020 & 2022 by the National Crime Records Bureau (NCRB)", it highlights the high prevalence of mental illnesses among inmates. Additionally, overcrowding exacerbates the issue, with 54% of jails in India being overcrowded, according to the India Justice Report 2022. The rights guaranteed under Article 25 of the Universal Declaration of Human Rights (UDHR) and Article 21 of the Indian Constitution affirm universal access to medical care, including the prisoners. Judicial rulings have consistently upheld inmates' entitlement to medical assistance. This article offers a theoretical perspective and policy recommendations aimed at enhancing the health and well-being of incarcerated individuals.

This study aims at advancing the discourse on criminal justice reform in India, emphasizing targeted interventions, policy amendments, resource optimization, and staff training to address healthcare challenges, aiming to improve inmate well-being and facilitate successful reintegration into society.

Keywords

Inmate Healthcare, Indian Prisons, Legal Barriers, Legal Reforms, Mental Health Legislation

1. Introduction

In Indian prisons, healthcare and mental health services are serious issues that affect both the prison population and the more extensive criminal justice system. The NIMHANS data raises concerns about the increasing number of inmates suffering from mental health issues and highlights the urgent need for improvement in the currently inadequate healthcare facilities to provide necessary treatment. With their overpopulation and scant resources, Indian jails find it challenging to offer basic medical treatment, much less comprehensive mental health services. This situation exacerbates the suffering of inmates and hinders their chances of recovery and successful reintegration into society. According to the NCRB Reports 2022, there are only nine psychologists or psychiatrists across 28 states: Maharashtra has one, Tamil Nadu has six, and West Bengal has two, while the Union Territories have none, despite a prisoner population reaching 573,220[1].

The legal issues related to prisoner healthcare protect prisoners' rights and promote rehabilitation. Article 21 of the Constitution of India guarantees "the right to life and personal liberty, including the right to health and medical care.[2] The right to health is recognized as a fundamental human right in international human rights documents, including Article 25 of the Universal Declaration of Human Rights (UDHR), highlighting the importance of ensuring adequate health and well-being for all individuals through access to medical care and necessary social services."[3] This article brings to light the legal challenges that prevent inmates in Indian prisons from receiving the essential medical care and mental health treatments to which they are legally entitled.

This article focuses on the legal obstacles that prevent the provision of adequate medical care and treatments for mental health in Indian prisons. The National Crime Records Bureau's (NCRB) 2021 data under the name 'Prison Statistics India' and research conducted by the National Institute of Mental Health and Neurosciences (NIMHANS) highlights the high prevalence of mental illnesses among inmates[4]. Moreover, the India Justice Report 2022 emphasizes the worsening effects of a 54% overcrowding rate in Indian prisons[5].

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[1]National Crime Records Bureau, Ministry of Home Affairs, Prison Statistics India 2022 (2023), https://ncrb.gov.in/ (last visited on June 4, 2024)

[2] Parmanand Katara v. Union of India, (1989) 4 S.C.C. 286

[3] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), Article 25.

[4] National Institute of Mental Health and Neurosciences, Annual Report 2013-14 (2014), https://nimhans.ac.in/wp-content/uploads/2019/02/NIMHANS_English-Annual-Report-2013-14 (last visited n.d.).

[5] Saxena, S. & Hanna, F., Dignity - A Fundamental Principle of Mental Health Care, 142 Indian J. Med. Res. 355 (2015).

An order was issued in the case of Kush Kalra v. Union of India. This case involved a request for the Union and state governments to provide training and awareness programmes. These programmes would introduce the Mental Health Act 2017 to prison staff and law enforcement officials. The plea also aimed to ensure that prisoners' medical exam reports include assessments of their mental health when they are admitted to institutions. It was noted that prisoners' mental health is not currently assessed during their initial medical examinations upon their arrival at prison. The petition claims that the lack of adequate mental health facilities, or their complete absence, in prisons violates Section 103(6) of the Mental Health Act of 2017. This provision requires that every state government must establish a mental health facility within the medical unit of at least one prison in the state[6].

Based on the data and direction, there is an immediate need for reforms to address these challenges, considering the rights protected by international human rights standards and the Indian Constitution. This study advocates for improving prisoners' well-being by conducting a thorough analysis of healthcare in Indian prisons and using quantitative studies and qualitative interviews to identify practical problems and provide solutions that blend theoretical insights with policy analysis. This research significantly contributes to the discussion on criminal justice reform in India by emphasizing the need for focused interventions, updated legislation, resource optimization, and training to meet the healthcare requirements of inmates.

2. Background

The development of health care services and mental health services in Indian prisons reflects a greater recognition of prisoners' rights after independence. Health services and mental health were neglected during the colonial period. For the first time, the 1894 Prisons Act provided some healthcare, which improved significantly only after landmark Supreme Court judgments like Sunil Batra v. Delhi Administration[7] case and Rama Murthy v. State of Karnataka case that insisted on better prison conditions and medical services. The Mental Healthcare Act of 2017 further emphasized inmates' rights to mental health treatment, but overcrowding, resource constraints, and systemic inefficiencies impede its implementation.[8] This situation is worse as Indian prisons are reported by the NCRB 2020 report to be operating at 118.5% of their capacities, thus exacerbating these issues. Despite this progress, there are still significant obstacles, suggesting the need for continuous change to guarantee enough healthcare for all prisoners.

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[6]Kush Kalra v. Union of India &Ors., A.I.R. 2022 S.C. 326
[7] Sunil Batra v. Delhi Administration, (1978) 4 S.C.C. 494
[8] Mental Health Act, No. 10 of 2017, Acts of Parliament, 2017

The healthcare and mental health services provided to inmates in Indian prisons have long been a subject of concern. Two critical studies, the 2013 study by the National Institute of Mental Health and Neurosciences (NIMHANS) and the 2021 & 2022 'Prison Statistics India' reports from the National Crime Records Bureau (NCRB), offer valuable insights into these concerns, including mental health issues among inmates, overcrowding, and the inadequate healthcare infrastructure in Indian prisons.

3. NIMHANS Study

NIMHANS is continuously attentive to the mental fitness of prisoners. A study was performed in 2021 to observe the mental health issues experienced by jail personnel at some point during the COVID-19 pandemic. The NIMHANS handbook makes a specialty of addressing intellectual fitness difficulties among jail people all through the COVID-19 pandemic. It sheds light on the substantial mental health-demanding situations encountered by the prison team of workers. 81% of the members reported experiencing moderate to excessive tiers of pressure, typically attributed to concerns about non-public safety, prisoner control, and circle of relatives matters[9]. In 2013, research via NIMHANS on the mental fitness of prisoners in India offered beneficial insights into the superiority of intellectual health illnesses among prisoners. The study furnished an alarming document that validated the sizable incidence of intellectual fitness problems in correctional centres[10]. NIMHANS can pay continuous interest to the intellectual health and wellness of prisoners. In 2021, NIMHANS conducted research on mental fitness concerns among the jail workforce during the COVID-19 pandemic[11].

The NIMHANS manual addresses the demanding mental health situations of prison employees amidst the COVID-19 pandemic, thereby highlighting critical mental fitness troubles faced by prison employees. Most of them pronounced mild to high degrees of stress (81%), which they related to personal safety, inmate management, and family problems. The NIMHANS survey shows that anxiety and despair, among other intellectual situations, affect more than 50% of inmates incarcerated. Further, prisoners faced more than one relatively commonplace psychiatric disorder, which includes schizophrenia and bipolar disorder. The research highlighted the marked loss of certified psychiatrists in prison centers, at the side of an insufficiently prepared area, necessitating instantaneous improvement in intellectual fitness care. This investigation similarly reveals the necessity of improving correctional establishments' psychiatric care requirements, in which there should be a wide

[9] National Institute of Mental Health and Neurosciences, Dealing with Mental Health Issues in Prison Staff during COVID-19: A Handbook (2021).
[10] NIMHANS, Study on Mental Health in Prisons, supra note 4
[11] NIMHANS, Handbook on Prison Staff Mental Health during COVID-19, supra note 7

variety of nicely trained experts and improved infrastructure to ensure psychological balance among inmates[12].

4. NCRB's 'Prison Statistics India' Reports, 2021 & 2022

The National Crime Records Bureau (NCRB) releases the 'Prison Statistics India' statistics for 2021 and 2022. These reports provide comprehensive details on the jail. The assessments offer extensive data, including factors such as the availability of medical services in the office, the prison's capacity, and the inmates' profiles.

According to the 2021 NCRB report, 9,180 out of the 554,000 convicts in Indian jails were diagnosed with mental illnesses. The analytical study evaluation reveals that over half (54%) of prisons have exceeded their maximum capacity due to overcrowding, emphasizing the urgent need for improvements.[13] By 2022, the number of inmates had reached 580,000, and 2% of them (11,600 detainees) had psychological instabilities. Correctional facilities continue to be overcrowded, with 60% exceeding their capacity. An acute scarcity of healthcare personnel and an inadequate mental healthcare infrastructure were identified in the 2022 NCRB report[14]. However, it acknowledged the utilization of rehabilitation initiatives to mitigate recurrent offences and facilitate the reintegration of convicts. As per the report analysis the pressing necessity for improvements in the Indian prison system, specifically the resolution of mental health issues and the improvement of healthcare services and rehabilitation programmes for detainees.

5. Inmate Mental Health and Overcrowding Issues

The data from the NIMHANS study and the NCRB reports for 2021 and 2022 reveal a distressing truth regarding the mental health emergency within Indian prisons. Data from 2021 revealed that 9,180 prisoners, or about 1.7%, were diagnosed with mental disorders, and by 2022, the figure had gone up by over two percent to nearly 11,600 convicts suffering from such ailments. These statistics indicate the enormous gap in the provision of effective psychological treatment in penitentiaries. Overcrowding is a serious concern, as proved by the fact that in 2021, more than half of all prisons (54%) were filled beyond capacity, with this increasing to sixty percent in 2022. The India Justice Report (2022) points out another important issue: over fifty percent of Indian prisons are overcrowded. Prison overcrowding significantly affects prisoners' mental well-being and compounds the already scarce healthcare resources available. Among other problems, self-harm risk increases for mentally ill inmates who are crowded

[12] Id.
[13] National Crime Records Bureau, Ministry of Home Affairs, Prison Statistics India 2021 (2022).
[14] National Crime Records Bureau, supra note 1.

together[15]. Thus, it can be seen that prison conditions need urgent improvement, and advanced mental health facilities for prisoners have to be introduced as soon as possible. The study has brought out a critical need for revamping the health care system within detention centres, more so concerning overall mental healthcare provision.

6. Current Challenges & Legal Barriers to Inmate Healthcare and Mental Health Services

The state of mental health services and treatment available in Indian prisons is facing many challenges. This section attempts to discuss the problem of overcrowding in prisons based on Kush Kalra's Public Interest Litigation along with several Right to Information applications filed by various people to highlight the lapses and inadequacies in the prison's mental health infrastructure.

7. The Mental Health Consequences of Prison Overcrowding

Prison Overcrowding is a prevalent issue that harms both inmates' physical and mental health. According to the India Justice Report 2022, 54% of India's jails are overcrowded, with some prisons housing inmates well beyond their official capacity. This overcrowding has various detrimental impacts on the mental health of the prisoners[16]. The Supreme Court recently constituted the Justice Amitava Roy panel, which submitted its report in February 2020. As per the survey, Indian prison has a 114% occupancy rate, while Delhi prison is the most overcrowded at 180%[17]. According to the report, delays in investigation and trial processes are the primary source of congestion, which might be alleviated by filling vacancies in the police force, judiciary, and present authorities as swiftly as possible. Perturbed about the current state of mental healthcare presence across the country, Kush Kalra, the petitioner in the case Kush Kalra versus Union of India and others filed an RTI application to question all the states and union territories (UTs) about their compliance with the mandate to establish mental health establishments in prison under the Mental Healthcare Act, 2017, responses were received from seven states, totalling 56 prisons. None of the 56 prisons had established mental health centres. However, psychiatrists had been assigned to eight of these institutions to aid the inmates[18].

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[15] India Justice Report 2022, https://indiajusticereport.org/ (last visited July 14, 2024).
The India Justice Report 2022 provides a comprehensive assessment of the capacity of the police, prison system, judiciary, and legal aid services in each state. The report aims to measure and improve the justice delivery system in India, leveraging evidence-backed strategies and trend analysis to inform policymakers and civil society.
[16]India Justice Report 2022, supra note 13
[17] Supreme Court of India, Report of the Justice Amitava Roy Committee on Prison Reforms (Feb. 2020).
[18] Kush Kalra, supra note 6

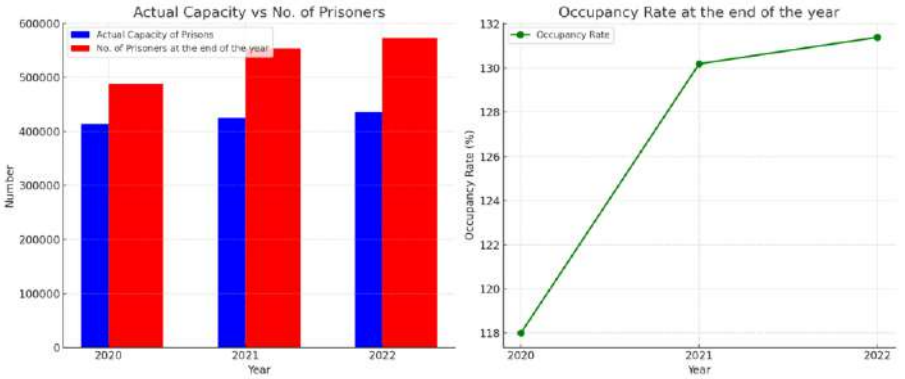

Fig-1

The bar chart on the left depicts the real capacity of the presence and the number of convicts at the end of each year from 2020 to 2022. The line graph on the right represents the occupancy rate at the end of each year for the same time period[19].

The two charts here display the present capacity and occupancy figures for 2020, 2021 and 2022. The left bar chart shows that the real prison capacity climbed from 414,033 in 2020 to 436,266 in 2022, but the present population increased from 488,511 to 573,220, demonstrating a rising disparity. Despite capacity expansion, the ongoing problem of overcrowding in India has been indicated in the line chart (right), which shows the occupancy rate increasing from 118% in 2020 to 131.4% in 2022. The absence of personal space and privacy and the suffocating confined space play a major role and significantly affect the mental health of inmates. Overcrowding also places a considerable strain on healthcare infrastructure, complicating the provision of timely and adequate medical and mental health services. The lack of basic amenities highlights the feelings of neglect and frustration.

8. Analysis of Mental Healthcare Infrastructure in Indian Prisons

The leading cause of mental health problems for prisoners in India is that there are no mental health services in jails. Prisons have few psychiatrists who are not adequately trained, too few non-psychiatrists staff who cannot deal with mental illness burden work, and prisons have no properly organized space for counselling and therapy and no equipment for diagnosis. When, rarely, they do exist—there are very limited drug and therapy options for treatment,

[19] This bar chart is based on data from the National Crime Records Bureau, Ministry of Home Affairs, reported in Prison Statistics India for the years 2020 (published in 2021), 2021 (published in 2022), and 2022 (published in 2023).

i.e. drugs like anti-anxiety medications or availability of psychotherapy options. At the same time, prison administration must handle the prescription red tape while treating prisoners well e.g. referral letters, etc., also at times psychotropic medications get sold amongst or by the inmates which adds to huge bureaucracy of psychological assessment before even starting any therapeutic work.

To fill other gaps, we need to boost funding, retrain prison staff, upgrade facilities, and do regular checks to make sure we're following the right legal standards. We can't just look at this from one angle - we need a plan that covers all bases. This means putting more money in, giving prison workers better training on how to handle these situations, and offering treatment options inside prisons. We also need to set up a system for visits that follows the law and keeps inmates safe without stepping on their rights.

9. Health Systems and Tangible Effects of Legal Barriers

This section aims to provide an in-depth analysis of the health care systems in a particular prison, supported by important case studies illustrating the consequences of inadequate health care for prison inmates. These examples provide tangible insights into the personal struggles and systemic challenges of prison health care in India. By drawing on personal experiences, this research aims to humanize the issue by providing a comprehensive and comprehensive understanding of urgently needed policy changes.

10. A Comprehensive Analysis of Specific Prisons and Their Healthcare Facilities

One of the largest prison complexes in South Asia, Tihar Jail accommodates over 16,000 inmates far exceeding its official capacity of about 5200, even though the presence healthcare infrastructure includes a central hospital with roughly hundred beds and several dispensaries, the number of healthcare professionals, including psychiatrist, and psychologist is usually in adequate, resulting in prolong rating times for consultations. Overcrowding severely affects the quality of healthcare, forcing inmates to wait for long periods to get medical attention. Mental health services are particularly under the strain with irregular assessments and follow-up further magnifying the issue[20].

Similarly, a report on Yerwada Central Jail located in Pune, Maharashtra, which is designed to hold around 2,200 inmates, usually accommodates more than twice the number. If we talk about the healthcare facilities available in the prison, include a hospital with basic facilities and several dispensaries; however, the mental health services are sporadic with occasional and irregular visits from

[20] Home | Central Jail, Tihar Prisons, https://tiharprisons.delhi.gov.in/ (last visited Mar. 6, 2024).

psychiatrists and no permanent mental health professional as staff. The overcrowded conditions formed a part of the reason for significant health issues among inmates with their mental health issues being hugely unresolved due to insufficient resources and professionals.[21]. The lack of care for inmates with severe mental health conditions results in the degeneration of their mental well-being.

With practically non-existent mental health services, inadequate staff and no mental health professionals available, Puzhal Central Prison in Chennai usually accommodates 3000 inmates which exceeds its original capacity of 2,500. Inmates who suffer from mental health issues often go untreated as there are no facilities available within the prison premises.[22]. Moreover, general healthcare facilities are unsatisfactory, which leads to neglect of inmates and poor health conditions.

Through the interviews of a few prisoners of Chhattisgarh, it was found out that access to mental health care within the prison system is severely lacking, with services largely unavailable within the prison premises. The services could only be accessible through external cooperation with private hospitals. The inmates marked the mental health care services as very poor. Through interviews with prison staff and inmates, the researcher was able to uncover insights into the prevailing mental health issues among inmates prior to their imprisonment. This research highlighted critical deficits in mental health facilities and care within the female prisons in Chhattisgarh. The feedback from interviewees highlighted the critical need for competent psychologists and psychiatrists, indicating an urgent need for reforms that are aimed at improving the availability of mental health care and the quality of mental health services for inmates.

11. Legal Framework for Inmate Healthcare and Mental Health Services in Indian Prisons

Stapling systematic issues faced by the prison population necessitates a complete understanding of the legislative framework governing inmate health care and mental health services in Indian correctional facilities. This part examines relevant sections of the Mental Health Act, 2017, fundamental freedoms provided for in international and national legal frameworks, and applicable court decisions.

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[21] A Brief Report OnYerawada Central Prison Of Pune Located In Maharashtra, Legal Service India, https://www.legalserviceindia.com/legal/article-2426-a-brief-report-on-yerawada-central-prison-of-pune-located-in-maharashtra.html (last visited July 14, 2024).

[22] Protecting Prisoners: The Hindu Editorial on Overcrowding of Prisons, The Hindu (May 12, 2021)

12. Legal Implications of the Mental Health Act, 2017 for Inmate Healthcare

The Mental Health Act, 2017 includes vital provisions that specifically focus on the healthcare needs of prisoners. The term "mental healthcare" is clearly defined in Section 2(o): “Mental healthcare includes “the analysis and diagnosis of a person's mental condition and treatment, as well as the care and rehabilitation of such a person for his or her mental illness or suspected mental illness.”[23]

Section 103 of the Mental Health Act, 2017 deals explicitly with prisoners with mental illness. As per Section 103, Clause 5, “the medical officer responsible for a mental health facility must provide a special report to the authority that ordered the person's detention every six months”. This report should include the mental and physical condition of the prisoner. The medical officer of a prison or jail must provide a quarterly report to the appropriate board confirming the nonexistence of any inmates with mental illness in the facility[24].

This provides an ongoing evaluation of their health and the efficacy of their medication. As per Section 103(6), every state and territory must establish mental health facilities within the health care facilities of at least one prison.[25]This legislation will ensure that those who have been convicted and also suffer from mental health disorders get the expert therapy and beneficial treatment that are necessary for their well-being.

In the case of Kerala High Court, Suo Motu v. Territory of Kerala[26], the Court, guided by the principle of parens patriae, issued many interim directions to remedy the plight of mentally ill prisoners under the Mental Healthcare Act, 2017.In this case Court directed the state government to immediately establish a mental health centre, as mandated by Section 103(6) of the Act, in order to guarantee that prisoners with mental illness get adequate care. Furthermore, Section 73 mandates the public authority to expeditiously establish Mental Health Review Boards. Section 103 requires medical officials in mental health and jail settings to fully comply with their duties. Furthermore, the Mental Health Review Boards were tasked with ensuring that inmates with mental illnesses receive the same medical attention as those with physical ailments and are treated with dignity. Despite the availability of specific guidelines, many medical establishments face difficulties fulfilling these essential responsibilities due to inadequate infrastructure and a scarcity of well-trained personnel.

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[23] Mental Healthcare Act, No. 10 of 2017, § 2(o), Acts of Parliament, 2017.
[24] Mental Healthcare Act, No. 10 of 2017, § 103(5), Acts of Parliament, 2017 .
[25] Mental Healthcare Act, No. 10 of 2017, § 103(6), Acts of Parliament, 2017 (India).
[26] Suo Motu v. State of Kerala, A.I.R. 2021 Ker. 123.

13. Understanding Inmate Healthcare Barriers through Article 25 of the UDHR and Article 21 of the Indian Constitution

The Universal Declaration of Human Rights (UDHR) in Article 25 states that everyone is entitled to a standard of living adequate for their health and well-being including food, clothing, housing, and medical care. This includes healthcare, food, homes, and clothes. The right to health is considered an inherent human right by all people including those incarcerated[27]. In India, the Indian Constitution's article 21 ensures every person has the right to life and personal freedom, as clarified by the Indian Supreme Court, which held that this also includes access to healthcare and medical[28].

This stand supports the principle of human dignity and the treatment of prisoners, which promotes humane acts towards them. However, numerous medical institutions have not met many of these essential duties despite having clear guidelines. Such reasons include lack of infrastructure and untrained manpower. Numerous RTI applications and PILs have also underscored these shortcomings, thereby demanding more stringent compliance with better oversight mechanisms. There will always be some functions that medical institutions for prisoners will never perform despite pre-set rules. Primarily, it is due to the absence of proper infrastructure and inefficiency on the part of untrained staff. Consequently, this situation has been a catastrophe in the end. Such shortcomings have come out through RTI applications and PILs, stressing additional regulatory steps and uniformity.

14. Judicial Pronouncements Affirming the Right to Medical Assistance for Inmates

Many landmark decisions have visible the Indian judiciary take a proactive function in putting forward the right to medical assistance for prisoners.

In Parmanand Katara v. Union of India, the Supreme Court declared that fitness and medical care are of fundamental rights guaranteed with the aid of Article 21 of our Constitution. It as a consequence obligates states to offer healthcare for everyone, even convicted offenders[29]. This view was restated in R.D. Upadhyay v. State of Andhra Pradesh, in which it referred to as upon national governments to offer reasonable healthcare in their prisons[30]. Similarly, In Vinay Sharma v. Union of India[31], the courtroom burdened that prisoners are entitled to have fitness offerings as appropriate as the ones given to regular citizens, thereby

[27] Universal Declaration of Human Rights, supra note 3.
[28] Parmanand Katara, supra note 2.
[29] Id
[30] R.D. Upadhyay v. State of Andhra Pradesh, A.I.R. 2007 S.C. 1947
[31] Vinay Sharma v. Union of India, (2014) 13 S.C.C. 1

emphasizing the position of the prison fitness care system in these topics as far as correctional facilities are concerned. In end, those judicial statements assert that there are constitutional and human rights obligations imposed on the kingdom concerning the provision of ok healthcare for prisoners; subsequently, robust mechanisms should be installed location to ensure compliance with legal standards and cope with systemic deficiencies in jail healthcare services.

The criminal framework comprising statutory provisions, constitutional rights, and judicial pronouncements establishes a robust basis for the protection of inmate healthcare rights in India. However, powerful implementation and enforcement are vital to translating these felony protections into tangible improvements in the well-being of prisoners.

15. Conclusion & Suggestions

The whole evaluation of Indian jail health care and the mental health system stems from the structural issues that need urgent attention. The 2013 NIMHANS (National Institute of Mental Health and Neurosciences) study as well as the 2021 NCRB report on Prison Statistics India reveal a dearth in mental health treatment and its impact on overcrowding among prisoners. Statistics clearly show that overcrowding affects 54% of prison convicts, leading to irregularities in healthcare provision. Based on Section 103(6) of the Mental Health Act, 2017, Article 25 of the UDHR, and Article 21 of the Indian Constitution, prisons are legally required to provide medical help since court cases have made this clarification.

Over-population causes psychiatric difficulties and overburdening resources. Research indicates that inadequate medical care and mental health services result in the deterioration of inmate well-being. Achieving positive inmate health outcomes necessitates implementing practical strategies, policy changes, resource allocation, and staff development. Large-scale interventions involve equipping medical facilities with essential supplies and basic diagnostic equipment, periodically screening inmates to facilitate early detection and treatment of illnesses and offering a range of comprehensive mental health programmes that comprise psychiatric screenings, counselling services, and peer support.

The suggested changes aim to tackle system-wide issues found in the research. They seek to boost prisoners' health through hands-on steps, policy tweaks, and better use of resources and staff training. Putting these ideas into action will improve health and mental care in jails. This will help inmates regain their feet and rejoin society while protecting their rights and worth. Good health and mental care in prisons play a crucial role in the justice system. They have a big impact on helping inmates recover and fit back into society. The new

plans can help inmates feel better by improving their physical and mental health, reducing pain, and improving life overall. These changes can lead to fewer repeat offences by helping inmates heal. They also ensure human rights are respected by meeting legal health and mental care rules. This creates a kinder and fairer justice system.

Implementing the proposed solutions can create a more humane and effective prison system that prioritizes inmate well-being and works on prisoner reformation, rehabilitation, and reintegration, ultimately contributing to a safer and more just society. The time for action is now, with the well-being of thousands hanging in the balance, awaiting the promise of care and compassion that every individual deserves.

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Remission Jurisprudence in India: Tracing through Landmark Judgments

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Abstract

The case of **Bilkis Yakub Rasool v. Union of India** emerged from a writ petition challenging the remission granted to 11 convicts from the Gujarat High Court. The Apex Court of India was called to determine whether the Gujarat High Court had the authority to pass the remission order. The High Court had relied on the 1992 Gujarat Remission Policy, which allowed for premature release under Section 432 of the Code of Criminal Procedure. However, the Supreme Court held that remission should be granted by a competent authority on a case-by-case basis, ultimately quashing the High Court's order. This study aims to examine the multifaceted impact of the Bilkis Bano case on the jurisprudence of remission in India. It explores the historical and contemporary scope of remission laws, focusing on procedural requirements and the normative dimensions highlighted by the case. The methodology involved a thorough analysis of statutory and case law foundations shaping remission jurisprudence, a comparative review of the 1992 and 2014 Gujarat remission policies, and an examination of the Maharashtra remission policy as an alternative. The study also scrutinized observations from the Bilkis Bano case to identify broader legal principles and assessed the appropriateness of remission in light of alternative correctional measures. Key findings include the Supreme Court's clarification on the discretionary nature of remission and the necessity for competent authority approval. This ruling may recalibrate the approach to similar legal scenarios and underscores the importance of procedural rigor in remission decisions. In conclusion, the Bilkis Bano case holds significant implications for the future of remission jurisprudence in India. It prompts a re-evaluation of existing policies and highlights the need for stringent procedural adherence. Future research should explore the long-term impacts of this case on remission practices and correctional policies in India.

Keywords

Bilkis Bano, remission, jurisprudence, Gujarat Remission Policy, Supreme Court, Section 432, Code of Criminal Procedure, India.

1. Introduction

Prisons are essentially 'human warehouses' built to confine people who have broken the law for a short or long period of time and then cut loose after their time is served[1]. These institutions not only serve many purposes as a form of punishment and deterrence but can also act as correctional systems providing rehabilitation and facilitating the reformation of prisoners. In India, the Prisons Act of 1894 is responsible for amending the laws regulating prisons and also providing rules for the regulation of such prisons, including its systems of reformation. The fundamental theme of this text is focused on one such system, that is, the remission policy, which, under Section 3 (5) of the Act[2] refers to the shortening of sentences of prisoners in jail. The remission system is an important aspect of the reformation principle as the categories of prisons eligible for such release will have to have had good conduct and behaviour within the premises of their prisons, thereby incentivising discipline in jails. However, the issue lies when these correctional mechanisms, in certain cases, are extended to convicts for political influence and benefits[3] Given that the States prescribe their own rules for the system[4].

Against this background, the case of Bilkis Yakub Rasool vs. Union of India[5], serves as a suitable study, as it holds profound implications for the jurisprudence of remission in the Indian legal landscape, extending beyond merely exploring the historical trajectory of remission laws. The Apex Court, in this case, quashed the remission of 11 convicts, stating that it is a 'classic case' where the order of a court is used to violate the rule of law while passing an order on remission lacked state jurisdiction granting such a release. Furthermore, given the complexities surrounding the remission system and procedures in India, it is pertinent to understand the precedent and statutes that have shaped the contemporary scope of remission legislation in India.

This paper attempts, firstly, to provide a meticulous examination of the jurisprudence surrounding remission in India, elucidating the statutory and case law foundations that shape its nuanced contours. This initial section aims to provide a contextual framework for a more profound comprehension of the implications of the Bilkis Bano case.[6]. Secondly, the next aim of this paper entails a comparative scrutiny of the different remission policies in force and use the distinction made

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[1] JOYCELYN M. POLLOCK, PRISONS TODAY AND TOMORROW, XIX (Jones & Bartlett Learning, 1997)
[2] The Prisons Act, 1894, § 3, cl. 5, No. 9, Acts of Parliament, 1894 (India)
[3] Nitesh Rana, *Remission policy and its misuse for political gains*, BAR AND BENCH (Jul. 7, 2024, 6:33 PM) https://www.barandbench.com/columns/the-remission-policy-and-its-misuse
[4] *Supra*, note 2, § 46, cl. 4
[5] Bilkis Yakub Rasool V. Union of India, 2024 SCC OnLine SC 25
[6] *Id.*

to understand why the initial grant of remission was given . This section aspires to unravel the determinative factors influencing the court's decision-making processes. Thirdly, the paper adopts a comparative lens, dissecting the observations rendered in the landmark cases around remission to discern how they might recalibrate the approach to analogous legal scenarios. By closely examining the unique facets of the cases, this segment endeavors to extract broader principles that may reshape the jurisprudential landscape. Lastly, the paper examines the lacunae and loopholes inherent in the remission laws which facilitate scrutinising the correctional measures in place, posing an inquiry into whether remission is an appropriate recourse in cases where alternative measures are available. This comprehensive analysis aims to provide a holistic understanding of the ramifications of the case studies, thereby contributing to the evolving discourse on the jurisprudence of remission in India.

2. Jurisprudence of Remission

The legal landscape surrounding life imprisonment in India demands meticulous examination, with particular emphasis on the inherent complexities and ambiguities within the applicable statutes. Section 53 of the Indian Penal Code[7], the provision governing life imprisonment notably lacks specificity regarding the duration of incarceration for individuals sentenced to life terms. The landmark case of *Gopal Vinayak Godse vs. State of Maharashtra*[8], as adjudicated by the Supreme Court, unequivocally establishes that a prisoner serving a life sentence is legally obligated to fulfill the entirety of the stipulated life term. The origin of life imprisonment as a punitive measure traces back to the Indian Penal Code (Amendment) Act[9], which supplanted the erstwhile punishment of transportation for life. This legislative shift, however, did not diminish the severity of the penalty. Although Section 55 of the Indian Penal Code[10] empowers the Government to reduce a life sentence for a period not exceeding 14 years, Section 57[11] dictates that, for calculation purposes, life imprisonment should be considered tantamount to a 20-year term. Furthermore,the Criminal Procedure Code under Section 432[12] grants the government authority to suspend or remit sentences. Despite these provisions, the judiciary is precluded from directing the release of prisoners who have served more than 20 years, as the power to commute resides exclusively with the Government under the constitutional authority vested in Articles 72[13] and 161[14]. Consequently, the existing legal framework implies an

[7] Indian Penal Code, 1860, § 53, No. 45, Acts of Parliament, 1860 (India)
[8] Gopal Vinayak Godse vs The State Of Maharashtra, 1961 AIR 600
[9] India Penal Code (Amendment) Act, 1955 (Act No. 26 of 1955)
[10] *Supra*, note 5 at § 55
[11] *Id.*, at § 57
[12] *Supra*, note 2
[13] Indian Constitution, article. 72
[14] *Id.* at art. 161

indeterminate period for life sentences, ranging from 16 to 19 years, inclusive of pre-conviction periods in certain states. This research endeavours to unravel the intricacies of this legal conundrum, examining the implications, uncertainties, and constitutional dimensions surrounding the incarceration duration for life-term convicts in India.

In response to the recommendations posited by the Mulla Committee, the Indian Government instituted a prison advisory board focused on premature releases. Proposing the release of prisoners meeting specific criteria, the board advocated for the early release of individuals aged 65 and above, those who had served ten years of actual imprisonment (inclusive of remand periods), and elderly inmates. Guidelines for the release of inmates were published under the Section 433(A) of the Criminal Procedure Code[15]. Despite these guidelines, the practice of premature release became tainted by political influence, notably during the tenure of the Telugu Desam Party government from 1988 to 1993. This period witnessed the premature release of 60 politically connected prisoners after completing a mere 3-5 years of their sentences, raising questions about the impartiality of the process.

However, the Andhra government in 1993 abandoned the procedure for considering cases recommended by the advisory board, asserting that life-sentenced prisoners had no entitlement to demand release even after 20 years of imprisonment. The Government proposed a merit-based consideration for premature release, further intensifying concerns about fairness and potential corruption.

This abrupt shift in the procedure for premature release prompted dissatisfaction among life-sentenced and long-term prisoners. In protest, they initiated a hunger strike in 1994, expressing discontent with the lack of a fixed sentence period for life prisoners and challenging the discretionary powers of the Government. The prisoners, initially led by Naxalite inmates, achieved a reduction in life sentence to seven years of actual imprisonment through the process of premature release. Post the prisoners' movement, around 400 individuals were released in 1995, and 1,000 life convicts during 1996-2000[16]. This scenario of abrupt changes in procedure highlights the necessity of having a set of guidelines for premature release; and to this extent in the case of *Laxman Naskar V. State of West Bengal*[17] , the Supreme Court requested the police report in order to evaluate the request for the early release of the prisoners based on the following criteria: i) Whether the offence is a single criminal act that does not

[15] *Supra* note 2 at § 433 (A)
[16] K. Murali, *Premature Release of Prisoners*, 39, Economic and Political Weekly (start pg), (pg cited) (2004), https://www.epw.in/journal/2004/39/commentary/andhra-pradesh-premature-release-prisoners.html
[17]Laxman Naskar V. State of West Bengal, (2000) 7 SCC 626

have a significant impact on society as a whole; ii) Is there a possibility that the offender will commit crimes again in the future; iii) Is the offender no longer capable of committing crimes; iv) Is there a legitimate reason to keep this offender behind bars; and v) The convict's family's socioeconomic situation. However, there needs to be consideration of premature release after looking into all the guidelines together and not just selectively looking into a specific aspect as was done in Laxman Naskar[18], where the police only reported on whether there is a chance of future recurrence of a crime and to consider all the above guidelines, there needs to be thorough observations by authorities on the conduct of the convicts, which failed to happen in this case since it was made clear by the record that the Government had disregarded the petitioners' behaviour while they were incarcerated and had not taken into account the possibility that they had lost their ability to commit crimes. In regards to this case, a question arises: Should all 'factors' prescribed that are applicable to the convicts regarding remission be followed mandatorily, or does it provide discretion to authorities?

On the one hand, the lack of uniformity and the fact that they are guidelines and factors and not policies, one can be tempted to state that the authorities can have discretionary powers not to consider all factors. However, that is not the case as asserted in *State of Haryana vs Mahender Singh*[19]. In this case, the Supreme Court held it is true that no convict has a fundamental or enforceable right to remission or shortening of sentences, but it is also true that the State, in the exercise of its executive power of remission, must consider each individual case keeping in view the relevant factors. This means that the state has to consider all the relevant factors while exercising its executive power to prevent any sort of discrimination among convicts. Lastly, in *Union of India v V. Sriharan*[20], a Constitution Bench deliberated whether an offender can be convicted of life imprisonment till their "last breath", without the option of remission. The Court, with regards to this matter, observed that such a sentence should not be given unless there is an extraordinary situation in which there is no doubt in the minds of the Court that there is no other option that is suited to the instant case. Although this was the majority opinion, the dissent by the former CJI U.U. Lalit is to be highlighted as the Justice has opinionated that providing such 'unusual' sentence would be *ultra vires* or beyond the powers of the judiciary since no law prescribes such a sentence and that it will not be conducive to reformation of the person and will in fact push him into a dark hole without there being semblance of the light at the end of the tunnel.

There are also manners in which governments display varying degrees of sensitivity towards prisoner issues. During the second term

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[18] *Id.*
[19] State of Haryana vs. Mahender Singh, (2007) 13 SCC 606
[20] Union of India v V. Sriharan, (2016) 7 SCC 1

of the Telugu Desam Party rule, the Government released a mere 46 prisoners in three years, attaching numerous conditions to such releases. This approach resulted in numerous prisoners, who would have been released under ordinary circumstances, languishing in prisons, highlighting the disparities in sentence durations. The lack of uniformity in the premature release system across states prompted the National Human Rights Commission to issue guidelines in 1999. Unfortunately, many states did not respond, indicating a systemic neglect of this critical issue. The presence of prisoners with political affiliations influencing premature release decisions, coupled with the Government's stake in prison administration, raises significant concerns about the rights of ordinary prisoners, especially those sentenced for life. Given the dearth of supportive structures within society to safeguard prisoner rights, the present controversy threatens to undermine the positive outcomes achieved through the prisoners' struggle. This research aims to delve into the legal intricacies, socio-political influences, and systemic challenges surrounding premature releases, shedding light on the potential consequences for the broader incarcerated population. There is an imperative for a standardised and transparent system governing the premature release of life-term convicts in India to prevent political influence and ensure equitable treatment. The existing legal framework and practices exhibit significant inconsistencies in the administration and reduction of life sentences, often swayed by political affiliations and the discretionary power of state authorities. Establishing clear, uniform guidelines alongside robust supportive structures is essential to addressing these issues. This approach would safeguard prisoner rights and uphold the integrity of the justice system, ensuring that premature releases are predicated on consistent and objective criteria rather than arbitrary or biased decisions.

3. Bilkis Bano Case Study

3.1. Background

In the case of *Bilkis Yakub Rasool V. Union of India*[21], a writ petition arose in the Supreme Court, which challenged the remission granted to 11 convicts who were imprisoned for committing heinous crimes against women by the Gujarat High Court. The Apex Court in this instant case, was tasked with determining if the Gujarat High Court was the appropriate authority to pass the order of remission. The High Court relied upon the 1992 Gujarat Remission Policy, which was in force during the time the trial was convicted and allows for premature release of the convicts by virtue of powers vested in the Code of Criminal Procedure under Section 432[22]. The Supreme Court maintained that there was no legal need to release inmates, even if

[21] Bilkis Yakub Rasool V. Union of India, 2024 SCC OnLine SC 25
[22] The Code of Criminal Procedure, 1973, § 432, No. 2, Acts of Parliament, 1973 (India)

they fulfilled the remission policy's standards. If the release was authorised, it should be carried out by a qualified authority comprehensively on an individual basis. In its verdict, the Supreme Court quashed the order given by the Gujarat High Court as it was not competent to issue the impugned order.

However, the author's focus is not only on the observations of the Court, but in this comment, the author's submissions dwell on the impact of the case. The authors submit that the impact of Bilkis Bano is fourfold

The Bilkis Bano case[23] holds profound implications for the jurisprudence of remission in the Indian legal landscape, extending beyond a mere exploration of the historical trajectory of remission laws. This research seeks to delve into the intricate development and contemporary scope of remission legislation in India, with a specific focus on the normative dimension of the case—unveiling the procedural requisites for the remission of convicts. This paper endeavours to offer a comprehensive analysis of the multifaceted impact of the Bilkis Bano case on the jurisprudence of remission in India, adopting a structured approach across four pivotal dimensions.

In the aftermath of the 2002 Gujarat Riots, Ms Bilkis Bano faced a horrific incident in Chappawrwad village, where she was gang-raped, and seven family members, including her infant daughter, were reportedly murdered. Seeking justice, Ms. Bano encountered initial reluctance from local law enforcement, who filed an incomplete FIR. In December 2003, with the support of the National Human Rights Commission, Ms Bano approached the Supreme Court, leading to a Central Bureau of Investigation (CBI) inquiry. The trial started in Ahmedabad but later shifted to a special CBI Court in Bombay due to safety concerns. In 2008, the Special Court convicted 13 of the accused, with 11 receiving life sentences and 7 acquitted. The Bombay High Court upheld these convictions in May 2017.[24]

In March 2022, Mr Radheshyam Bhagwandas Shah, a convict, sought remission under Gujarat's 1992 policy. The Gujarat government, opposing the plea, argued that remission decisions fell under the jurisdiction of the Maharashtra government. However, in a pivotal May 2022 ruling, the Supreme Court directed Gujarat to assess Mr Shah's remission application according to the 1992 policy. On Independence Day 2022, the Gujarat government approved remission for all 11 life-sentence convicts, citing 'good conduct.' Criticism ensued

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[23] *Supra*, note 1

[24] Express News Service, *"Bilkis Bano Case Brief:: The timeline, the key milestones"*, INDIAN EXPRESS, (Mar. 24, 2024, 12:56 PM) https://indianexpress.com/article/cities/ahmedabad/bilkis-bano-case-timeline-key-milestones-9099716/#:~:text=March%203%2C%202002%3A%20Bilkis%2C,who%20were%20residents%20of%20Randhikpur.

as the convicts hadn't completed the mandated 14 years, sparking protests. This research explores the legal complexities and implications of this release, unravelling the interplay between remission policies, judicial decisions, and public response in the Indian legal system.

3.2. Remission Policy of Gujarat 1992 V 2014

The Gujarat Government had released the 11 convicts under the 1992 Gujarat Remission Policy as opposed to the 2014 revision of the same, which is still in effect today. The Government justified this by stating that the policy, which was in force during the time of conviction had to be considered, which the 1992 policy is in this case. This principle is backed by the case of *State of Haryana V. Jagdish*[25], where the Supreme Court ruled that the policy in effect on the day of conviction must be taken into consideration while evaluating an application for premature release.. However, it was also previously noted by the Supreme Court that in the case of *Sangeet vs. the State of Haryana*[26], the presiding judge of the Court that found someone guilty must be consulted by the relevant Government in order for the remission to be given. This requirement was not met. Therefore it was put forth in the instant case that the convicts could secure their release only through the 1992 policy and not through the 2014 revision, as more stringent measures were put in place. So, what does the 1992 policy lack which the 2014 revision has implemented?

As far as the 1992 policy is concerned there are only three essentials to consider, which are (1) if the convict has completed 14 or more years of their sentence, (2) their conduct while in prison and (3) the opinion of the jail authorities regarding the prisoner seeking remission. While the convicts have been in remission as per these essentials, when the 2014 revision comes into the picture, it shows a different outcome. The 2014 revision includes the above essentials and also adds it additional factors to consider, being (1) the nature of the crime, i.e. the seriousness of the crime committed; (2) the guidelines put forth by the Supreme Court in the Laxman Naskar[27], the same are listed previously and, most importantly with respect to the instant case (3), the exclusion of prisoners from receiving remission who are convicted of committing heinous crimes of rape and/or gang rape as per Annexure 1 of the 2014 revision. The 2014 revision is meant to implement stricter policies so as to not extensively give remission to prisoners who have committed heinous crimes but to establish a narrow window of crimes which are of less severity in nature, to which the policy might be applicable. When considering the factors included in the 2014 revision policy, it is easy to state that the convicts would not have been granted remission just because they fulfilled the old criteria.

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[25]State of Haryana V. Jagdish, (2010) 4 SCC 216
[26]Sangeet vs. State of Haryana, (2013) 2 SCC 452
[27] *Supra* note 15

4. Analysis of the Judgment

The Gujarat High Court's dismissal of Bano's petition was grounded in a directive from the Supreme Court issued in May 2022, which bolstered Bano's argument regarding the determination of the "appropriate government." This directive essentially limited the High Court's jurisdiction in entertaining such matters. Bano's motion particularly looked at what a "appropriate government" is in cases of pardon. However, the order was silent on whether it was right to file Public Interest Litigation (PIL) on remission orders. This implies there is still room for interpretation when it comes to PILs, whether they may be accepted or not, as far as societal significance and remission decisions made through them are concerned, no matter how important they may be.

Where the remission of the convicts was granted, a spate of PILs citizens challenging their release. In such PILs, it is then argued that the remission orders will have monumental impacts on society; the evaluation of remission lies in the administrative, not criminal, ambit; and also that the very heinous nature of the offence committed by the convicts. However, judgment shied away from definitely ruling on the justifiability of such PILs on the ground that it was an academic question not relevant to the facts of the case.

The judgment also delved into the complex issue of determining the "appropriate government" for making remission decisions. It leaned towards the state where the convict was tried and sentenced, emphasising the pivotal role of the presiding judge in such matters. Legal precedents, particularly the State of Madhya Pradesh v Ratan Singh[28] case and Union of India v V. Sriharan[29], were cited to support this interpretation. The judgment critiqued the Gujarat government for not rejecting the remission application based on these established legal principles.

One significant aspect addressed in the judgment was the Supreme Court's May 2022 Order directing the consideration of remission, which was deemed legally flawed due to suppressed facts presented by the convict. This omission led to subsequent legal complications and was criticised as a misstep in the judicial process. The judgment particularly faulted the Gujarat government for not taking corrective measures or filing a review petition to rectify this error, which contributed to the legal chaos surrounding the remission orders.

The overriding message in the judgment was that the rule of law supersedes individual freedom. It held that allowing convicts to roam scot-free, despite arguments for rehabilitation and personal freedoms,

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[28] Madhya Pradesh v Ratan Singh, 1976 AIR 1552
[29] *Supra* note 18

would undermine the integrity of the legal system. The judgment had uniquely brought out the role of the judiciary as protector and promoter of the rule of law and strongly brought out that adherence to such legal protocols would have actually avoided such entanglements. Proper, unambiguous definition of the "appropriate government" authority in issues of remission still persists for uniformity and equity in law application. The Bilkis Bano case brings out the ambiguities as to which is the Government has jurisdiction for remission, especially in cases where convicts have been tried in jails located within different states and sentenced by courts in yet another set of states. The inconsistency apart, the possibility of misusing remission policies is wide open and injurious to the very integrity of the judicial process. There must thus be a uniform standard for determining the competent authority and other factors in remission cases, as otherwise, the rule of law cannot be maintained and safeguarded by ensuring that the interests of society are protected. The question is: On what should this uniformity be based?

5. The Model Prison Manual

The formulation of the Model Prison Manual of 2003 derives its basis on developing a national consensus on the relevant issues to prison reforms in India, and most importantly the increasing concerns of human rights and how citizens from different walks of life are treated unequally, including prisoners. The plight of the prisoners has come infamously into the limelight due to overcrowding, poor infrastructure and health conditions and lack of qualified personnel in prisons. This model can be the standard which rids the inconsistency stated in the judgment as one of the prison objectives of this model manual is the application of a remission system which comes under Chapter 16 of the same. The manual puts forth the purpose of a remission system as an incentive and a reformative measure; that is to say, the system is to be used as a method to expect good conduct and behaviour from prisoner if they want an early release from their sentence. The manual details the eligibility criteria for the three types of available remissions: (1) Ordinary Remission; (2) Special Remission and (3) State Government Remission and also details the competent authority and procedure for the same. Furthermore, the manual also includes the conditions of forfeiture of remission; that is, the State, Superintendent of Prisons or the Inspector-General of Prisons can forfeit a prisoner remission if they have committed prison offences or are convicted of certain sections under the Indian Penal Code, which includes Section 302 of the IPC, the same section which the 11 convicts were convicted of in 2008 by a verdict passed by the Special Judge in Greater Mumbai. Therefore, even by the standards of the Model Prisons Manual of 2003, the nature of the crime is a pertinent factor despite the good conduct of the convicts and the same is reflected in the 2014 revision of the Gujarat Remission Policy.

6. Determinants

The issue of premature release of prisoners in India has been addressed by various entities, including the judiciary, the National Human Rights Commission (NHRC), and individual states, each formulating their own guidelines. However, there exists a notable lack of cohesion and organisation in the available information, with no comprehensive body of knowledge consolidating these guidelines. Notably, several states, the judiciary, and the NHRC have recognised the eligibility of terminally ill prisoners for remission, emphasising the human rights aspect of premature release.

In the case of Laxman Naskar[30], the Supreme Court outlined pertinent questions for considering premature release, focusing on individual aspects of the crime's impact, the potential for recurrence, the loss of criminal potential, the purpose of continued confinement, and the socioeconomic condition of the convict's family. The NHRC, acknowledging the non-uniformity in state government standards for remission, established guidelines for a sentence review board to evaluate applications. These guidelines parallel the criteria outlined in Laxman Naskar and introduce a reasonable classification based on the gravity of the offence. Notably, the NHRC limits the total imprisonment period to 20 years, extending to 25 years in specific cases, such as murder with rape or dacoity.

Furthermore, the Bureau for Police Research and Development's 2003 Model Prison Manual emphasised the use of premature release and remission as incentives for self-discipline. It proposed considerations for women offenders sentenced for infanticide, non-habitual offenders, elderly and infirm offenders, and those suffering from incurable diseases. The manual also recommended the establishment of a body for monitoring review board activities. Despite the NHRC's amended guidelines in 2003 removing certain prisoners' ineligibility for premature release, individual states like Andhra Pradesh and Karnataka have introduced exclusions, raising concerns about adherence to the spirit of the NHRC guidelines. These exclusions range from life convicts with specified sentences to prisoners involved in communal incidents or found guilty of rape.

Instances of non-uniformity and potential violations are evident in the review process. The Kerala High Court's scrutiny of the prison review committee[31] revealed serious lapses, including perfunctory recommendations and inadequate application of mind. Blanket exclusion based on the heinousness of the offense remains a ground for denying remission. The lack of a standardised rehabilitation policy contributes to this heterogeneity in the premature release scheme. The a critical need for a standardised and cohesive framework for remission

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[30] *Supra* note 15

[31] High Court of Kerala in Criminal M.C. Nos. 400 of 2001 and 1059 of 2005

and premature release of prisoners in India to ensure fairness and consistency. The current system is fragmented, with significant variations in guidelines and practices across states, as highlighted by discrepancies in policies and their implementation. Establishing uniform standards, as recommended by the Model Prison Manual of 2003 and the NHRC, would mitigate arbitrary decisions and enhance the rehabilitative potential of remission. This research will explore the necessity of such a standardised approach and its implications for the Indian criminal justice system.

7. A Look into Landmark Judgements

In the case of Union of India v. Sriharan[32], the Court framed seven crucial issues, with the fifth issue delving into the concept of "Appropriate Government" under Section 432(7) of the Code of Criminal Procedure (CrPC)[33] in India. This issue arises particularly when deciding which authority, either the Central Government or the State Government, holds the power to grant remission or commute sentences for offences listed under Schedule VII of the Constitution (List III or Concurrent List). The analysis revolves around understanding the division of executive power as outlined in Articles 72[34], 73[35], 161[36], and 162[37] of the Indian Constitution, which delineates the executive power and authority between the Union (Central Government) and the States.

At the heart of this analysis lies Section 432(7) of the CrPC[38], which defines the "Appropriate Government." It specifies that the Central Government wields this authority concerning offences against laws where the Union's Executive Power extends. The interpretation becomes intricate when considering Article 73(1)(a)[39] and its proviso, which grants Parliament the power to retain executive authority for enforcing laws enacted under the Concurrent List, even if States can also legislate on the subject. This grants a level of supremacy to the Central Government in certain scenarios.

The analysis further dissects how to determine the "Appropriate Government" on the basis of the nature of the offence and the law under which the sentence is pronounced. For instance, if the offence falls under a Central enactment or a law explicitly granting Executive Power to the Union in the Constitution [like offences under the Terrorists And Disruptive Activities (Prevention) Act], the Central Government assumes the role of the "Appropriate Government."

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[32] *Supra* note 18
[33] *Supra* note 2 at § 432 cl.7
[34] *Supra* note 11
[35] *Id.* at art. 73
[36] *Supra* note 12
[37] *Id.* at art. 162
[38] *Supra* note 27
[39] *Supra* note 29 at cl. 2(a)

Conversely, if the sentence stems from the CrPC or a law restricting liberty within the State's territorial jurisdiction, then such State Government becomes the "Appropriate Government."

The concept of co-extensive power is also examined. In cases where both the Union and the State can legislate on a subject, precedence is determined by certain principles. Firstly, Union Executive Power takes precedence if the offense pertains to a law where the Union's Executive Power applies, such as offenses related to currency under the Union List as per Entries 36 and 93. Additionally, when the Union enacts a law under Articles 248[40] to 252[41] of the Constitution, granting itself exclusive Executive Power, it supersedes any potential State Executive Power.

The case of G.V. Ramanaiah[42] provides a framework for determining government primacy in situations where both the Union and the State can enact laws. This framework, combined with the proviso to Article 162 under the Constitution[43], establishes that the State's executive power yields to the Centre's when expressly conferred by the Constitution or Parliamentary law. While this case primarily deals with the interplay of executives, it aids in analysing statutory provisions concerning conflicts of "competent authority."

Shifting focus to the case of Swamy Shraddananda v. State of Karnataka[44], the Court delves into the legal complexities surrounding remission for life sentences in India. The judgment clarifies that a life sentence implies imprisonment for the convict's natural life, contradicting the prevalent practice of granting remission and early release after 14 years.

Several past judgments are cited to establish "life imprisonment" as an actual term until the convict's natural death, contrary to the belief that remission reduces it to roughly 20 years, with a further reduction to 14 years post-remission benefits. The judgment critiques the mechanical approach to remission, highlighting concerns about public safety and the efficacy of life imprisonment as a deterrent. Acknowledging the 1973 Supreme Court observation that life sentences often translate to only 12 years of actual imprisonment, the judgment notes the introduction of Section 433A in the CrPC[45] in 1978 mandating a minimum 14-year term. However, it argues that this fails to address the core issue adequately.

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[40] INDIA CONST. art. 248
[41] *Id.* at 252
[42] G.V. Ramanaiah v. The Superintendent of Central Jail, Rajahmundry, AIR 1974 SC 31
[43] *Supra* note 31
[44] Swamy Shraddananda v. State of Karnataka, AIR 2008 SC 3040
[45] *Supra* note 13

The conclusion emphasises the court's authority to impose sentences exceeding 14 years for life terms, ensuring that the punishment aligns with the gravity of the crime committed. This broader sentencing power is seen as vital to prevent undue pressure towards resorting to the death penalty in cases where a 14-year term appears insufficient.

8. The Lacune in Law

The law, by its very nature, cannot anticipate and provide solutions for every conceivable situation, and it should not be expected to do so. Consequently, the law occasionally exhibits casus omissus—gaps, deficiencies, inadequacies, and voids[46]. This has been the case for centuries and will likely remain so. This inherent incompleteness is evident in the remission policies and laws, which exhibit several significant lacunae.

Firstly, the remission systems implemented by the States are governed by Section 3(5)[47] of The Prisons Act, which defines these systems as rules regulating the award of marks to prisoners and the consequent shortening of their sentences. However, this pre-constitutional statute lacks detailed provisions concerning the reformation and rehabilitation of prisoners, focusing predominantly on custody and enforcement of discipline. Although Section 46(4)[48] allows State Governments to prescribe rules for the remission system and conditions regarding the loss of prisoners' privileges, it does not provide for the regulation of these systems. This oversight grants State governments considerable latitude in establishing their own rules and conditions for remission.

Secondly, the absence of a model remission policy from the central Government exacerbates the issue. Without a standardised policy, State Governments possess the discretion to develop their own remission systems, which can result in the misuse of remission as a tool to serve the States' needs rather than as a corrective measure. This gap is starkly illustrated in the case of Bilkis Bano[49], where the Gujarat government employed its remission system to release all 11 convicts, contrary to the Supreme Court's directive, which considered the remission of only one convict.

The last relates to non-universal applicability and limited enforcement of the Model Prisons Act, 2023. This Act embodies the modified provisions of the 1894 Prisons Act and the 1950 Transfers of Prisoners Act. However, it would be applicable only upon adoption by

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[46] Francois Venter, *Filling Lacunae by Judicial Engagement with Constitutional Values and Comparative Methods*, 29, TULANE EUROPEAN AND CIVIL LAW FORUM.79, 79-80 (2014), https://journals.tulane.edu/teclf/article/view/1653/1512

[47] The Prisons Act, 1894, § 3 cl. 5, No. 9, Acts of the Parliament, 1894 (India)

[48] *Id.* at § 46 cl. 4

[49] *Supra* note 1

the concerned State, as specified by the Ministry of Home Affairs. The new Act seeks improvement in prison management, prisoners' rehabilitation, and social reintegration, with special directions in women and transgender prisoners' security, transparency in prison management, and the correctional and rehabilitative aspects of inmates. Despite these laudable innovations, the Act is still model legislation, its implementation dependent on state adoption.

While the law is always incomplete, these gaps within remission policies nevertheless reflect the necessity of having a more fine-tuned and regulated approach. These gaps would be covered in terms of detailed and uniform remission policies that strike a complete balance between the principles of reformation and discipline and wide-scale use and application of the improved legislative models, such as the Model Prisons Act, 2023. These changes are imperative for the development of jurisprudence on remission and making the criminal justice system in India effective.

9. Recommendation

The major issue lies with the actions of the political executive, but effective management at lower levels of the executive is equally crucial, especially given that remission systems aim to promote good behavior. This can be achieved by improving the 'prison climate,' which refers to the quality of prisons and the procedures within them. Studies conducted in the U.K. and U.S. validate that better rule compliance is observed when there is an improved social and moral climate, including enhancements in staff-prisoner relationships and the overall prison environment[50].

While judicial review effectively curtails unlawful actions of the executive, it does not impose consequences, failing to deter governments from attempting to pass unlawful remission grants in the future. Enhanced transparency regarding prisoners eligible for special remission can notify the public beforehand about possible remission grants. For example, as part of the 'Azadi Ka Amrit Mahotsav' celebrations in 2022, the Government planned to provide special remission for inmates; a website would let the people generate the eligible list of convicts for amicable remission. A similar approach can be implemented for all types of remission, with regular public notifications.

An obvious counter to this recommendation is that the Government would have to implement such services, which might be challenging if they do not already maintain an active record. In such

[50] Bosma, A. Q., C. van Ginneken, E. F. J., Sentse, M., & Palmen, H, Examining Prisoner Misconduct: A Multilevel Test Using Personal Characteristics, Prison Climate, and Prison Environment, 66 Crime & Delinquency 451, 452 (2022), https://doi.org/10.1177/0011128719877347

cases, public push for the implementation of such a record can align political benefits with public support, making it more likely to happen.

10. Conclusion

Remission serves as a beacon of hope for convicts to be reinstated into society by having their sentences suspended or remitted wholly, acting as a corrective measure that encourages good behavior and discipline—key elements for successful rehabilitation. However, its susceptibility to undue influence and lack of regulation poses significant disadvantages. The Supreme Court quashing the remission order effectively invalidates the misuse of court orders by the Gujarat government but leaves room for doubts regarding the absence of consequences, potentially leading to further acts of 'unlawful remission.'

The practice of using rewards to influence prisoners' behaviour is widespread and effective in maintaining order and safety[51], making it unlikely that remission systems will be completely deprived. Nonetheless, the unfair use of the system for political benefits rather than on account of prisoners' conduct is unmistakable and well evidenced, particularly the Bilkis Bano case study.

The political executive's direct link with the bureaucratic executive can lead to abuse, influencing law and order enforcement[52]. The courts are also not entirely neutral[53]. Therefore, corrective steps are warranted to improve rehabilitation system operations and prevent unlawful remissions. By enhancing institution-level factors and installing deterrence mechanisms, the remission system can better fulfill its intended purpose of promoting good behavior and successful reintegration of convicts into society.

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[51] Jan Maarten Elbers, Esther F.J.C. van Ginneken, Paul Nieuwbeerta, Miranda Boone, Hanneke Palmen, The effects of reward systems in prison: A systematic review, 71 THE INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE 1, 1, (2022) https://www.sciencedirect.com/science/article/pii/S1756061622000349

[52] PRAN CHOPRA, THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM, 132, (SAGE Publications Pvt Ltd 2005).

[53] Id. at pg 162

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The Fate of Secularism in Indian Politics and the Role of the Constitution

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Abstract

Indian Politics deeply revolves around the religious identity of multiple political parties as well as the population. It is no surprise for a country formed after a brutal partition primarily based on religion. India was formed as a 'secular' state after the Imperial British granted them Independence in 1947. The Constitution of India boasts multiple provisions that have incorporated secularism in its essence. In addition to this, the term 'secularism' was included in the Preamble of the Constitution as per the 1976 amendment by the Government. The country did not witness religious politics in the early decades of its democracy; however, this changed quickly to the current state of politics in the country, which uses religion as its greatest weapon. The researcher has studied this relationship between politics and secularism in India and traced its historical journey from the formation of the Constitution to its current status.

Keywords

Secularism, Indian Constitution, Politics, Political Party, Religion.

1. Introduction

"India is the world's most populous country."[1] Along with this, it boasts of diverse religious practices and beliefs, and in fact, this country is said to be the birthplace of 4 major religions of the world- Hinduism, Sikhism, Buddhism and Jainism. Religion has played a significant role in Indian culture throughout history. The country has always had multiple religions, usually worshipping local deities or nature. Oftentimes, Indian history has been controversially divided into Hindu, Muslim and British periods, and the Royalty, in many

[1] "Akhilesh Pillalamarri, "India is the World's Most Populous Country: What It Means," The Diplomat, January 25, 2023, https://thediplomat.com/2023/01/india-is-the-worlds-most-populous-country-what-it-means/"

instances, did try to impose a certain religion on its subjects, but religious pluralism couldn't be done away by them. Afterwards, a more tolerant society emerged till the 20th century, when this was threatened by the issue of Partition. Now, post-independence, India is recognised as the largest democracy in the world and, as contended by many political leaders and other authorities, the most secular state of the world as well.

India is a secular state, according to the Preamble to the Indian Constitution. Along with this, the "right to freedom of religion."[2] is recognised as a fundamental freedom as enshrined in Part III of the Constitution. Thus, one of the core principles of the Constitution is secularism. "India, in recent years, has been witnessing an escalation of religious revivalism, fundamentalism and religious-communal identification."[3] Indian social and political life is in danger of being overtaken by the growing tide of these fissiparous forces. In light of this, secularism has taken centre stage in the nation's social and political discourse, and numerous important questions about its application, interpretation, and practice are being brought up. However, India was not officially recognised as a secular state until the 42nd Amendment to the Constitution was passed in 1976. Enshrined in the Preamble of the Indian Constitution, secularism is intended to ensure equal treatment of all religions by the state, promoting an environment where diverse faiths coexist harmoniously. There are also several Articles in the Constitution that deal with the aspect of religion, such as Article 25. This article grants "freedom of conscience and free profession, practice and propagation of religion which is subject to public order, morality and health." However, the practical implementation and interpretation of secularism in Indian politics have been subjects of extensive debate and contention. In the Indian context, the secular state is conceptually understood in terms of two tenets: first, the protection of religious and cultural pluralism while upholding the fundamental civil right to religious liberty, and second, a focus on the contemporary democratic ideals of justice, equality, and freedom. Nevertheless, it's important to note that Indian secularism views religious communities as dynamic and active rather than static, and as a result, the Indian secular state has refused to interfere on certain grounds in order to defend democratic values.

"However, secularism started posing as a question mark ever since the Ram Janmabhoomi-Babri masjid controversy started leading up to the Babri masjid demolition (on December 6, 1992) by Hindu communal fanatics."[4] But the truth is that the ideal of

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[2] Indian Constitution, Article 25

[3] "Rajarajan, R. "SECULARISM IN INDIAN POLITICS : THEORY AND PRACTICE." *The Indian Journal of Political Science*, vol. 68, no. 2, 2007, pp. 403–12. *JSTOR*, http://www.jstor.org/stable/41856335. Accessed May 26 2024."

[4] "Shah, Rajula. 25 THE SECULARISM DEBATE IN INDIA. Religion and Society. 2018. https://ebooks.inflibnet.ac.in/socp12/chapter/the-secularism-debate-in-india/"

secularism started being toyed with before by the Congress government. The researcher has extensively discussed chronologically the various times religion was used by political parties to divide the people of the country and gain votes for political gain.

1.1 Research Problem

i. What has been the role of secularism in political campaigns and policy-making?
ii. What are the major contemporary challenges to secularism in Indian politics?

1.2 Objectives

This project aims to study the relationship between politics and secularism in India. The precise objectives are:

i. To chronicle the historical journey of secularism in India.
ii. To critically analyse the role of the Constitution in shaping secularism.
iii. To evaluate the interplay between secularism and politics in India.

1.3 Hypothesis

The growing dominance of religion in the Indian political scenario has deeply undermined the Constitutional provisions enshrined to uphold secularism in the country. Further, these Constitutional provisions must be interpreted by the independent Judiciary to safeguard against the rise of any one religion over the others.

1.4 Kind of Research

The research method for this project is based on primary and secondary doctrinal sources, which are available on the internet and in the university library. Along with the Constitution of India, various books, news articles, other research papers and internet sites have been studied and utilised for the project.

2. Secularism: Meaning

According to Merriam-Webster, "secularism" is defined as *"indifference to or rejection or exclusion of religion and religious considerations."* Oxford Dictionary, on the other hand, explains secularism as: *"The term was coined c.1850 to denote a system which sought to order and interpret life on principles taken solely from this world, without recourse to belief in God and future life. It is now used in a more general sense of the tendency to ignore, if not to deny, the principles of supernatural religion."* Meanwhile, the Cambridge Dictionary simply describes it as *"the belief that religion should not be involved with the ordinary social and political activities of a country."*

2.1. Secularism as a concept in the West

One of the best and most respected ideas of our day is secularism, which has been linked to both scientific temper and moral excellence. Every dictionary used in Western Europe makes clear that this phrase refers to a doctrine that rejects religion and religious considerations. Englishman George Jacob Holyoake first used the term secularism in 1851. The struggle between reason and faith that surfaced in Western Europe in the later Middle Ages is the backdrop to the birth of the contemporary ideology of secularism. It was commonly understood to be the struggle between the Church and the State or the dissolution of Christendom. By the latter part of the eighteenth century, the Enlightenment, often known as the Age of Reason, had finally declared secularist philosophy. In fact, some academics, such as Peter Berger, have argued that secularism is a gift from Christianity to humanity. Marx and Weber, Comte and Durkheim, Spencer and Saint-Simon, and others were well-known early proponents of this theory. Thus, the notion of secularism—often regarded as a bequest from the Judeo-Christian tradition—was included in the modernisation paradigms of Western social theorists. "Secularism was originally developed for the sake of preserving peace among Christians."[5] The word "secular," which comes from the Latin word *"saecularis"*, was originally used to describe random festivities and it took on a negative meaning when used to describe those who lived outside the church rules in Christian Latin. But by the early nineteenth century, the term's connotation had dramatically altered. Rather than drawing a line between the religious and the worldly, it attested to the welfare of human society in the absence of supernatural punishment. Gradually, the connotation shifted from negative to good.

All religious organisations and institutions in the West are separate from the Government, and the state believes that there should be no restrictions on religious practice. Thus, we can say that secularism that is practised in the West is 'negative' secularism, i.e. there is a distinct and clear separation between State and religion, while the former doesn't recognise any religion. The State has the right to restrict citizens' rights if religion is impeding the state's ability to operate. The U.S. Constitution's First Amendment ensures the separation of Church and state by prohibiting the establishment of any religion by the Government and protecting the free exercise of religion. Landmark cases such as "*Engel v. Vitale*[6]" (1962) and "*Lemon v. Kurtzman*[7]" (1971) reinforced secular principles by banning school-sponsored prayers and excessive government interference with religious matters and religion. France, on the other hand, practices a

[5] "Cline, Austin. "What Is Secularism?" Learn Religions, August 27, 2020, learnreligions.com/secularism-101-history-nature-importance-of-secularism-250876."
[6] "Engel v. Vitale, (1962) 370 U.S. 421"
[7] "Lemon v. Kurtzman. (1971) 403 U.S. 602"

strict form of secularism known as *"laïcité"* enshrined in the 1905 law on the separation of the Churches and the State. This principle mandates the absolute neutrality of the state in religious matters. The French Government has implemented policies such as banning religious symbols in public schools to maintain secularism. Unlike the U.S. and France, the U.K. has an established church, i.e. the Church of England, but it still maintains a level of secular governance. The monarch is the Supreme Governor of the Church of England, while the bishops have seats in the House of Lords.

2.2. Secularism as a concept in India

In India, the national independence movement is when the idea of secularism as a political philosophy first appeared. "As the constitution of newly independent India was being drafted (ratification came in 1950), disagreements over secularism welled up."[8] While most wanted a secular nation after witnessing the bloodshed during the Partition, there were others who advocated for a religious majority state. In the end, the majority decision was upheld, and the Constitution was made so that it recognised every religion and simultaneously provided minority rights. Along with this, religious freedom was granted to all "subject to public order, health and morality."[9] The Preamble of the Constitution of India originally lacked the phrase "secular." Implemented in 1976, the 42nd Constitutional Amendment incorporated it into the Preamble. Its introduction was intended to clearly state that the nation's integrity must be preserved, as well as the lofty ideals of secularism. The Congress administration led by Smt. Indira Gandhi introduced the 42nd Amendment Act, commonly known as the tiny Constitution when the country was still under a state of emergency. "Modern India is always inspired by the concept of secularism."[10]. The Preamble makes clear that India is a secular nation without a state religion and that the state will accept and acknowledge all religions without endorsing or favouring any one of them. So, we can say that India practices a 'positive secularism' unlike the West.

The Supreme Court ruled in the historic case of "*Ahmedabad St. Xavier's College v. State of Gujarat.*[11]" that "secularism is neither pro- nor anti-God." It guarantees that there will be no religious discrimination against anyone. Therefore, in regard to the state, secularism eradicates the idea of God. Further, Article 14 of the Indian Constitution grants "equality before the law" to all persons while Article 15 prohibits discrimination on the basis of one's

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[8] "Sumit Ganguly, The Crisis of Indian Secularism, 14 J. DEMOCRACY 11 (2003)."
[9] "Indian Constitution, Art. 25"
[10] "Chatterjee, Subhasri. Understanding Secularism In Indian Democracy: Concept, Crisis And Fate. Lawyers Club India. 2020. https://www.lawyersclubindia.com/articles/understanding-secularism-in-indian-democracy-12110.asp"
[11] "Ahmedabad St. Xavier's College v. State of Gujarat, (1975) 1 S.C.R. 173."

religion, among others. There is also Article 25, which grants "freedom to practice, profess and propagate religion." This may be "subject to public order, health and morality" and along with this, this article allows the state to make any laws controlling or prohibiting any financial, political, or other secular action that might be connected to a religion. In "*Stanislaus Rev v. State of MP*[12]*"*the Madhya Pradesh High Court clarified that the right to freely declare one's association with a certain creed in public is an example of one's freedom of "profession." Furthermore, the Court declared that one's right to worship in public or private constitutes freedom of "practice." It was clarified further that the freedom to spread one's religion includes the ability to share one's religious convictions with other people but not the ability to convert others to one's faith. Article 26 allows Independence to manage religious affairs, such as establishing and maintaining institutions for religious and charitable purposes, as well as to own and acquire movable and immovable property. Article 27 states that *"No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."* Article 28 grants *"Freedom as to attendance at religious instruction or religious worship in certain educational institutions"*, further adding that *"No religious instruction shall be provided in any educational institution wholly maintained out of State funds"* as well as institutions recognised by the state or operating from State funds, partly or wholly. Hinduism is the religion of the majority of Indians; hence, to protect the interests of the minorities, Article 29 of the Constitution is granted to the people of India. This intends to protect the minority interests that have a unique language, script, or culture. In addition to this, subsection 2 of this article provides for no discrimination in admission into educational institutions maintained by the State funds on the grounds of religion or caste, among others. Article 30, on the other hand, states the *"right of minorities to establish and administer educational institutions."* Article 44 of the Directive Principles of State Policy deals with the Uniform Civil Code. Its goal is to administer secular civil laws to all people, regardless of their caste, religion, or tribe. The foundation of this law is the constitutional duty to provide equity and justice for all citizens. All citizens of our nation are subject to the same criminal code, regardless of their gender, caste, religion, or place of residence. However, India does not yet have a matching code that addresses issues related to marriage, divorce, succession, and other family matters.

The Indian Supreme Court ruled in "*Kesavananda Bharati v. State of Kerala*[13]*"* in 1973, secularism was a fundamental component of the Constitution. Furthermore, it was decided that the Parliament

[12] "Stanislaus Rev v. State of MP" 1977 SCR (2) 611

[13] "Kesavananda Bharati v. State of Kerala A.I.R. 1973 SUPREME COURT 1461"

could not change the fundamental components of the organisation. The Kesavananda Bharati case established a principle that was reaffirmed in the 1994 case of "*S.R. Bommai v. Union of India*[14]". The meaning of the word "secularism" in the Constitution was clarified by the Supreme Court. The Court ruled that a society is not automatically atheist just because it is secular. Society becomes more diverse when it is secular. A secular nation's laws treat all religions equally and do not favour or discriminate against any group of people.

3. Religion and Politics in India

India's religious diversity and landscape significantly shaped its fight for Independence. Mahatma Gandhi was a leader who advocated for nonviolence and adhered to Hindu philosophy. He was a strong advocate for religious harmony during the fight for Independence and inspired many people. However, in 1947, India was divided into two separate countries, Pakistan and India, based on religious differences. As a result, there was a great deal of violence and relocation for a large number of people. "On the eve of independence, India decided to establish a secular state with its own characteristics of religious tolerance, liberty and equality."[15] At the time of Independence, religion was scarcely used for political gains. It's intriguing to note that after approximately four decades of National Governance, communal politics started playing a pivotal role in the Indian political scenario. Indian politics has undergone dramatic alterations in language, behaviour, and approach since the 1960s. These changes reflect a deeper understanding of Indian country life rather than the Western-influenced ideals of the early leaders like Nehru. In the early 1980s, Hindu communal organisations, led by the RSS (Rashtriya Swayamsevak Sangh), a Hindu militant right-wing group, along with its mass organisations like the V.H.P. (Vishva Hindu Parishad), which oversees religious bodies, and the B.J.P. (Bharatiya Janata Party), its political arm, expanded the scale, intensity, and aggressiveness of their activities. "In more recent years, romanticism has stimulated forms of Hindu nationalism and the reimagining of India's gloried past."[16] In the present moment, the rise of Hindutva as a major opposing viewpoint has intensified the discussion about secularism in India. Hindutva ideology is a nationalist ideology that vehemently opposes the secular concept underlying the Indian Constitution. Some people call this ideology 'religious nationalism' or 'Hindu nationalism'. The Hindu religious community has endured significant change, as well as its

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[14] "S.R. Bommai v. Union of India 1994 AIR 1918, 1994 SCC (3)"

[15] "Dr. Rajkumar Singh, *The Use of Religion in Indian Politics | And the Floundering Pillars of Secularism,* The Daily Star, July 4, 2019, https://www.thedailystar.net/opinion/perspective/news/the-use-religion-indian-politics-1766164 (accessed July 13, 2024)."

[16] "Fred W. Clothey, Religion in India: A Historical Introduction (Routledge, 2007)."

engagements with other communities and the Hindu community was urged to action in these altered conditions, not as one of the many Indian communities, but instead as "the Indian community". The modernising reformists and religious activists associated the Hindu community with "*Indianism"* and patriotism. On the other hand, the practice of hosting Iftar parties for Muslims at the time of Ramadan was initiated by the central Government and other state governments in 1970. Presently, political figures engage in competition with one another to host extravagant parties in state and national capitals, a tradition that has persisted throughout the B.J.P. administration. The media covers these celebrations extensively, highlighting the guests and food served. It is often overlooked that the politicisation of iftar is a betrayal of a sacred custom that Muslims may find offensive. The practice of hosting iftar parties for Muslims at the time of Ramadan has been politicised, turning religious observances into political events. This is how religious authorities such as "sants," "mahants," "imams," and "priests" are now actively involved in making decisions for the Government. Religious leaders' meddling in administrative affairs might be detrimental to India's secular democracy. The resurgence of religion-inclined political parties further destabilised secularism in India. The Congress party's pro-Hindu strategies reminded the B.J.P., RSS, and V.H.P. of their goals, prompting a shift in their approach. In the 1970s, the B.J.P. began to reframe its appeal to the middle class, emphasising cleaner, more efficient governance rather than overt Hindu nationalism. However, the success of the *rath yatras* marked a return to religious rhetoric, blending their secular and religious appeals. From the early 1980s, Hindu communal organisations, directed by the militant Hindu right-wing party RSS and its affiliates V.H.P. and B.J.P., escalated their operations in scale, aggressiveness, and violence. Post Mrs Indira Gandhi's assassination in 1984, under the leadership of Atal Bihari Vajpayee, the B.J.P. secured just two seats in the Lok Sabha elections. Therefore, Vajpayee resigned, and LK Advani, known for his hard-line stance, assumed leadership of the party. Advani and the B.J.P. leadership manifested to promote Hindu militancy to capture the Hindu vote bank from the Congress. Recently, the head of our country from the same party contended that he was not born like a human, implying that he is sent from the heavenly world to grant salvation for the people of our nation.

The incorporation of religion into Indian politics has significantly impacted the country's secular framework. Originally envisioned as a secular state with religious tolerance, India has seen a growing influence of religious leaders and practices in politics. This shift has been driven by political strategies that use religious identity to gain support, challenging the secular ideals enshrined in the Constitution. Despite efforts to maintain secularism, contemporary political dynamics and historical legacies continue to pose significant challenges to India's secularism.

Political parties in India have introduced religion into the political sphere. Political parties employ religion in different contexts to win over people and consolidate authority in order to further their political goals in the following ways.

3.1. Identity Politics

Indian politics have always revolved heavily around religion, and they still do. The emergence of religious nationalism and inter-communal conflict has put the secular principles outlined in the Constitution to the test. The demolition of the Babri Masjid and the ensuing political changes demonstrate the powerful influence of religious identity within the democratic Indian context. The demolition of the Babri Masjid in Ayodhya by Hindu nationalists, including members of the B.J.P. and RSS, led to widespread communal riots and deepened Hindu-Muslim polarisation. The B.J.P. used the Ram Janmabhoomi movement to consolidate Hindu votes. Further, early this year, the Ram Mandir, which was made in its place in Ayodhya, was inaugurated by the PM of our country. In these ways, political parties target specific religious communities in an effort to gain their support. Politicians make promises to address issues and fulfil demands in an effort to win over voters. By providing for their requirements in terms of religion, society, and finances, the initiative seeks to win over more religious organisations.

However, new technology and modes of voicing opinions and ideologies through social media have been playing a pivotal role in the current era. By giving voice to underrepresented groups and encouraging increased political engagement, technology may empower them. Through disinformation and hate speech, social media can exacerbate differences while also raising awareness of identity concerns.

3.2. Communal Polarisation

Communal polarisation by political parties in India refers to the deliberate strategy of using religious and communal identities to create divisions among different communities, primarily for electoral gains. This tactic involves emphasising religious differences, fostering antagonism, and mobilising support based on communal lines.

"During her second term as the PM, Indira Gandhi found it electorally beneficial to give up the secular burka and project herself as Kali, fighting the Islamic and Sikh fundamentalists in Kashmir and Punjab, respectively."[17] During Rajiv Gandhi's office, religious appeasement reached a peak when the Government opened the doors of Babri Masjid to accommodate Hindu fundamentalists and overturned the Shah Bano case court ruling to appease Muslim

[17]"Srikanth. H., Majoritarianism and Communal Polarization in India (Counter Currents, 2022)."

fundamentalists. In this case, "*Mohd. Ahmed Khan v. Shah Bano Begum and Ors.*[18]" maintenance after the divorce was held as a right of the ex-wife; however, the then-Congress Government under PM Rajiv Gandhi overturned the judgment through the Muslim Women (Protection of Rights on Divorce) Act, 1986. The destruction of the Babri Masjid in 1992 in Ayodhya sparked extensive sectarian rioting and escalated animosity between Hindus and Muslims. Utilising the Ram Janmabhoomi movement, the B.J.P. managed to garner support from Hindus. That marked the start of the procedure, which resulted in religious polarisation and the strengthening of majoritarian governance in India. Through the promotion of historical ideals, inflaming anti-minority sentiment, opposing the Congress's appeasement policies, and inflating religious conversion and refugee fears from Bangladesh, the B.J.P. gained traction in several northern states and gained political power in the national Government as well as in numerous states. Further, in the 2002 Gujarat riots after the Godha train burning, the state saw severe violence against Muslims. The state government's handling of the riots, under then-Chief Minister Narendra Modi, has been a subject of intense debate and is seen as an example of using communal polarisation for political consolidation. "Later, credible allegations would surface that officials in Modi's government were complicit in acts of arson and mayhem."[19] The rise of cow protection groups, often supported by Hindu nationalist rhetoric, has led to violence against Muslims and Dalits accused of cow slaughter or beef consumption. "In addition to beating up cattle traders and transporters that have caused serious injuries, even fatalities, cow protectors have reportedly assaulted Muslim men and women in trains and railway stations in Madhya Pradesh state, stripped and beat Dalit men in Gujarat, force-fed cow dung and urine to two men in Haryana, raided a Muslim hotel in Jaipur, and raped two women and killed two men in Haryana for allegedly eating beef at home."[20] Muslim cattle merchants, butchers, and vendors from Uttar Pradesh, Madhya Pradesh, and Bihar unsuccessfully claimed that laws prohibiting the killing of cows infringed their basic rights in "*Mohd Hanif Quareshi & Ors. v. State of Bihar*[21]" (1958). These rights included the freedom of religion, the right to equality, and the right to pursue any profession. The debate over cow protection has recently taken a violent turn, with self-declared cow vigilantes attacking Muslims on the grounds that they eat beef or deal in the buying or selling of cows. This has been used to polarise rural Hindu votes.

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[18] "Mohd. Ahmed Khan v. Shah Bano Begum and Ors. 1985 AIR 945, 1985 S.C.R. (3) 844"

[19] "Sumit Ganguly, The Crisis of Indian Secularism, 14 J. DEMOCRACY 11 (2003)."

[20] "Human Rights Watch (H.R.W.), "Violent Cow Protection in India: Vigilante Groups Attack Minorities," February 18, 2019, pen_spark https://www.hrw.org/report/2019/02/19/violent-cow-protection-india/vigilante-groups-attack-minorities."

[21] "Mohd Hanif Quareshi & Ors. v. State of Bihar 1958 AIR 731."

The Citizenship Amendment Act (C.A.A.) and the proposed National Register of Citizens (N.R.C.) led to large-scale protests, particularly from Muslim communities. The C.A.A. was passed by Parliament in 2019, but since then, the Modi administration of the Bharatiya Janata Party (B.J.P.) has postponed its implementation. Early in 2020, religious unrest rocked the capital city of New Delhi, sparking months-long protests against the law that brought portions of the city to a standstill. The violence across the nation claimed the lives of over 100 people, most of them were Muslims. Political narratives around these laws have been highly polarising, with parties taking starkly different stances as the act favours non-citizens of certain religions only for citizenship status in India. The Government then passed the law in March 2024.

3.3. Religious Endorsement, patronage and resource distribution

In Indian politics, religious Endorsement, patronage, and resource distribution are powerful tools used by political parties and leaders to secure votes, consolidate power, and influence public opinion. It refers to the public support and backing of political parties or candidates by religious leaders and organisations. This Endorsement can significantly influence the voting behaviour of religious communities. Influential religious leaders, such as sants, mahants, imams, and priests, can sway the opinions of their followers. Their Endorsement lends credibility and legitimacy to political parties, especially in regions where religious authority is strong, and people are blind believers of such leaders. Political parties often seek the blessings and endorsements of religious leaders during election campaigns. This is done through public visits to religious places, participation in religious ceremonies, and publicised meetings with religious figures. Governments at both the central and state levels allocate funds for major religious events such as the Kumbh Mela, Eid celebrations, and Christmas. Currently, in between the ongoing elections in our country, the Prime Minister has gone to meditate in Swami Vivekanda's memorial rock in Kanyakumari. This is the same place where Vivekananda is said to have meditated before his famous Hindu speech in Chicago. In these ways, parties target specific religious communities to secure their votes, leveraging endorsements to assure these communities that their interests will be protected.

Governments and political leaders provide financial aid to religious institutions for the construction of temples, mosques, churches, and other religious structures. Funding may also be directed towards religious festivals and events. Political leaders might grant special privileges, land, and resources to religious organisations. This can include easing regulations, granting permissions for religious gatherings, and providing security during religious events. Patronage often involves honouring religious leaders with awards, titles, or public platforms to boost their status and influence.

The Government also implements welfare schemes targeting specific religious communities, such as scholarships for minority students, grants for pilgrimage (like the Haj subsidy), and economic assistance for religious festivals. Special development programs are launched to uplift economically backward communities, which often include religious minorities. These programs can cover areas like education, health, and infrastructure. In some cases, reservation policies are applied to provide opportunities in education and employment for members of religious minorities.

4. The Role of the Constitution to uphold secularism

The Indian Constitution, adopted in 1950, establishes India as a secular nation. It "prohibits the state from discriminating based on religion."[22] and grants all citizens the "freedom to practice their religion."[23]. India has implemented constitutional measures to limit religion's influence in politics, ensuring secularism, equality, and adherence to democratic principles. Key constitutional provisions include:

Article 25: Freedom of Religion

- "Guarantees freedom of conscience and religion, allowing individuals to freely practice and propagate their religion.
- Protects the right to practice any religion, enabling individuals to choose their religion.
- Permits the state to regulate religious practices for reasons of public order, morality, and health."

In the case of "*Bijoe Emmanuel v. State of Kerala*[24]" (1986), three students belonging to the Jehovah's Witnesses faith were expelled for not singing the national anthem. Hereby, the Apex Court, which is the Supreme Court, ruled in favour of the students and upheld their right to freedom of religion under Article 25. It established that people have the freedom to decline to engage in activities that conflict with their religious convictions, provided that they do not interfere with the proper operation of the Government or disrespect national symbols.

Article 26: Freedom to Manage Religious Affairs

- "Allows religious groups to manage their own affairs without government interference.

[22] Indian Constitution, Article 15
[23] Indian Constitution, Article 25
[24] "Bijoe Emmanuel v. State of Kerala (1986) 3 SCC 615"

- Religious groups can establish and maintain religious institutions, manage properties, and handle religious endowments.

- The state can regulate these institutions to ensure public order, morality, and health."

Secularism

- "The 42nd constitutional amendment in 1976 added the word "secular" to the Indian Constitution, which provides a distinctive model of religion-state relations and regulation that is rooted in historical struggles with colonial rule and abundant religious diversity."[25] The Preamble of the Constitution declares India a secular nation, meaning the state has no official religion and treats all religions equally, preventing any single religion from dominating politics.

Anti-Discrimination

- The Constitution prohibits discrimination based on religion. Article 15 "forbids the state from discriminating against citizens based on religion, race, caste, sex, or place of birth." It also prohibits political parties from engaging in religious discrimination for electoral support.

Along with constitutional provisions, there are also special statutes to check the constitutionality of the acts of political parties during politics, and special authorities have also been set up to check them.

Electoral Laws

- "The Representation of the People Act, 1951"[26], governs election conduct in India, prohibiting the use of religion, caste, or language in campaigns. Political parties and candidates cannot solicit votes based on religion or create religious hatred.

In the case of "*Abhiram Singh v. C.D. Commachen*[27]" (2017), the Supreme Court ruled that seeking votes in the name of religion is a corrupt practice as per the Representation of the People Act, emphasising the secular nature of elections.

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[25]" Kristina M. Tear & Laura Dudley Jenkins, "Religious Regulation in India," Oxford Research Encyclopedia of Politics (April 26, 2019), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-845?d=%2F10.1093%2Facrefore%2F9780190228637.001.0001%2Facrefore-9780190228637-e-845&p=emailAeBcLT.xdGBrw"

[26] "The Representation Of The People Act, 1951 Act No. 43 of 1951"

[27] "Abhiram Singh v. C.D. Commachen (1996) 3 SCC 665, (2014) 14 SCC 382"

Election Commission of India

- This constitutional body ensures free and fair elections, enforcing electoral laws and guidelines. It monitors election campaigns, penalises rule violators, and ensures equal opportunity for all political parties, regardless of religion.

State Neutrality

- The Constitution mandates state neutrality in religious matters. Article 27 prohibits using public funds to promote any religion, requiring the state to treat all religions equally and fairly.

These constitutional measures aim to maintain India's secularism and prevent the use of religion in politics, ensuring fairness for all citizens and equal opportunities for political parties during elections.

5. Conclusion

Secularism refers to the treatment of religion as a strictly private concern and the separation of religion from the political, economic, social, and cultural spheres of life. It placed a strong emphasis on the state's separation from religion, complete freedom for all religions, and tolerance for all faiths. It also represents the ideals of nondiscrimination and impartiality based on religion, as well as equal chances for adherents of all faiths. *"Sarva Dharma Sambhava",* which literally translates as "the destination of the paths followed by all religions is the same, though the paths themselves may differ," is related to Indian secularism philosophy and signifies equal respect for all religions. The concept of secularism has been incorporated in the Indian Constitution right in the Preamble as well as in Part III, which constitutes the fundamental rights.

However, its implementation faces numerous challenges, including communal polarisation, religious Endorsement, and resource distribution by political parties. Other issues, such as personal laws, spark discussions about uniform civil codes and the limits of secularism. The existence of religion-specific personal laws indicates the state's acceptance of religious identities. However, this fragmentation is inconsistent with the constitutional promise of equality. Hindus are governed by the “Hindu Marriage Act."[28], Muslims by the “Muslim Personal Law (Shariat) Application Act”[29], Christians by the “Indian Christian Marriage Act”[30], and so forth. Under traditional Muslim personal law, a man can divorce his wife unilaterally through "triple talaq" (now banned by the Supreme Court in “*Shayara Bano v. Union of India*[31]” (2017)), whereas women face

[28] “The Hindu Marriage Act, 1955 No. 25 Of 1955”
[29] “The Muslim Personal Law (Shariat) Application Act, 1937, Act 26 of 1937”
[30] “The Indian Christian Marriage Act, 1872 Act No. 15 Of 1872”
[31] “Shayara Bano v. Union of India [(2017)9 SCC 1]”

more stringent conditions. Hindu inheritance laws have historically favoured male heirs, though reforms like the Hindu Succession (Amendment) Act, 2005[32] have sought to address this. This differentiation perpetuates legal inequality. Therefore, the researcher suggests the bold move of eradicating of all personal laws in India and believes that only their elimination will put the country on the right path of a secular democracy. In its place, a single uniform civil code must be upholded.

On the other hand, the B.J.P.'s Hindutva-driven policies aim at consolidating Hindu votes; the Congress and other regional parties have often engaged in religious appeasement to secure minority support. The B.J.P.'s involvement in the Ram Janmabhoomi movement, which culminated in the demolition of the Babri Masjid in 1992, was a significant example of using religion to mobilise political support. The construction of the Ram temple in Ayodhya has been a key promise in their election manifestos. The C.A.A. (Citizenship Amendment Act) is another example of this. Meanwhile, The Congress party, traditionally seen as a secular party, has also been accused of engaging in religious appeasement to secure votes from minority communities, particularly Muslims. In 1985, the Supreme Court's ruling in favour of alimony for Shah Bano, a Muslim woman, was overturned by the Congress-led Government through the "Muslim Women (Protection of Rights on Divorce) Act, 1986."[33], in response to pressure from conservative Muslim groups. In addition to this, Congress leaders have been known to host Iftar parties during Ramadan, which are seen as efforts to appeal to Muslim voters. This growing polarisation between the two main religions in the country has often seen violent riots claiming the lives of hundreds of thousands, and what lies ahead, if this continues, is a civil war which has the possibility of ripping the country apart again like the Partition. In addition to this, "it could mean bloody strife on an unprecedented scale between militants from India's 82 per cent Hindu majority and their opposite numbers from minorities such as the Muslims, who make up about 12 per cent of India's population of more than one billion people."[34]

Despite these challenges, there have been notable efforts to uphold secularism through judicial interventions and the role of the Election Commission. Landmark cases like "*Kesavananda Bharati v. State of Kerala*[35]" and "*S.R. Bommai v. The Union of India*"[36] has reinforced the importance of maintaining a secular state.

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[32] "Hindu Succession (Amendment) Act, 2005 (39 of 2005)"
[33] "The Muslim Women (Protection Of Rights On Divorce) Act, 1986. Act No. 25 of 1986"
[34] "Sumit Ganguly, The Crisis of Indian Secularism, 14 J. DEMOCRACY 11 (2003)"
[35] "Kesavananda Bharati v. State of Kerala A.I.R. 1973 SUPREME COURT 1461"
[36] "S.R. Bommai v. Union of India 1994 AIR 1918, 1994 SCC (3)"

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Unveiling the Essence of the Mediation Act, 2023

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Abstract

There has been general prevalence in our country from the ancient period to even till now that when some dispute arises between two persons, that issue or the dispute must be resolved by those disputing parties by mutually understanding each other's claims and perspectives before they move to a competent authority for redressal. Mediation is mentioned in ancient Indian texts. Also, with the help of mediation disputes were resolved in villages by means of "Panchayat" or the "Sabha." However, in the contemporary world, there is a possibility of settling disputes outside the courtroom, which can be achieved through the mechanism of Alternative Disputes Redressal (hereinafter referred to as ADR).

Mediation generally means resolving disputes with the help of a third person who is a neutral party to the dispute. However, there was no specific Act dealing with the mediation process in India; hence the Parliament for the first time, enacted this Mediation Act, 2023 on September 14 2023 and the same was enforced on October 9 2023.

The main objective of the Act is to stimulate community mediation, enforce settlement agreements reached through mediation, create a body to register mediators, and encourage and assist institutional mediation in particular when it comes to mediating conflicts in all contexts—commercial or otherwise.

This paper is an attempt to critically examine the Mediation Act 2023 and understand the key objectives and motive behind the enactment of Mediation Act 2023. Also, the suggestions to the shortcomings have been mentioned.

Keywords

Alternative Dispute Redressal, Mediation, Mediation Act, Advantages, Shortcomings.

1. Introduction

"***The litigation must be discouraged, and the people should persuade their neighbours to compromise whenever they can,***" as stated by Abraham Lincoln.[1]

What he is trying to explain in those words is that whatever issue or conflict arises between the two parties, before the parties proceed to court and involve themselves in lengthy legal proceedings, the parties must try to resolve their dispute outside the courtroom atmosphere by using the Alternative Disputes Redressal mechanism.

The definition of the ADR says that "***alternative dispute redressal means the process in which the disputes are resolved by the parties themselves without getting involved in the lengthy processes of the court proceedings***.[2]" It is the way to get justice in a speedier manner. As we all might have heard, "justice delayed is justice denied." To achieve this goal of speedier justice, ADR serves as a good alternative.

As per last updated data provided by the **National Judicial Data Grid[3]** (District and Taluka Courts of India), there are more than 4.4 crore criminal and civil cases pending in the Indian courts. This clearly shows the burden on the Indian judiciary is very huge; clearing this backlog of cases as per current court proceedings might take several years, and till then, more backlogs will get added. In this chaos of heavy burdening on the judiciary, the Alternative Disputes Redressal Mechanism offers the parties involved in the dispute a chance to settle their disputes outside the courtroom, which gives the parties faster justice. ADR provides multiple tools to achieve this goal, and one of such tools is mediation.

The Mediation Act, 2023, got the President of India's assent on September 14, 2023, and it brought a significant change for mediation as the Alternative Disputes Redressal (hereinafter mentioned as ADR) mechanism in India. Earlier, there was no such Act that covered mediation as an ADR tool for resolving disputes between parties outside the courtroom atmosphere; however, other tools of ADR, like Indian arbitration and conciliation procedures, are regulated by the Arbitration and Conciliation Act, 1996.

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[1] "Collected Works of Abraham Lincoln. Volume 2 [September 3, 1848-Aug. 21, 1858]." In the digital collection Collected Works of Abraham Lincoln. https://name.umdl.umich.edu/lincoln2 . University of Michigan Library Digital Collections. Accessed May 15, 2024.

[2] EQUAL EMP'T OPPORTUNITY COMM'N, Department of Commerce, EEO Mediation Guide 2 (May 15, 2024) https://www.commerce.gov/sites/default/files/ocr/mediationguide.pdf .

[3] NAT'L JUD. DATA GRID, https://njdg.ecourts.gov.in/njdgnew/index.php (last visited May 4, 2024).

As per the ***Rajasthan State Legal Service Authority***[4]***,*** "Mediation is one of the forms of ADR in which the parties to the disputes try to resolve their disputes with the help of a third party; he assists the parties to negotiate on their disputing issues; however, he is neutral to those parties." That third party is known as the mediator, who has no interest in the parties; he is neutral, and rather than directing the process of mediation, he facilitates the parties throughout the process of mediation.

2. Historical background of Mediation

We all might have heard about the story of the biblical Israelite king Solomon settling a dispute between the two mothers, claiming a single child to be of theirs'. He settled the dispute between them without initiating a legal proceeding, which is one of the examples of the mediation process.

In ancient Hindu texts, the Mahabharata depicts several chapters in which Lord Krishna attempted to make peace between the Kauravas and the Pandavas. He used the instruments like negotiation and compromise to settle the disputes between them.[5] Kautilya has expressed several techniques to conquer enemies, including the concept of Sama, Dama, Danda, and Bheda. He while defining Dama has included the concept of negotiation and finding a middle way to avoid the war.[6]

In India, the history of mediation as a dispute resolution mechanism can be traced back to the Vedic ages, when '***The Panch Parmeshwar***' *was* used to settle disputes between the two disputing parties in the villages of India. Still, in some parts of India, this concept of solving the dispute with the help of 'the Panch' or the 'Panchayat' can be seen. The tribes living in the forest regions settling their disputes with the help of their 'tribal chief' is also an example of mediation.

The formal procedure of mediation in India gained recognition after the British came to India. They enacted several acts to promote the Alternative Dispute Redressal Mechanism. But mediation as the medium of dispute redressal was officially introduced in India with the enactment of the ***Industrial Disputes Act, 1947***[7]. The Act prescribed a detailed procedure for resolving disputes outside of court. Later, the Lok Adalat was established in India with the ***Legal Services Authority Act*** enactment***, 1987***[8]. The establishment of Lok Adalat under the Act

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[4] RAJ. ST. LEGAL SERV. AUTH., https://rlsa.gov.in/mediation.html (last visited May 4, 2024).
[5] Anandita Sarkar Dutta & Dr. Isha Chaterjee, *The Tradition and Significance of Mediation in India*, 12(10) EUR. CHEM. BULL. 802, 803 (2023).
[6] https://www.vedic-management.com/kautilyas-approach-to-conflict-resolution-sam-dam-dand-bhed/
[7] Industrial Disputes Act, 1947, No. 14, Acts of Parliament, 1947 (India).
[8] Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987 (India).

further facilitated the concept of mediation. Lok Adalat is a kind of forum where disputes are compromised or settled between the disputing parties to the case. Further, Section 89 of the Code of Civil Procedure, as amended in the ***Code of Civil Procedure (Amendment) Act, 1999***[9]***,*** which became operative July 1, 2002, included mediation as one of the dispute resolution options. The Justice Malimath Committee and the Indian Law Commission's recommendations served as the foundation for this particular amendment. They suggested making it mandatory for the court to refer disputes after the issues were framed to be resolved through arbitration, conciliation, mediation, or judicial settlement with the help of Lok Adalat.

Later, the ***Commercial Courts Act, 2015***[10]***,*** was enacted in India, which states that mediation is a mandatory pre-institutional provision in certain classes of commercial suits. The Hon'ble Supreme Court recently decided in the case of ***M/s Patil Automation Private Limited and Ors. v. Rakheja Engineers Private Limited***[11] that the provision in question of mandatory pre-institutional mediation under the Commercial Courts Act, 2015, is not only procedural; it must to be followed before using the aforementioned Act's remedies, and if there is failure to invoke the same, the court can dismiss a commercial suit.

However, no prescribed procedure was given for mediation as the means of the alternative dispute redressal mechanism in any of the above-mentioned acts. However, the ***Mediation Act of 2023*** filled that gap. The Act provides provisions for facilitating mediation as a means of dispute redressal, with the goal of providing quicker justice to the disputing parties.

3. Objectives behind the Enforcement of the Mediation Act, 2023

The Mediation Act, 2023, have been brought into force to fulfil those lacunas that were never addressed by any of the previous acts facilitating alternative dispute redressal processes in India. The main objective of the Act lies in its Preamble, where it states that:

"***The objective behind passing the Act is of promoting and facilitate mediation processes in India. It also promotes and facilitates institutional mediation for resolving disputes, whether they are commercial or not. The act involves provisions to enforce mediated settlement agreements and establishes an institution for the registration of mediators. The act also provides provisions for encouraging community mediation and online mediation so that they are cost-effective processes for netizens***."[12]

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[9] CODE CIV. PROC., No. 5 of 1908, (India).
[10] Commercial Courts Act, 2015, No. 4, Acts of Parliament, 2016 (India).
[11] 2022 SCCOnLine 1028.
[12] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).

The Act promotes and facilitates the mediation process with the goal that the disputing parties will look to mediation as an alternative for quickly resolving their disputes without getting involved in lengthy and time-consuming legal proceedings.[13] As earlier, mediation was not covered under any of the previous acts; it never got the recognition that other ADR instruments did, but as the scope of the Act includes pre-litigation mediation, this alternative of dispute redressal with the assistance of a third person will provide an amicable settlement of their disputes.

4. Critical Analysis of the Mediation Act, 2023

4.1 Applicability of the Act

This Act is applicable to mediation procedures carried out in India or when both parties either have an Indian business address or are incorporated there. The Act also recognizes international mediation involving commercial disputes; the condition is that one of the parties habitually resides or has a place of business outside India. Further, it has been provided Section 3 of the Act[14] That is, it has application over commercial disputes where one of the parties in dispute is either the central or state government or anybody or entity that is owned and controlled by that respective government.

4.2 Pre-Litigation Mediation

Section 5 of the Act[15] states that before instituting a suit, the parties involved may refer their disputes for settlement through mediation. An eligible person shall be appointed as the pre-litigation mediator, and he shall assist the parties throughout the process.

This provision under mandates the parties to opt for pre-litigation mediation before filing any suit or proceeding, whether they had any mediation agreement between them or not, is a violation of 'access to justice', which is a fundamental right protected by Article 21 of the Constitution of India. However, objective behind mandating the parties to opt for pre-litigation mediation is understandable in a general sense, as it has been done to disburden the judiciary, but restricting an aggrieved person from moving to court is a violation of the fundamental right guaranteed under the Constitution.

[13] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).
[14] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).
[15] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).

4.3 Mediators under the Act

The provision of Section 8[16] of the Act provides that any person may be appointed as the mediator if the parties, through the agreement, decide so or make an application to the mediation service provider for the appointment. The Act further provides that, except in cases where parties, through an agreement, appoint a mediator, the mediation service provider will appoint a mediator in that case. This mediator appointed by the mediation service provider shall be registered with the Mediation Council of India or shall be empanelled by a court-annexed mediation centre, a recognized mediation service provider, and under the Legal Services Authority.

However, the Act is silent on the matter of why registration under any of the above-mentioned authorities is not sufficient to be appointed as mediators. There are in total 4 authorities under which a mediator must be registered or empanelled; this is burdensome upon the mediators; registration under any one competent authority must be considered sufficient.

4.4 Mediation Council of India

The provision of the Section 31[17] provides for the constitution and incorporation of a regulating body known as the Mediation Council of India. The role of the Council is to register, recognize, and regulate mediators and mediation institutions in India. It also has a duty to promote mediation processes both at the international and domestic levels.

Certain powers have been given to the Council under the Act to discharge its functions. It performs most of its functions by issuing regulations, which are subject to approval from the central government. This raises a question about the effectiveness of the Council, since it would be very limited if it had to wait for approval to perform its core functions.

Further, the Act includes provision for the appointment of a chairperson and, as such, the number of members provided under the Act. To be eligible to be appointed as a full-time member of the Council, one must have experience and knowledge in mediation or the alternative dispute resolution mechanism. However, the Act leaves a scope for people who have very certain knowledge of mediation to be appointed as members of the Council since it involves the professionals of other alternative dispute redressal means.

[16] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).
[17] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).

4.5 Online Mediation

As stated in Section 30 of the Act[18] that online mediation may be conducted at any stage of mediation when the parties provide written consent to it. The parties may use the electronic form or computer networks by video conferencing, audio mode, or both, provided that the integrity of the proceedings and confidentiality must be maintained.

However, a report published by the Niti Aayog in 2022 revealed that about 45% of the Indian population lacks access to the Internet, and only 27% possess compatible devices. This signifies an accessibility problem for the citizens of the nation.

4.6 Community Mediation

Section 43 of the Act[19] provides provision for facilitating community mediation in those cases that affect the peace, harmony, and tranquilly between the members of a locality or area. Community mediation services may be availed of by the parties with their prior mutual consent. It must be conducted by a three-mediator's panel. However, this requisite seems unrequired, and it impinges on the flexibility that mediation brings.

4.7 Mediated Settlement Agreement

The Mediation Act, 2023 elaborates provisions related to a mediated settlement agreement in Section 27 to 29 of the Act, where it signifies the form in which an agreement must be prepared and registration for the same. It further provides for the enforcement of an agreement as a decree or judgement of a court.

However, the Act is limited to the mediation agreement made in India; it remains silent on those mediated settlement agreements that involve international mediation conducted outside India.

4.8 International Settlement Enforcement

The Mediation Act recognizes cross-border mediations that are held in India; it considers those mediations to be domestic, and their settlement is recognized in the form of a judgement or decree of the court. The Singapore Convention on Mediation does not recognize those settlements that are already in the form of a judgement or decree.[20] And recognizing cross-border settlements as domestic curtails the nature of international enforceability.

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[18] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).
[19] Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).
[20] United Nations Convention on International Settlement Agreements Resulting from Mediation, December 20, 2018.

5. Future of mediation in India

With a favorable legal environment, judicial backing, cultural acceptability, corporate adoption, professionalization, technology developments, and more public awareness, mediation appears to have a bright future in India. It is anticipated that mediation will become more and more important in the Indian judicial system as these tendencies develop. As India continues to embrace alternative dispute resolution processes to lessen the stress on its legal system and promote a more effective and peaceful settlement of disagreements, mediation has a bright future ahead of it. There are a number of reasons behind this positive perspective, including:

5.1 Legal Framework

The value of mediation as a successful alternative dispute resolution (hereinafter referred to as ADR) process has been acknowledged by India. Through legislative initiatives like the Commercial Courts Act, 2015, which requires pre-litigation mediation for business disputes, the government has been aggressively pushing mediation. Furthermore, the goal of the 2023 Mediation Act's introduction was to institutionalize and regulate mediation procedures even further. Even personal laws might use mediation as a useful tool for conflict settlement. Mediation could be implemented even in personal laws for effective resolution of disputes. Research has highlighted the scope of mediation in resolution of inheritance disputes.[21]

5.2 Judicial Support

Another important factor influencing mediation's future in India is judicial backing. In an effort to lighten their caseloads, resolve conflicts more quickly, and increase access to justice, Indian courts are referring more and more cases to mediation. To encourage the settlement of conflicts through mediation, the Supreme Court of India has been very active in this regard, setting up mediation centers all around the nation.

5.3 Cultural Acceptance

Culturally speaking, community-based systems and panchayats—traditional Indian conflict resolution practices—align with mediation. As more people become aware of mediation's advantages, more people and companies accept mediation as a workable approach to dispute resolution. This cultural acceptability is encouraging for mediation's future in India since it lays a strong basis for its expansion and uptake throughout time.

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[21] Syabbul Bachri, Sudirman Sudirman, Erfaniah Zuhriah & Ramadhita Ramadhita, Contextualizing Islamic Inheritance Law In Indonesia: Addressing Negative Stigma, 7(2) Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam (2024).

5.4 Corporate Adoption

The Indian corporate community is beginning to see the benefits of mediation as a means of settling business conflicts. A growing number of companies are including mediation terms in their contracts in order to promote quick and economical dispute settlement. The usage of mediation is anticipated to expand across several industries as long as the business sector continues to support it, which would further propel mediation's growth in India.

5.5 Professionalization

Another important aspect influencing mediation's future in India is its professionalization. The number of qualified and accredited mediators in the nation is increasing, and they have the knowledge and experience needed to resolve conflicts amicably. A strong mediation ecosystem is developing in India thanks to organizations like professional training programs in mediation are offered by the Indian Institute of Arbitration & Mediation (IIAM) and the Indian Institute of Corporate Affairs (IICA).

5.6 Technology Integration

Technology's incorporation into mediation procedures is probably going to improve accessibility and efficacy even further. Parties to conflicts may find mediation more practical and effective by using virtual mediation tools and online dispute resolution platforms to bridge geographic distances and conduct remote mediation sessions.

5.7 Public Awareness

Due to initiatives by government agencies, non-governmental organizations, and legal education institutes to promote mediation as a successful substitute for traditional litigation, more people are becoming aware of the advantages of mediation. As knowledge increases, more people and companies are probably going to choose mediation as a dispute resolution method, which will accelerate mediation's uptake and expansion in India.

6. Stance of Indian judiciary on mediation

6.1 M/S. Afcons Infra. Ltd. & another v. M/S Cherian Varkey Construction Company Private Ltd.& another[22]

It was discussed by the Supreme Court that there exists an anomaly under clauses (c) and (d) of sub-section (2) of section 89 of the Civil Procedure Code, 1908 whereby the definitions of `mediation' and `judicial settlement' have been mixed up. As per Clause (c), the court must refer a “judicial settlement” to an appropriate entity or individual who will be considered a Lok Adalat. According to clause (d), if the term

[22] 2010 (8) SCC 24.

"mediation" is used, the court will mediate a settlement between the parties by using any prescribed process. As stated in section (d), it is illogical to refer to a compromise reached by a court as "mediation." Furthermore, as stated in clause (c), it is absurd to refer to a court's recommendation of a suitable entity or individual for reaching a settlement as a "judicial settlement." "Mediation" is also a well-known term and it describes a non-binding dispute resolution process when opposing parties seek the aid of an impartial third party to facilitate a negotiated settlement. If mediation process is not available (for want of a mediation center or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. If the suit is complicated or lengthy, mediation will be the recognized choice. Thus, it was the first time that the court reflected upon an institutionalized mediation framework.

6.2 K. Srinivas Rao v. D.A. Deepa[23]

The issue involved the following case relates to matrimonial dispute whereby the court opined that if the case in its earlier stages would have been referred to mediation center or pre-litigation clinic the animosity would perhaps not have grown. If someone had mediated between the spouse at the earliest opportunity, things would not have come to this point. In many cases, there is a little miscommunication that may be resolved as the root of the problem in a marriage conflict. Alternative conflict resolution techniques like mediation are increasingly recognized by law. According to the court, evidence indicates that between 10% and 15% of marriage conflicts resolved in this court are resolved through various mediation centers. The court has assigned many matrimonial issues to mediation centers. The court thus believed that mediation centers needed to be consulted as soon as possible, i.e., when the matter was brought for a hearing before the court of first instance or the Family Court.

6.3 Yashpal Chaudhrani & another v. State (Government of National Capital Territory Delhi) & another[24]

The issue involved in the following petitions were regarding the validity of settlement arrived through mediation in criminal cases like credit card fraud, rape and sexual assault. The court held that Credit card fraud cases are not personal and have serious consequences for the state. They directly impact banking institutions as well as the general people. The fact that the lawsuits date back more than 15 years indicates that there hasn't been a significant resolution. The guilty are profiting from their own transgressions. In the interest of justice, their settlement is not reasonable. A settlement agreement reached through mediation cannot possibly result in the quashing of such a serious

[23] AIR 2013 SC 2176.

[24] AIR Online 2019 Del 585.

criminal charge because the offense is neither compoundable under section 320 Code of Criminal Procedure (hereinafter referred to as CrPC) nor quash able under section 482 CrPC, assuming the criminal court has enough evidence to put the accused person on trial. When a mediator is asked to help parties in a situation like this, it is their duty to advise them legally and not mediate a settlement that would not seem to be acceptable or legal. The court thus dismissed all the petitions.

6.4 Amrit Kumar v. State of Uttarakhand and another[25]

After submitting their revision to the Honourable Court, the revisionists asked that the matter be referred to mediation in order to potentially resolve the matrimonial conflict. It is unquestionably a positive step that the parties have preferred to adopt amicable dispute resolution technique. The Uttarakhand High Court thus held that if a settlement of this kind is reached, everyone will benefit. However, the lower court has not yet made a decision in this matter. This Court has no doubt that the court below will make every effort to reach a mutually agreeable resolution between the parties through mediation, conciliation, etc., and that the revisionist may make such a request there.

6.5 Suruchi Bhasin and another v. Rajiv Bajaj and another[26]

The issue involved in the case relates to partition of properties. While the case is still pending the parties arrived at a mutual settlement in Delhi High Court Mediation and Conciliation center. The said settlement was signed and counter-signed by the parties and the counsels. The defendant backtracked from the settlement and the court decided that the actions of the defendant is malafide. The Hon'ble court decreed the suit on the terms of the settlement.

6.6 Prameela Gurung v. Urmila Manger and another[27]

The issue in the following suit was with respect to title of the property. The said dispute was referred to mediation and was amicably settled between the parties. The suit was thus dismissed by the trial judge. The respondent filed execution proceedings against the revisionists. The revisionists then prayed for setting aside the compromise deed and decree on the ground of them being unlawful and barred by law, and the suit be restored to pre settlement stage. Unless the revisionist can provide evidence to the contrary, it must be acknowledged that the parties resolved their disagreement and came to a resolution following the mediation process and that the parties signed a compromise deed. According to the learned Trial Court, the revisionist has merely claimed that she signed the compromise document while being misled. A bare

[25] 2024 SCCOnLine Utt 977.
[26] 2024 SCCOnLine Del 3062.
[27] 2024 SCCOnLine Sikk 7.

remark from the revisionist would not be sufficient to show misrepresentation since it is a positive accusation that needs to be expressly stated against a specific individual and proven. Nothing else that the revisionist has added could possibly generate the appearance that someone misrepresented the facts to her in order to get her to sign the compromise deed. The court also held that revision is not maintainable and upheld the decision of the trial court.

7. Recommendations

i. **Mediation Centers**: Encourage the creation of independent and court-affiliated mediation centers across the nation to offer easily accessible and reasonably priced mediation services. These facilities must be accompanied with the required furnishings and a sufficient number of certified mediators and staff in order to facilitate mediation sessions. The authorities responsible for its maintenance and management must be responsible towards their duty.

ii. **Public Awareness and Education**: Initiate educational programs and public awareness campaigns to highlight the advantages of mediation and raise knowledge of it as a substitute for litigation as an alternative conflict resolution method among the citizens so that they consider mediation as a medium to settle their disputes. Educate all parties involved—litigants, attorneys, judges, and legislators—about the function and methodology of mediation for the better functioning of the mediation as an alternative dispute resolution mechanism.

iii. **Mediation in Specific Contexts**: To meet the distinctive demands and requirements of various dispute types, such as family, business, labor, and community issues, there is a need to develop customized mediation frameworks. Mediation Act, 2023 provides certain techniques like online & community mediation however mediation techniques and processes must be adjusted to accommodate the specific requirements of every situation.

iv. **Monitoring and Evaluation**: An act is as good as its implementation is. The authorities responsible must provide systems for keeping an eye on and assessing how well mediation programs and the Mediation Act, 2023 are working. Gather information on user satisfaction, standards compliance, and mediation results to pinpoint areas that need work and guide future policy choices.

8. Conclusion

With the enactment of the Mediation Act, 2023, India's legal system has reached a critical turning point and ushered in a new era of accessible, equitable, and efficient conflict settlement. The Act aims to meet the rising demand for prompt and economical conflict resolution while reducing the load on the court system by acknowledging and promoting mediation as a viable alternative to traditional litigation.

The Act ensures that parties have access to competent mediators, open and transparent procedures, and legally binding results by establishing clear definitions, strong foundations, and strict requirements. It encourages an atmosphere that is favorable to candid communication and fruitful negotiation by highlighting the concepts of voluntariness, secrecy, and impartiality. This gives parties the freedom to come to agreements that are acceptable to both parties on their own terms.

The Act also recognizes that different types of disputes require different techniques, which makes it easier to create customized mediation frameworks for various situations, including family, business, and community issues. It mentions the procedures like online mediation & community mediation which is certainly a good initiative to facilitate the mediation. It aims to remove obstacles to the adoption of mediation and provide stakeholders the knowledge and tools they need to make decisions about their alternatives for resolving conflicts.

Given the favorable legal environment, judicial backing, cultural acceptability, corporate adoption, professionalization, technology developments, and growing public awareness, it can be concluded that mediation has a bright future in India. With mediation providing a more effective, economical, and civil means of resolving conflicts, mediation is anticipated to become more and more important in the Indian judicial system as these trends develop.

To sum up, the Mediation Act, 2023 is a big step in the right direction toward creating an egalitarian, accessible, and effective legal system in India. India reaffirms its commitment to promoting a culture of discussion, cooperation, and reconciliation by adopting the principles and practices of mediation, so laying the groundwork for a more peaceful society.

India may enhance its mediation framework by providing good infrastructure and well-skilled professionals, encouraging the use of mediation as a preferred means of resolving disputes, and aid in the creation of a more effective, accessible, and equitable judicial system by implementing the suggestions into the Mediation Act, 2023.

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No Woman's Land: A Study of India's Apathy Towards Crimes Against Women

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On June 20, 2014, the nation got the shocking news of two jackfruits being stolen from an Aam Aadmi Party MP's jackfruit tree.[1] The gravity of the matter was such that the police force was employed to look for the jackfruit thief. The police had registered a case of theft and launched investigation into the matter. They managed to lift fingerprints and footprints from the garden and the backyard to establish the thieves' route. As reported last, they were in the process of examining the CCTV footage from outside the bungalow and were planning to interrogate the workers at the residence. Meanwhile, in Bhopal, a minor rape survivor was beaten by police officers to make her withdraw the complaint.[2]

In 2019, the Supreme Court of India gave a landmark judgement by prohibiting feeding of birds off of the balcony of a flat in a residential society.[3] While the respondents claimed that the suit had been filed by the complainants due to strained business relationships and not due to any probable nuisance created by the bird feeding activities of the respondents, the complainants claimed that the act clearly caused nuisance since the respondents start feeding birds at 6:30 AM in the morning and do so several times a day, creating nuisance due to filth created by the birds for the people residing in the floors below the respondents. Meanwhile, a man beat his wife to death in Uttar Pradesh over dowry.[4] A domestic violence case had been filed against him which

[1]India Today, "Delhi cops hunting for thieves who stole 2 jackfruits from MP's house", India Today, June 20, 2014. https://www.indiatoday.in/india/north/story/2-jackfruits-stolen-from-jdu-mps-house-cops-form-special-team-to-nab-thieves-197600-2014-06-20

[2] Shruti Tomar, "Bhopal: 3 police personnel suspended for forcing girl to withdraw rape complaint", Hindustan Times, September 8, 2022. https://www.hindustantimes.com/cities/bhopal-news/bhopal-3-police-personnel-suspended-for-forcing-girl-to-withdraw-rape-complaint-101662615887515.html

[3] Press Trust of India, "Can't Feed Birds From Balcony," Supreme Court Tells Flat Owner", NDTV, March 19, 2019. https://www.ndtv.com/india-news/supreme-court-tells-flat-owner-dont-feed-birds-from-balcony-2009514

[4] Keshav Agarwal, "Man beats woman to death over dowry, case filed after court intervenes", The Times of India, December 19, 2020.

the court had referred to mediation since it saw scope for amicable resolution of the matter and to save the Court's time which it could utilise for more important cases.

In 2018, the parliament roared with laughter when Rahul Gandhi had a short celebration of Valentine's day in July with the Prime Minister Narendra Modi when the former hugged the latter spontaneously.[5] Gandhi said that he wanted to return Modi's hate for him with love. The PM retaliated by saying that this was the first time he had realised the difference between different kinds of hugs; an embrace and someone throwing themselves at you. Modi considered Gandhi's act to be the latter. Meanwhile about 6% of all married women in the country continue to suffer some form of sexual abuse at the hands of their husbands that they do not have any recourse to as marital rape has still not been criminalised.[6]

These incidents in the three organs of the state, the Executive, the Judiciary and the Legislature accurately represent the state's and the criminal justice system's attitude towards crimes against women. If rape, domestic violence or sexual assault are not considered serious enough for the state to invest its resources in, what types and elements of crimes are considered serious enough to be adjudicated upon and regulated? What factors promulgate such a bias against crimes suffered by women?

This paper will aim to examine the causes of such biases by looking into rape myths and gender stereotypes plaguing the Indian Criminal Justice System and all actors involved.

HIDDEN NUMBERS

According to the latest National Crime Records Bureau data, India recorded approximately 32,000 cases of rape in the year 2021, averaging at about 86 cases every day. That means approximately four women reported rape every hour.[7] Nearly 49 cases of crimes against women were lodged every hour last year. These numbers may not seem like a lot but when the fact that about 99.1% of cases of crimes against women go unreported[8] is taken into account, the numbers change

https://timesofindia.indiatimes.com/city/bareilly/man-beats-woman-to-death-over-dowry-case-filed-after-court-intervenes/articleshow/79802746.cms

[5] Sunil Prabhu, "How PM Modi Described Rahul Gandhi's "Hug And Wink" In Parliament", NDTV, February 13, 2019 https://www.ndtv.com/india-news/how-pm-modi-described-rahul-gandhis-hug-and-wink-in-parliament-1993049

[6] Times of India, "Nearly 1 in 3 women have suffered spousal sexual, physical violence: Family Health Survey", The Times of India, May 11, 2022. https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms

[7] NCRB data 2021

[8] Pramit Bhattacharya and Tadit Kundu, "99% cases of sexual assaults go unreported, govt data shows", Mint, April 24, 2018.

drastically. The above mentioned numbers are just the cases that have been formally reported to law enforcement agencies such as the police. The actual numbers are alarmingly high. Taking into account the unreported cases along with the reported cases, the real number of rapes stands to be about 3,55,555 or about 3.5 lakhs per year, which means about 40 rapes an hour and 960 cases every single day. When the same formula is applied to cases of crimes against women, one finds that the actual number is about 4.76 crore per year, which means about 1,30,000 cases everyday and about 5,444 cases every hour.

A small scale survey conducted for the purpose of this research paper showed a similar trend. About 27 women had participated in the survey and 70.4% (19 women) of them reported having experienced sexual, violent or sexually violent crimes but only approximately 10% reported the crimes to the police. Disappointingly, the women who decided to approach the police did not receive a favourable outcome as the perpetrator was either let go with a simple warning without getting any official complaint registered against them, or the police tried to act as a mediator between the victim and the perpetrator in ordered to "amicably" resolve the dispute without adding to their workload, or they were asked to not file an official complaint. None of these cases went to the court for formal adjudication.[9]

Even if any of the matters were to reach the Court, it would not be shocking to find out that the court did not consider the matters to be serious enough to apply its resources and time to adjudicate upon it considering its track record, as well as the leeway provided by the Legislature through various provisions which allow the courts to take a lackadaisical approach towards crimes against women.

RAPE MYTHS: A TEMPLATE FOR RULING

Rape myths are prejudicial, stereotypical and false beliefs about sexual assaults, rape victims and rapists that hold the victim responsible for the act, excusing the rapist for the same.[10] Rape myths influence the actors involved in the Criminal Justice System, such as the police and the judges. Such stereotypical, false beliefs lead to

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https://www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html

[9] The women who decided not to approach the police regarding the matter cited the following reasons to do so: they did not want to get involved in prolonged, mentally taxing legal proceedings; they were hesitant as they believed that the police would not take them seriously; they did not want their family to know in case it lead to curtailment of their freedom; they did not want to get blamed or shamed for what happened to them; they were scared that the police would abuse or harm them if they sought help; they thought that approaching the police would be of no help; or that the matter was not serious enough to seek help of the police. The Excel sheet link with the results of this survey is attached with the email.

[10] Mrunali H. Damania and Ram Manohar Singh, "An exploratory qualitative analysis of rape myths in India", The Society for the Psychological Study of Social Issues, August 23, 2022. https://spssi.onlinelibrary.wiley.com/doi/full/10.1111/asap.12323

victim shaming, blaming, doubting the victim's testimony and trivialisation of the victim's experience.

Rape culture is a set of cultural norms and institutions that normalise sexual violence.[11] Rape culture produces a discourse wherein rape claims are analysed based on the prevailing rape myths that determine who can be victimised or who can be accused of rape.[12] Rape culture, can therefore be defined as a practice that determines what kind of women are more prone to being sexually assaulted, a rationale that legitimizes violence.[13] By creating a distinction between women who can be assaulted and women who cannot, it allows violence to be inflicted upon the latter without consequences.

To create this distinction, women are divided into two categories: the "good" and the "bad". A good woman conforms to the gender norms set by the society, such as being "innocent", soft spoken, submissive, obedient and sexually chaste.[14] A "good" woman stays at home and does not drink, dress in western clothing, go out to party with her friends, have a romantic partner before marriage, step out of the house after it gets dark, etc.

A "bad" woman on the other hand, is the exact opposite of the "good" woman. She does not conform to the gender norms set by the society, drinks and smokes, has sex before marriage, is a threat to the society's "traditional" patriarchal make up and so does not need to be protected, making her rapable without severe consequences.

According to the prevailing rape myths, a "real" rape occurs when a virginal woman is violently accosted by a stranger. She resists but is brutally raped sustaining serious, lasting physical injuries and runs to report immediately in a highly emotional state to the police. This is the ideal rape, and a victim whose behaviour is in consonance with the above mentioned paradigm is the ideal victim.

In *Vikas Garg vs. State of Haryana*[15], the High Court suspended the sentences of three students convicted of rape giving the reasoning that the rape in question did not seem like real rape as it was not shockingly violent and that it offered an alternate conclusion of "misadventure stemming from a promiscuous attitude and a voyeuristic mind". The judge brings up the victim's smoking and drinking habits in order to discard her testimony and implicitly giving her a tag of a "bad" woman. The fact that the victim did not confide in anybody, including her parents, about the incident(s) also played an

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[11] Benson Rajan, Devaleena Kundu, and Sahana Sarkar, 'Rape, Popular Culture, and Nirbhaya: A Study of India's Daughter and Delhi Crime', Journal of Communication Inquiry, 2022, pp. 5.
[12] Ibid.
[13] Ibid.
[14] Aparna Bhat v State of MP AIR 2021 SC 1492
[15] Cr.M.No.23962 of 2017; Cr.M.No.26910-11 of 2017; Cr.M.No.26930 of 2017

important role in the judge's attempt to frame it as an "unreal" rape. This case is a textbook example of the above mentioned paradigm used by the court to characterise rapes as real or unreal.

In the Mahmood Farooqui case[16] the judge said that the victim's unwillingness for the sexual act was conveyed through a "feeble" no and so it could have meant a yes. This reflects the stereotype of a shy woman being seduced by a man and the rape myth that a woman enjoys being raped.[17] The court also focused on the fact that the victim and the perpetrator knew each other from before and since a real rape can only be committed by a stranger, this was not it. In *Prem Chand vs. State of Haryana*[18], the victim had run away with her boyfriend and both of them were taken into custody by two constables, who raped the victim. The Supreme Court reduced their sentences on the ground that victim was a girl of easy virtue, habitual to sexual intercourse and of questionable character,[19] similar to what was held in the infamous Mathura[20] rape case.

JUDICIARY NOT THE ONLY ONE AT FAULT

These judicial precedents appear to be extremely unsettling and compel one to think about the bias of the law against women. It is not just these judgements that are problematic but the leeway provided to various actors of the criminal justice system to take a lax attitude towards crimes against women.

Section 320 Criminal Procedure Code provides a list of compoundable offences i.e. those offences which do not affect the society at large and the harm inflicted is individual and personal. The list specifies Section 354 of the Indian Penal Code, which talks about assault or criminal force to woman with an intent to outrage her modesty, to be an offence compoundable with the permission of the court. The Legislature assumed the effect of the offence to only prevail at an individual level, conveniently ignoring the fact that sexual harassment is a social epidemic, faced by at least about 80% of the female population.[21]

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[16] Mahmood Farooqui v. State (NCT of Delhi) (2017) 243 DLT 310

[17] Arun Sagar, 'Judicial Narrative and Rape Myths: The Farooqui Case' (2019) 15(1) Socio-Legal Review. 51.

[18] AIR 1989 SC 937.

[19] R.K. Bag, "Domestic Violence And Crime Against Women : Criminal Justice Response In India", Journal of the Indian Law Institute , April-December 1997, Vol. 39, No. 2/4 (April-December 1997). 365.

[20] Tuka Ram And Anr vs State Of Maharashtra 1979 AIR 185.

[21] As per the small scale survey conducted for the purposes of this research paper, and;
Nita Bhalla, "Almost 80 percent of Indian women face public harassment in cities: survey", Thomson Reuters Foundation, MAY 23, 2016.
https://www.reuters.com/article/us-india-women-harassment-idUSKCN0YE220

Nonetheless, for the Judiciary the compoundability of offences seems irrelevant as it anyway ends up acting as per its own whims and fancies. This can especially be seen in the case of marital disputes.

Section 89 of the Civil Procedure Code states that in cases where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, it may refer them to alternate methods of dispute resolution such as mediation and conciliation. Section 9 of the Family Courts Act too, direct family courts to make efforts for settlement so as to protect the "sacred" institution of marriage and safeguard familial structures.

In the landmark *Afcons* case[22] the court held that cases that involve prosecution of criminal offences should not be referred to alternate methods of dispute resolution yet the courts have time and again referred cases of domestic violence and dowry for mediation and conciliation because they saw scope for amicable settlement in non-compoundable, cognizable and non-bailable offences such as domestic violence and dowry.[23]

In *Gian Singh v. State of Punjab & Anr.* the court held that criminal proceedings for offences that bear "civil flavour" such as offences arising out of matrimony, relating to dowry, may be quashed by the High Court.[24] In *Mohd. Mushtaq Ahmad v. State*[25]*,* the court directed the parties to mediate in a 498A case. In *Gurudath K vs State Of Karnataka*[26] the Court held that Section 320 of the CrPC will not be a bar to the exercise of court's power to quash proceedings in matrimonial disputes (498A).

IS ADR THE WAY TO GO?

While ADR[27] does sound lucrative when it comes to safeguarding of familial structure as the state places a lot of importance of maintenance of traditional family values, why should it come at the cost of dignity of the victim? The victim is often compelled by social stigmas (especially when the marriage has been consummated or a child has been begotten out of the marriage) and the state[28] to settle for compensation or compromise.

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[22] Afcons Infrastructure Ltd. and Anr. V Cherian Varkey Construction Co. (P) Ltd. and Others (2010) 8 SCC 24.

[23] Section 498A IPC criminalises cruelty by husband or in-laws and The Dowry Prohibition Act, 1961 criminalises giving or soliciting dowry.

[24] **(2012) 10 SCC 303.**

[25] (2015) 3 AIR Kant R 363

[26] CRIMINAL PETITION NO.7258/2014

[27] Alternative Dispute Resolution

[28] The Government came up with the concept of Family Dispute Resolution Cells or FDRCs during the lockdown when women faced immense amount of abuse at the hands of their husbands or in-laws. Instead of sending such criminal matters to court, the State has been actively advocating the settlement of these matters through these conflict resolution cells. Indian express reports that one such cell in Greater Noida has a success rate of 88.2% i.e. in 88.2% of cases the Cell has prevented filing of FIRs in

Even in cases of rape and sexual assault, though ADR methods such as conciliation may provide "closure" to the victim,[29] is "closure" enough of a recourse for the victim? Rape is considered a crime against the monogamy, rather than sexuality of the woman raped[30], and in order to protect the "woman's" lost honour, the rapist is either asked to get a Rakhi tied by the victim[31], or marry her.[32] Do any of these decisions provide any real relief to the victim?

NO PLACE FOR WOMEN

This gross trivialization of crimes against women is nothing but an attempt by men to keep the strata of the society suppressed. This aids in retention of power in the hands of men as women will always "need" men to be protected against men.[33] Even though a trend can be seen in the judiciary wherein it has been delivering one progressive judgement of the other, a long way is still to go in order to achieve legal equality for women in this male state.

matters of domestic abuse. This could hardly be celebrated as a success but a massive failure.

[29] Clare McGlynn, Nicole Westmarland and Nikki Godden, "'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice", Journal of Law and Society , June 2012, Vol. 39, No. 2 (June 2012), pp. 213-240.

[30] Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", Signs, Vol. 8, No. 4 (Summer, 1983), pp. 635-658.

[31] Ibid n. 14.

[32] Because who will marry her now? More explicitly accepting rape to be a crime against female monogamy than female sexuality.
The Indian Express, "Are you willing to marry her, SC asks man accused of raping girl, grants protection from arrest", The Indian Express, March 1, 2021
https://indianexpress.com/article/india/are-you-willing-to-marry-her-sc-asks-man-accused-of-raping-girl-grants-protection-from-arrest-7209854/

[33] Ibid n 11.

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