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MESSAGE FROM PROFESSOR-IN-CHARGE

To make our country *Vishwa Guru*, the quality of research work becomes very important. I am delighted to present before the readers the sixth issue of Delhi Journal of Contemporary Law, a flagship journal of Law Centre-II of Delhi University. This online journal has become a living testament to our mission of engaging the researchers, academic community, advocates, judges and policy makers to publish their scholarly work. In this issue, a wide spectrum of brightest mind of the country have contributed scholarly articles on diverse issues, such as the right to repair, law on arbitration, family law, traditional knowledge, indigenous people, constitutional law, IPR, family planning, artificial intelligence, criminal law etc. These articles reflect the quality of intellectual rigor that symbolizes the journal. I am sure that this issue fulfils the need to discuss, analyse, and propose reforms in the contemporary legal framework in our country. The editorial team, led by Professor Vageshwari Deswal, deserves applaud for bringing out this issue of the journal by selecting the best articles on contemporary legal issues. I hope that this issue would receive the same level of response as the earlier ones. My best wishes to the progress of journal in achieving a wider readership across the country and the world!

Prof. Dr. Anupam Jha
Editor in-Chief
Professor In-Charge, Law Centre-II
Faculty of Law, University of Delhi

EDITOR'S NOTE

In recent times we have witnessed rapid technological advancements including artificial intelligence, geopolitical uncertainties and changing dimensions of social institutions such as marriage and family. Law has been inundated with a sea of complexities arising out of these contemporary realities. Traditional laws and their conventional interpretations are all grappling with modern day problems and at this critical juncture legal scholarship needs to evolve beyond traditional silos to engage with comparative and inter disciplinary perspectives.

This issue of our journal is dedicated to examining how legal institutions respond to these evolving challenges. From regulation of assisted reproductive techniques, online speech, airport zoning to changing contours of laws relating to sports, arbitration, LGBTQ rights, IP, AI, religious freedoms, consumer protection and many more areas have been explored and scrutinised critically to serve the intellectual pursuit of our readers. Exploring digitalisation and innovation through our articles our online journal itself stands testimony to the fact that digital platforms provide easier access to legal scholarship.

I convey my sincere thanks for our Professor In-charge Prof. Anupam Jha, my editorial team and all the contributors for their support. I am indebted to our readers for their continued patronage and invite you all to participate in this ongoing endeavour so that our collective engagement may constructively contribute towards legal reform and justice in the contemporary era.

Happy reading!

Prof. (Dr.) Vageshwari Deswal
Editor
Professor, Law Centre-II,
Faculty of Law, University of Delhi

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INTERSECTIONAL FEMINISM: APPLICATION OF THE PoA ACT IN CASES OF SEXUAL ASSAULT AGAINST WOMEN

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ABSTRACT

Feminism, though developed in the West, found itself 'feel at home' in India, a country whose roots are still deep and strong in patriarchy. The Indian educated upper class has been an active proponent of the feminist movement and their experiences have been widely cited by the media. However, the experiences of the SC/ST women and their plight have taken a backseat, being curtained from popular discussion and has not received the attention it deserved. To make feminism more inclusive, the idea of intersectionality took birth. This idea attempts to recognize the overlapping positions of vulnerability faced by women. In the Indian context, caste, along with gender overlaps and makes SC/ST women vulnerable to immense violence and abuse.

I. Introduction

"There is no thing as a single-issue struggle because we do not live single-issue lives"[1]

The above quote is by Audre Lorde, who was an American writer with multiple identities, a woman of colour and also a lesbian. She often found herself as part of a group that is defined as deviant, inferior or simply wrong. It was her identity as a black and lesbian woman that exacerbated the challenges she faced as a woman.[2]

This is the core issue intersectional feminism aims to address, the multiplicity of discrimination against the identities that threaten to increase vulnerability. In order to understand why the topic holds immense relevance in contemporary times, we need to understand that the world today, despite being postmodern and mostly democratic, is infected with elements of bigotry. For the Indian subcontinent, caste, gender, colour, sexual preference and religion play an important role in deciding how a person is treated in society.

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1 A feminist revolution demands climate justice, *available at:* https://www.opendemocracy.net/en/5050/feminist-revolution-climate-justice/ (last visited on July 18, 2023).

2 Audre Lorde, *Sister Outsider* 114 (Crossing Press 1984).

In order to understand how gender and caste work, we need to understand that gender is a social construct[3] and the treatment meted out to the different genders is based on their position in the society. The society has been ignorant of the diverse gender pool and has primarily acknowledged the existence of the male and female gender as the only two genders. However, this mindest is on an evolving journey. Among men and women, the society has unequally placed men on a pedestal, treating women as inferior citizens, depriving them of any autonomy on themselves. Women throughout the world have been victims of blatant discrimination, both by individuals in society as well as by governments. They had to struggle to achieve basic rights such as the right to vote, which came after a long struggle for the American women.[4] This century long suppression gave rise to the feminist movement. Despite the vibrant movements, violence against women is still a reality and women still face discrimination in every aspect of life.[5] Sexism refers to the inherent bias through which people are judged only by virtue of them belonging to a particular sex. It is a manifestation of historically unequal power relations between women and men, which leads to discrimination and prevents the full advancement of women in society.[6] While discrimination based on gender created enough developmental gaps, to add to this came the double vulnerability of certain groups. The phenomenon of intersectionality recognizes that a person's multiple identities are not isolated and hence the discrimination they face based on these multiple identities is not a byproduct of an isolated identity.

This paper will study intersectional feminism in the Indian context, particularly focusing on sexual assault faced by women belonging to specific caste groups, the Scheduled Castes (SC) and the Scheduled Tribes (ST) and the application of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989[7]. It would also explore judgments pronounced by courts in rape and sexual assault cases against SC and ST women and how far the law recognises the 'caste' element in such cases.

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3 Gender and Health, *available at:* https://www.who.int/health-topics/gender#tab=tab_1 (last visited on July 22, 2023).

4 Women's Suffrage, *available at*: https://www.history.com/topics/womens-history/the-fight-for-womens-suffrage (last modified on February 23, 2023).

5 Feminism and Women's Rights Movements, *available at:* https://www.coe.int/en/web/gender-matters/feminism-and-women-s-rights-movements (last visited on July 22, 7:57 PM).

6 Recommendation of CM/REC (2019)1 of the Committee of Ministers to member States on preventing and combating sexism (Committee of Ministers, European Council, 2019).

7 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, (Act 33 of 1989), s. 3.

Objectives

The objectives of this research are:

i. To understand intersectional feminism

ii. To analyze the application of intersectional feminism in the Indian context

iii. To understand the impact of caste in aggravating the sexual violence faced by SC/ST women

iv. To look at the role of Courts in recognizing intersectionality and recognizing the dual evil faced by SC/ST women

Methodology

In order to understand intersectionality in the Indian context, secondary research has been carried out by studying various research papers, articles, and online blogs. Further, case laws have been analysed to learn the extent to which the provisions of the Prevention of Atrocities Act 1989[8] have been successful. The paper takes a step by step approach, from the birth of feminism to the arrival of the concept of intersectionality and further its application in India. The study limits itself at the intersection of caste and gender to evaluate the experiences of SC/ST women and the application of the PoA Act.[9]

II. Concept of Feminism

Feminist movements and demands for equal rights for women have been in existence even before the term 'feminism' started to be used in common parlance. British activists used to call themselves "Women's Righters" or "A Woman's Rights Woman" and the issues addressed by them were named as "Woman Question" or "Woman Problem" or the "Condition of Woman Question". The focus of feminism then was on public organized activity instead of private and interpersonal issues (Mitchell).[10] Feminism refers to the theory that women should have political, economic and social rights equal to those of men. (Webster)

8 *Supra* note 7.
9 *Ibid,*
10 Mitchell, S. (2015), *Feminism,* The Encyclopedia of Victorian Literature, D.F. Felluga (Ed.).

Intersectional feminism

Intersectional feminism is a term coined by American law professor Kimberley Crenshaw in the year 1989. She defined intersectional feminism as, "a prism for seeing the way in which various forms of inequality often operate together and exacerbate each other."[11] (Kimberley Crenshaw, 1989) To understand Crenshaw's definition of intersectioanlity, it is important to understand the mechanics of a prism. When white light hits the surface of the prism, it refracts to reveal the seven colours of the rainbow. The white light is the discrimination faced by women, by virtue of their gender, however, this discrimination is not an isolated event. The colours of the rainbow that appear stand for the multiple identities that become an additional cause for the discrimination faced by women. These identities are often hidden within white light and go unnoticed as a factor adding to the vulnerability of specific groups of women. It is these multiple identities within the common identity of being a woman that function to make some women more vulnerable than the other. Intersectional feminism[12] recognizes that barriers that exist to gender equality change and vary depending on the woman's other identities, such as colour, ethnicity, race, class, religion, caste etc. For example, the extent of discrimination and harassment faced by a white woman at work would differ from the discrimination and harassment faced by a black woman at the same workplace due to her additional identity of being black. Hence, intersectional feminism centres on the voices of those facing oppression due to their overlapping and concurrent identities. (Intersectional feminism: what it means and why it matters right now, 2021)[13]

III. Intersectional feminism in the Indian context

The much-glorified diversity of India has often come to us at the cost of discrimination paid by various groups of people. Intersectional feminism sets perfect in the Indian sub-continent because of the multiple identities of people here and the discrimination they often face because of these. Scheduled Caste and Scheduled Tribe women have often been at a disadvantage and are at a more vulnerable position to face sexual assault as compared to upper-caste women. This can be

[11] Kimberley Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", 1989 *UCLF* 13 (1989).

[12] Intersectional feminism, *available at* https://www.dictionary.com/browse/intersectional-feminism (last visited on 22 July, 2021).

[13] Intersectional feminism: what it means and why it matters right now, *available at* https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters (last visited on 23 July, 2023).

made clear by understanding the patriarchal idea where asserting power meant having control over one's property and women. And whoever had to demean the honour of his opponent, attacked the women of the opponent's household. Often to assert their power and dominance, upper-caste men have sexually assaulted SC and ST women. This is how caste functions as an element making SC and ST women more vulnerable because of their vulnerable identities.

Equal treatment of unequal violence

Violence faced by Dalit women is normalised and remains invisible in public discussions.[14] Feminist movements and discussions are often found to be dominated by upper-caste women with high social standing. The lived experiences of SC and ST women comprise oppression based on gender, caste and class. These women have become victims of casteism, patriarchy and poverty at the same time. They are oppressed by men not just from their community but by upper-caste men as well. These women then become a part of a marginalised group, within a marginalised group. Their voices remain unheard in the mainstream media.

In order to address and penalise this issue of sexual assault faced by SC and ST women because of their caste identity, the country takes shed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989[15]. The application of the same will be studied next.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act) 1989

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act[16] was enacted in the year 1989 in order to prevent the commission of atrocities against people belonging to the Scheduled Castes and Scheduled Tribes. It also aimed to create Special Courts for the trial of such offences, as well as for the relief and rehabilitation of victims of these crimes.

According to Section 3 (1) (w) (i) and (ii)[17] of the amended Act, any person who is not a part of the Scheduled Caste or Scheduled Tribe shall be punishable with imprisonment for at least six months and which can extend up to five years and with a fine, if:

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14 Not Just Rape…The 'Commentary' On Hathras Rape Case & The Lack Of A Caste-Sensitive Lens, *available at* https://feminisminindia.com/2020/10/01/hathras-rape-case-up-thakur-caste-based-violence/ (last visited on 22 July, 2023).

15 *Supra* note 7.

16 *Ibid.*

17 *Ibid.*

i. Intentionally sexually touches a woman belonging to such communities without obtaining her consent or

ii. Uses sexual words, acts or gestures towards her, knowing that she belongs to the SC or ST community

Section 3 (2) (v)[18] of the PoA Act states that any person not belonging to the SC or ST community shall be punishable with life imprisonment and fine, if:

i. Commits an offence under the Indian Penal Code, 1860[19] which is punishable with imprisonment for ten years or more.

ii. Against a person or property with the knowledge that such person belongs to the SC or ST community or the property belongs to such person.

Application of the PoA Act in cases before the 2016 amendment

Ashrafi v. *State of Uttar Pradesh (2017)*

In this case[20], the Court did not convict the accused under Section 3 (2) (v) of the PoA Act[21] and held that the evidence in the case did not prove that the accused committed the offence and raped the minor girl on the ground that she belonged to the Scheduled Caste community. Here, the provision was interpreted as the offence should have been committed "only" on the ground that she was a member of the SC community.

Dinesh Alias Buddha v. *State of Rajasthan* (2006)

In this case[22], an eight-year-old girl was sexually ravished by the accused who was found guilty under Section 376 (2)[23] of the IPC and Section 3 (2) (v) of the PoA[24] Act by the trial court. However, the Rajasthan High Court set aside the conviction under the PoA Act stating that there

18 *Ibid.*
19 Indian Penal Code, 1860 (Act 45 of 1860).
20 *Ashrafi vs. State of Uttar Pradesh*, (2018) 1 SCC 742 : 2017 SCC OnLine SC 1432 : (2018) 1 SCC (Cri) 489 at page 745.
21 *Supra* note 7.
22 *Dinesh v. State of Rajasthan*, (2006) 3 SCC 771.
23 Indian Penal Code, 1860 (Act 45 of 1860), s. 376.
24 *Supra* note 7.

was no evidence that the crime was committed because the girl belonged to the Scheduled Caste community.

Issue of the burden of proof

In the above judgments, the court held that due to lack of evidence, conviction under Section 3 (2) (v) of the PoA Act[25] was not possible. But the question that arises here is that what kind of evidence would be admissible to prove that the sexual assault was committed on account of the victim's caste. One of the ways that this can be proved is that the mere knowledge that the victim belonged to the SC or ST community would constitute sufficient evidence to convict under the Act. This criterion has been recognised in the amended PoA Act[26]. While it is recognised that proving the caste factor in cases of sexual assault is difficult, will it make a generalisation that the knowledge of the victim's caste amounts to the reason for rape? These are important questions that the judiciary will have to address in the course of time while pronouncing judgments in such cases. In order to prove the existence of caste as a reason for rape, should the sexual assault make it very explicit that caste was an active factor like in the case of *Bhanwari Devi (1992)*[27] where the victim tried to stop a child marriage in an upper-caste family and the upper-caste men enraged by her interference and to re-establish their power raped Bhanwari Devi and physically assaulted her husband.[28]

Also, what role do the police play in collecting evidence in such cases, and how can the investigation be conducted in order to find out the impact of the caste factor in the commission of the crime?

The Parliamentary Standing Committee Report[29] on Atrocities and Crime against Women and Children also recognised that the high acquittal rate in cases of sexual assault plays a role in motivating and boosting the confidence of the dominant and powerful communities to continue oppressing.

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25 *Ibid.*
26 *Ibid.*
27 *Bhanwari Devi v. State of Rajasthan*, (2011) 15 SCC 493.
28 Isha Sharma, "Bhanwari Devi Rape Case: A Brief Reflection", 4 *SSR* 22 (2018).
29 Parliament of India, 230th Report on Atrocities And Crimes Against Women And Children (Department-Related Parliamentary Standing Committee on Home Affairs, 2021).

Judicial recognition of intersectionality

While interpreting Section 3 (2) (v) of the SC and ST (Prevention of Atrocities) Act in the case of *Patan Jamal Vali v. State of Andhra Pradesh (2021)*[30], the Supreme Court by expanding the scope of the provisions created a landmark judgment. The accused, Patan Jamal Vali filed an appeal in the case he was tried under Section 376 (1)[31] of the IPC and Section 3 (2) (v)[32] of the Prevention of Atrocities Act for committing rape on the victim who was a twenty-year-old girl, blind by birth. On the basis of evidence, the court, in this case, set aside the conviction under Section 3 (2) (v)[33] of the PoA Act but upheld the conviction under Section 376 (1)[34] of the IPC. However, the court also held that Section 3 (2) (v)[35] would not exclusively apply "only" in situations where the caste of the victim is the sole criteria for committing sexual assault against her. The bench declared that the provision would apply in all such cases where the woman's caste is one of the grounds for the commission of the crime. The court noted that the 2016 amendment which replaced the words "on the ground of" with "knowing that such person is a part of the SC or ST community" will further work in decreasing the threshold of proving that the crime was committed because of the caste identity of the woman. The court also laid the principle that in case the accused was known to the victim's family, it would be reasonable to assume that he was also aware of her caste.

The court in this judgment acknowledged the idea of intersectionality by stating that while incidents of rape and sexual assault are traumatising for all women in the society, the experience of women belonging to the Scheduled Caste or Scheduled Tribe community or a woman with a disability is a result of their overlapping identities and the different relationships of power. In cases where the identity of a woman intersects with her caste, class, religion, disability, sexual orientation, she might become a victim on account of her additional identities. The court noted that it is important to use an intersectional lens to understand how the multiple sources of oppression operate together to subordinate the women. This judgment is a landmark as it will initiate a new

[30] 2021 SCC OnLine SC 387.
[31] *Supra* note 20.
[32] *Supra* note 7.
[33] *Ibid.*
[34] *Supra* note 20.
[35] *Supra* note 7.

conversation around intersectionality in the Indian context and its application in Indian courtrooms.

IV. Conclusion

"When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something sexist, I ask 'Where is the heterosexism in this? 'When I see something that looks homophobic, I ask 'Where are the class interests in this?'[36]

\- *Mary Matsuda*

When Kavin Malar[37], a poet and journalist was trying to get her poem Vanpunar (Violent) based on real-life experiences of sexual assault of Dalit women published, she was asked if the last line saying, "there are no more Cheri (Dalit) women left for you to violate" could be edited and the word 'Dalit' be omitted, making it general to violence faced by women. She recognised that even though keeping this line would not affect the publisher, it portrayed the reluctance of mainstream media towards Dalit voices.

The concept of intersectional feminism has often been critiqued on the ground that intersectionality would create many new identity categories which could lead to friction. However, the aim of the concept is to recognise the multiple identities to break the hierarchical structure itself. While the concept originated in America, activists and more recently, the Court has recognised the application of intersectionality in the Indian context. By doing so, it has given rise to a new movement peculiar to India. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, though recognises and punishes, caste-based violence against women, its application in the past has been limited to courts setting aside orders under the provision.

Hopefully, the new amendment which recognises knowledge of the woman's caste as a criterion for conviction, as well as the court's interpretation of intersectional feminism and its application in India will work to bring a change in the rate of conviction under the PoA Act. It is time that we recognise that ignorance of the existence of caste is a privilege of those who are not affected by its ravages. As long as the country does not ensure effective implementation of the SC

[36] Anandita Pan, *Mapping Dalit Feminism* 5 (SAGE Publications 2020).
[37] Kannalmozhi Kabilan, "The missing ideal of intersectionality", *The New Indian Express,* Dec. 15, 2020.

and ST Act, India will continue to become a witness of brutal cases like the Hathras gang rape[38] (2020).

[38] *Satyama Dubey v. Union of India*, (2020) 10 SCC 694.

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BIRD-STRIKE RISK AND AIRPORT ZONING REGULATIONS: A COMPARATIVE STUDY OF BANGLADESH AND INDIA

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Abstract

Bird strikes pose a persistent threat to aviation safety worldwide, particularly in rapidly developing nations where urban expansion encroaches upon airport vicinities. This paper undertakes a comparative legal analysis of bird-strike risk management and airport zoning laws in Bangladesh and India, two South Asian countries experiencing significant growth in air traffic and urbanization. The study critically examines the legislative frameworks, institutional practices, and enforcement mechanisms in both jurisdictions to assess their effectiveness in mitigating bird-strike incidents. This article highlights regulatory frameworks, enforcement mechanisms, and the impact of incompatible land use practices—such as waste dumping and slaughterhouses—in the vicinity of airports. The paper further analyzes relevant international standards, including ICAO Annex 14, and evaluates how both countries have integrated or deviated from these norms. While India has made notable strides through centralized aviation safety guidelines and state-level zoning enforcement, Bangladesh faces challenges due to fragmented regulatory oversight and limited coordination among urban, environmental, and aviation authorities. The research concludes with policy recommendations aimed at enhancing inter-agency collaboration, improving land-use planning, and strengthening legal accountability in both countries. The findings provide insightful information for policymakers, and aviation stakeholders who are working to improve air safety in countries in the global south by implementing strong environmental and legal governance.

I. Introduction

Bird strikes have emerged as one of the most frequent and hazardous threats to aviation safety, particularly in countries with densely populated urban zones surrounding airports. Because of their diverse features and actions, birds pose varying threats to airplanes. Concerns about a possible aviation disaster are being raised by a drastic rise in the probability of bird attacks during aircraft takeoff and landing at airports around Bangladesh, especially at the Hazrat Shahjalal International Airport (HSIA) in Dhaka.

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However, data provided by Adani Airport Holdings Limited (AAHL) demonstrated a noticeable increase in bird strikes over time. The number of events increased from 20 in 2020 to 59 in 2024. Nineteen bird strikes have already been documented in the first half of 2025 alone.[1]

Rapid urbanization and inadequate enforcement of airport zoning have led to a rise in animal strikes, particularly those involving birds, worldwide, according to the International Civil Aviation Organization (ICAO). In South Asia, where the conflicting goals of urban growth and aviation safety frequently collide, the issue is particularly noticeable. With their growing aviation industries and inadequate enforcement of airport regulations, Bangladesh and India have both seen an unexpectedly large amount of bird-strike events. Increased bird presence in airport airspace is mostly caused by open slaughterhouses, unlawful building, poor waste disposal techniques, and wetlands close to airports. Implementation on the ground has been unequal even though they have signed international aviation safety standards, such as ICAO Annex 14, which requires nations to reduce wildlife hazards in and around aerodromes.[2] At the international level, member states are bound by ICAO Annex 14's aerodrome safety requirements, which include enforcing land-use limitations, implementing wildlife hazard control programs, and maintaining a safe airside environment. Furthermore, comprehensive instructions on danger detection, bird dispersal techniques, and institutional coordination are provided in ICAO's Airport Services Manual Part 3.[3] Even though India has created a fairly strong regulatory framework, which includes state-level environmental clearance procedures, wildlife hazard control plans, and coordination mechanisms between municipal and airport authorities, implementation gaps still exist because of weak enforcement and fragmented jurisdiction. Bangladesh, on the other hand, has implemented fundamental guidelines through its Civil Aviation Authority (CAAB), but it does not have a specific, legally obligatory zoning structure that involves local accountability or inter-ministerial coordination.

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1 'Mumbai airport bird strike incidents nearly triple since 2020: What's causing the sudden surge? Here's what authorities reveal' *The Economic Times* (India, 28 June 2025), *available* at: https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/mumbai-airport-bird-strike-incidents-nearly-triple-since-2020-whats-causing-the-sudden-surge-heres-what-authorities reveal/articleshow/122124494.cms?utm_source=chatgpt.com > (last visited on 7 August 2025).

2 ICAO, *Annex 14 to the Convention on International Civil Aviation: Aerodromes* (Vol I, 8th edn, ICAO 2018) para 9.4.

3 *Id.,* paras 3.4–4.2.

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The paper provides a comparative legal assessment of the ways in which national laws, zoning regulations, policy frameworks, and international commitments are used in Bangladesh and India to mitigate the danger of bird strikes. It examines the relationship between urban governance, aviation safety, and environmental management, emphasizing the institutional difficulties in enforcing zoning regulations near airports. The study aims to find compliance gaps and suggest legislative and policy solutions for reducing the risk of bird strikes by looking at statutory instruments, case studies, and administrative procedures. By doing this, it adds to the larger discussion about managing aviation safety sustainably in the Global South, where development priorities and regulatory capability frequently overlap.

II. Bangladesh: Bird-Strike Risk Management & Zoning Laws

The growth of domestic carriers, greater foreign travel, and government efforts to update airport infrastructure have all contributed to Bangladesh's civil aviation industry's notable expansion over the last 20 years. The busiest airport in Bangladesh, Hazrat Shahjalal International Airport (HSIA) in Dhaka, has seen an increase in both passenger and cargo traffic, as have Shah Amanat International Airport in Chattogram and Osmani International Airport in Sylhet. However, this rapid growth has increased the risks connected with bird strikes, which are still one of the Civil Aviation Authority of Bangladesh's (CAAB) most important safety concerns. This risk is increased by Bangladesh's geographical and ecological surroundings—wetlands, agricultural fields, open waste dumps, and seasonal migratory bird routes close to airports all greatly increase the risk of birds. Specifically, Dhaka's HSIA is encircled by quickly growing urban areas where scavenging bird populations are drawn in by illegal building and poor waste management, raising the risk of aircraft collisions. Every year, the nation reports numerous instances of bird strikes, some of which result in engine obstruction and cancelled takeoffs. Even if there haven't been any catastrophic accidents in a while, the frequency of incidents indicates that there are still issues with airport zoning enforcement and urban development.

Current Initiatives

Although there are still issues with its effective implementation, CAAB has adopted a number of wildlife hazard management measures that are essentially in accordance with ICAO recommendations.

Physical Bird Control

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To keep bird flocks away from runways, airports use limited falconry techniques and auditory deterrents including gas cannons, crackers, and distress sounds.[4]

Habitat Modification

Airport grass cutting and water-logged area clearance are done on a regular basis, though they are frequently irregular and rely on financing availability.[5]

Waste Management Measures

CAAB has sent out circulars mandating that local governments move open landfills, slaughterhouses, and wetlands close to airports, especially those near HSIA.[6]

Monitoring and Reporting

CAAB maintains safety databases based on reports of bird strikes, which pilots and airlines are urged to submit.[7]

Notwithstanding these steps, Bangladesh does not have a particular, legally binding zoning law for airport land-use planning. Rather, general safety instructions, CAAB guidelines, and ad hoc local cooperation are the basis of bird-strike management.

Regulations for Aviation Safety in Bangladesh

As a party to the 1944 Convention on International Civil Aviation (also referred as the Chicago Convention), Bangladesh is subject to ICAO regulations, notably Annex 14, which mandates governments take steps to reduce the risks of birds at and near aerodromes.[8] The main regulatory body responsible for aerodrome safety is the Civil Aviation Authority of Bangladesh (CAAB), which was founded in accordance with the Civil Aviation Authority Ordinance 1985

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4 Civil Aviation Authority of Bangladesh (CAAB), *Bird Hazard Management Operational Guidelines* (CAAB 2020) 4.

5 Civil Aviation Authority of Bangladesh (CAAB), *Bird Hazard Management Operational Guidelines* (CAAB 2020) 5.

6 Civil Aviation Authority of Bangladesh (CAAB), *Safety Circular on Bird Hazard and Waste Management* (Circular No 01/2021) 2.

7 *Supra* note 3.

8 International Civil Aviation Organization (ICAO), *Annex 14 to the Convention on International Civil Aviation: Aerodromes* (Vol I, 8th edn, ICAO 2018) para 9.4

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which was later substituted by the Civil Aviation Authority Act 2017.[9] Regarding the management of animal hazards, CAAB has released several safety circulars;

i. Airport operators and local authorities are instructed by CAAB Safety Circular 01/2021 (Bird Hazard and Waste Management) to implement appropriate waste disposal procedures near aerodromes.
ii. Risk assessments for bird strikes are incorporated into the Aerodrome Safety Management System (SMS) Guidelines as part of the broader aviation safety framework.
iii. Although they are not well linked with zoning enforcement, Environmental Directives (which are in line with Department of Environment regulations) place a strong emphasis on limitations on garbage dumping and wetland encroachment near airport zones.

Bangladesh does not yet have a complete Airport Zoning Act, in contrast to India, which has created state-level zoning rules as well as clearance procedures for developments near airports.[10] Rather, separate local ordinances, CAAB guidelines, and urban development regulations are used to handle airport zoning concerns, which results in inadequate enforcement and jurisdictional overlaps.

III. India: Bird-Strike Risk Management & Zoning Laws

With more than 140 airports under the control of the Airports Authority of India (AAI) and multiple additional aerodromes in development, India possesses one of the world's fastest-growing civil aviation sectors. However, the risk of bird strikes has increased due to the quick development of urban areas surrounding important airports including Indira Gandhi International Airport in Delhi, Chhatrapati Shivaji Maharaj International Airport in Mumbai, and Kempegowda International Airport in Bengaluru. Between 2018 and 2022, over 1,400 bird-strike occurrences were reported at Indian airports, the majority of which occurred during the takeoff and landing phases, according to the Directorate General of Civil Aviation (DGCA).[11]

Bird dangers are particularly significant in India due to its geographical and socioeconomic context. Airports are frequently situated next to agricultural areas, wetlands, and unplanned urban

[9] *Civil Aviation Authority Act 2017* (Bangladesh)
[10] Airports Council International (ACI), *Wildlife Strike Hazard Reduction Strategies* (ACI 2019) 7
[11] Directorate General of Civil Aviation (DGCA), *Annual Safety Review 2022* (DGCA 2023) 12

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setlements where a lot of birds gather due to open trash disposal, slaughterhouses, and stagnant water bodies. Kite, pigeon, and migratory bird strikes are common at high-risk airports including Delhi, Ahmedabad, and Kolkata. A number of incidents have resulted in aborted takeoffs, precautionary landings, and expensive aircraft repairs, causing significant financial losses for airlines and raising worries about passenger safety even if the majority only cause minor damage.[12]

Current Control Mechanism

In India, the DGCA, AAI, and state governments cooperated to establish a multi-layered bird hazard management program. The main techniques consist of:

i. Wildlife Hazard Management Committees (WHMCs) are set up at every airport who are in charge of evaluating regional bird threats, working with local authorities, and putting mitigation plans into action.[13]
ii. Airports use a variety of physical and auditory deterrents to keep birds away from runways, including gas cannons, pyrotechnics, laser beams, distress sounds, and trained falcons.[14]
iii. Airports frequently cut grass, drain flooded areas, and disrupt habitat within a 10-kilometer radius. According to DGCA regulations, local governments must limit land uses that draw birds, like slaughterhouses and landfills.[15]
iv. Avian radar systems are used by major airports, such as Delhi and Mumbai, to track the movements of birds and notify air traffic controllers of any changes.[16]

Despite these efforts, state and local authorities' uneven execution of zoning regulations continues to be a problem, especially at smaller local airports.

Regulations for Aviation Safety in India

Both domestic laws and international commitments are included into India's legal and regulatory framework for managing the risk of bird strikes. India is subject to ICAO requirements

[12] S Rajesh and A Mehta, 'Urban Ecology and Bird Hazards in Indian Aviation' (2021) 14(2) *Journal of Air Transport Safety* 77

[13] Directorate General of Civil Aviation (DGCA), *Civil Aviation Requirements (CAR) – Aerodrome Design and Operations* (CAR Section 4, Series B Part I, 2021) 9

[14] Airports Authority of India (AAI), *Annual Report 2021–22* 16.

[15] Directorate General of Civil Aviation (DGCA), *Annual Safety Review 2022* 10

[16] 'Delhi Airport Deploys Avian Radar System' *Times of India* (New Delhi, 12 July 2021) https://timesofindia.indiatimes.com accessed 26 August 2025

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as a signatory to the Chicago Convention 1944, especially Annex 14, which requires wildlife hazard management systems at airports.[17]

i. Under Section 4, Series B, Part I (Aerodrome Design and Operations), the DGCA has issued specific CARs requiring airport operators to create plans for managing wildlife hazards and incorporate them into aerodrome safety management systems.[18]
ii. The national government has the authority to control construction near airports through the Aircraft Act 1934 and the Aircraft Rules 1937. For construction projects within a specified air funnel and within 20 kilometers of airports, the DGCA mandates a No Objection Certificate (NOC).[19] In order to reduce bird attractants like slaughterhouses and garbage disposal sites, these zoning limitations are essential.
iii. In accordance with DGCA regulations, the responsibility for moving garbage dumps and implementing land-use restrictions falls on State Pollution Control Boards and urban local governments.[20]

A prime example is Delhi Airport, where, following multiple incidents of bird strikes, the Delhi High Court ordered the withdrawal of meat stores and waste disposal sites located within ten kilometers of the airport.[21] Following ICAO compliance audits, Ahmedabad's municipal officials were also instructed to move open slaughterhouses outside the airport's boundaries.[22]

IV. Comparative Summary: Bangladesh and India

Important similarities and differences in the approaches used by the two South Asian countries to address bird strike hazards and enforce airport zoning regulations are highlighted by the comparative study of Bangladesh and India. Both nations are subject to international duties under ICAO Annex 14 and the Chicago Convention 1944, which require states to detect and minimize wildlife risks around aerodromes. The degree of success in resolving the issue is shaped

[17] International Civil Aviation Organization (ICAO), *Annex 14 to the Convention on International Civil Aviation: Aerodromes* (Vol I, 8th edn, ICAO 2018) para 9.4
[18] Directorate General of Civil Aviation (DGCA), *Annual Safety Review 2022* 13
[19] *Aircraft Act 1934* (India); *Aircraft Rules 1937* (India) r 91
[20] Ministry of Environment, Forest and Climate Change (India), *Solid Waste Management Rules 2016* (MoEFCC 2016) r 15
[21] *Delhi High Court v Union of India* WP(C) No 15835/2006 (Delhi HC, 2007)
[22] 'Ahmedabad Airport Declared Bird-Hazard Sensitive Zone' *Indian Express* (Ahmedabad, 20 March 2020) https://indianexpress.com accessed 26 August 2025

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by the major differences in how these international norms are translated into domestic law, institutional procedures, and enforcement practices. Over the past 20 years, aviation has expanded rapidly in both Bangladesh and India, increasing its vulnerability to bird strikes. Three international airports in Bangladesh are the hub of the country's aviation expansion, with Dhaka's Hazrat Shahjalal International Airport (HSIA) being the most at risk because of nearby wetlands, garbage dumping, and unplanned urban expansions. With more than 140 airports, India, on the other hand, oversees a far larger aviation sector, increasing the likelihood of bird strikes, particularly at high-density airports like Delhi, Mumbai, Kolkata, and Ahmedabad.

Legal and Regulatory Framework

In Bangladesh, safety guidelines, CAAB circulars, and non-binding regulations play a major role in controlling bird strikes. Ad hoc collaboration with local authorities is also used. Aviation safety is based on general environmental and urban rules that are not strictly enforced, and there is no specific airport zoning regulation.

There is a thorough legal framework in India, with the Aircraft Act 1934 and the Aircraft Rules 1937 giving the government the power to control land use close to airports.[23] Zoning regulations require No Objection Certificates (NOCs) for any building or land use within a 10- to 20-kilometer radius,[24] while the DGCA's Civil Aviation Requirements (CARs) mandate wildlife hazard management programs at all aerodromes.[25] These duties have been further strengthened by Indian courts, especially the Delhi High Court, which has ordered the closure of slaughterhouses and landfills close to airports.[26]

Thus, Bangladesh depends on fragmented administrative procedures devoid of statutory force, whereas India has a more formalized and enforceable framework.

Control Methods and Use of Technology

Both countries utilize conventional deterrents, such as falconry, pyrotechnics, gas cannons, distress calls, and habitat manipulation (draining wetlands, trimming grass). But when it comes to

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[23] *Aircraft Act 1934* (India); *Aircraft Rules 1937* (India) r 91

[24] Directorate General of Civil Aviation (DGCA), *Civil Aviation Requirements (CAR) – Aerodrome Design and Operations* (CAR Section 4, Series B Part I, 2021) 9

[25] *Id.,* 11

[26] *Delhi High Court* v. *Union of India* WP(C) No 15835/2006 (Delhi HC, 2007)

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adopting technology, India is well ahead. Avian radar systems are used at major airports like Delhi and Mumbai to monitor bird movements and notify air traffic controllers in real time.[27] Bangladesh, in comparison, still relies nearly entirely on physical and manual dispersal techniques, which is a reflection of both technological and economic constraints.

Organizational Structures

Although CAAB is primarily in charge in Bangladesh, it has no real control over local governance, environmental protection, or urban planning. Because of this fragmentation, regulations are not properly enforced, and land uses that attract birds continue to exist close to airports.

A more organized system is in place in India, where state governments, local governments, the DGCA, and the AAI share accountability. However, this multi-tiered governance frequently results in jurisdictional overlaps and enforcement delays, especially when it comes to moving slaughterhouses and dumpsters. As a result, although India has better organizational framework, governance limitations in both countries jeopardize efforts to reduce bird strikes.

Compliance and Enforcement

The most obvious area of difference between Bangladesh and India is in enforcement. The lack of legally binding zoning laws and the unwillingness of local governments to move dangerous land uses are the main causes of Bangladesh's poor compliance. Safety is still being jeopardized by neighborhood objections, particularly with relation to the relocation of trash disposal close to HSIA.

In India, zoning laws have been enforced more strictly by the courts, especially in Delhi and Ahmedabad, where they have mandated the closure or relocation of establishments that attract birds. However, there are still disparities in compliance, especially at smaller regional airports with fewer resources and technology.

India's structure, in summary, gives enforcement more legal legitimacy, but socio-political realities continue to hinder its implementation. Bangladesh, on the other hand, lacks the legal capacity to impose any kind of compliance.

[27] 'Delhi Airport Deploys Avian Radar System' *Times of India* (New Delhi, 12 July 2021), *available at*: https://timesofindia.indiatimes.com (last visited on August 27, 2025).

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Common Challenges

Despite having different levels of regulatory development, Bangladesh and India have a number of significant problems with how to properly control bird-strike threats through management strategies and zoning rules. Bangladesh's Civil Aviation Authority is reliant on administrative cooperation and non-binding circulars with little enforcement authority because the country lacks a comprehensive regulatory framework for airport zoning. Despite being more developed, India also has poor execution because zoning laws are frequently delayed or lessened by the overlapping jurisdiction of the DGCA, Airports Authority of India, state governments, and municipal agencies. Community opposition to moving slaughterhouses, trash dumps, or bird-attracting wetlands close to airports is a problem in both countries, underscoring the socioeconomic and political sensitivities involved.

Likewise, smaller regional airports in both jurisdictions continue to lack adequate resources and rely on outdated manual deterrents rather than advanced surveillance technology like avian radar. Long-term ecological planning is another area of vulnerability that both Bangladesh and India share: growing, unplanned urbanization continues to encroach on airport habitats because neither country has adequately incorporated bird-strike risk management into urban development laws. Therefore, both India and Bangladesh need a comprehensive, ecologically conscious, and community-integrated approach to sustainable bird-strike risk reduction, but Bangladesh's issues stem from a lack of regulations and India's from implementation gaps.

A holistic strategy is needed to close these gaps. While India should concentrate on standardizing enforcement across all airports, improving technological capacity at regional airports, and actively engaging communities to improve compliance, Bangladesh must create a statutory zoning law with clear enforcement mechanisms and strengthen intergovernmental coordination. By combining these focused measures, important gaps would be filled, enabling both countries to transition from reactive hazard management to environmentally conscious, legally sound, and sustainable aviation safety systems.

Key Insights of both countries

A number of important implications are drawn from the comparison of Bangladeshi and Indian airport zoning regulations and bird-strike risk management, which will be helpful to policymakers and aviation safety professionals equally.

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First, enforcement capacity is greatly impacted by legislative and regulatory development. India serves as an example of how statutory zoning laws combined with court supervision offer a more robust framework for reducing bird dangers. The limitations of informal regulation in guaranteeing compliance, however, are highlighted by Bangladesh's reliance on administrative circulars and non-binding directives.

Second, a key differentiation is the utilization of technology. While Bangladeshi airports continue to rely on conventional physical deterrents, Indian airports, especially large international hubs, use avian radar and data-driven monitoring to proactively manage wildlife dangers. This suggests that while technology can significantly improve risk prediction and mitigation, it also necessitates operational capacity and investment.

Third, governance structure and institutional coordination are just as important as actual legislation. Overlapping duties between aviation authority, local governments, and environmental organizations provide difficulties for both countries. In Bangladesh, the lack of legislative requirements makes coordination more difficult, while in India, execution gaps continue because of fragmented responsibility despite clearer statutory lines.

Fourth, socioeconomic factors and community involvement are crucial. Reluctance to move slaughterhouses, waste disposal facilities, or wetland areas close to airports compromises compliance in both countries, highlighting the need for community-focused policies and awareness campaigns in addition to legal and technological measures to effectively manage the risk of bird strikes.

Lastly, there are still significant gaps in environmental integration and urban planning. Bird-strike risk evaluations have not yet been completely integrated into urban development planning in either country. The necessity for a proactive, multi-sectoral approach that unifies city planning, ecological management, and aviation safety is highlighted by the rapid, uncontrolled urban expansion that continues to worsen wildlife threats close to airports. All of these observations point to the interdependence of governmental coordination, technological innovation, community involvement, regulatory strength, and urban integration as key components of successful bird-strike risk control. These lessons can be used by policymakers in Bangladesh and India in moving away from reactive, fragmented approaches and toward environmentally conscious, legally sound, and sustainable aviation safety systems.

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V. Comparative Recommendations

Both Bangladesh and India must implement comprehensive, holistic approaches that address organizational, technological, legal, and socio-environmental factors in order to improve aviation safety and reduce the danger of bird strikes. While Bangladesh suffers from legislative gaps while India enjoys the advantages of a reasonably developed regulatory framework, the comparison reveals that both nations deal with issues of community compliance, urban encroachment, and enforcement.

Legal and regulatory recommendations urge the adoption of a specific Airport Zoning Act is Bangladesh's top goal. Such laws should outlaw land uses that draw birds, such as wetlands, landfills, and slaughterhouses, clearly specify buffer zones around airports, and implement severe fines for noncompliance. To guarantee coordinated action, the law should explicitly give CAAB control over environmental, urban planning, and municipal agencies. In India, the emphasis should be on improving implementation consistency by making sure that DGCA regulations, zoning limits, and CAR standards are followed consistently, especially at regional and smaller airports. It is possible to further institutionalize judicial systems to encourage proactive enforcement and discourage non-compliance.

Both countries would gain from increasing the use of advanced bird monitoring and detection technologies, like avian radar and predictive tracking software, which have shown promise in important Indian airports. In order to assess the cost-effectiveness of radar deployment and integrate it with air traffic management systems, Bangladesh ought to take into account pilot programs at HSIA and other high-risk airports. India should concentrate on expanding this technology to minor airports so that manual deterrents are not the only option for smaller hubs.

Strong interagency coordination is necessary for effective bird strike control. To enable coordinated decision-making, Bangladesh has to set up official channels connecting the CAAB, the Department of Environment, local government representatives, and urban planning organizations. To avoid duplication or enforcement gaps, India should improve the clarity of roles and responsibilities among the DGCA, AAI, and local governments, even with its more structured system. Every airport in both nations should have a wildlife hazard committee with defined duties, sufficient manpower, and funding.

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One important lesson from both countries is that technology and legal remedies are not enough on their own. One persistent obstacle is community opposition to the relocation of hazardous land uses. In order to encourage local stakeholder engagement and provide incentives for compliance, Bangladesh and India should both make investments in education, awareness, and participatory governance initiatives. Outreach initiatives could include encouraging neighborhood-supported trash management and urban planning solutions, as well as clarifying the connection between hazardous land use and aviation risks.

Bird-strike risk management needs to be incorporated into larger urban development plans in both nations. This entails examining planned building projects, controlling the growth of landfills and wetlands, and incorporating ecological studies into zoning permits. India could strengthen the enforcement of such evaluations and bring them into compliance with DGCA zoning regulations, while Bangladesh should create official environmental and aviation impact assessments for all developments close to airports. It is crucial to continuously enhance the capability of aviation planners, local government representatives, and airport staff. In addition to funding research projects on bird ecology, migration patterns, and regional enticements, both countries should fund training programs on risk assessment, mitigation strategies, and wildlife hazard management. Evidence-based methods will enable customized tactics instead of general deterrence, boosting sustainability and efficiency.

In the end, the comparative experience indicates that long-term bird-strike risk reduction requires integrated, multi-sectoral approaches that include organizational coordination, technology instruments, legal authority, community participation, urban design, and scientific research. India can improve implementation consistency and broaden coverage to regional airports, while Bangladesh can take use of India's regulatory approach while customizing interventions to its resource situation. Both nations may move from fragmented, reactive management to resilient, environmentally conscious, and legally sound aviation safety systems by taking a comprehensive and proactive strategy. This will bring their systems into compliance with ICAO requirements and promote the expansion of sustainable aviation.

VI. Conclusion

The comparison of Bangladesh's and India's airport zoning regulations and bird-strike risk management highlights the two countries' similar difficulties and differences in ensuring aviation

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safety. Bangladesh is still limited by the lack of a specific statutory framework and fragmented governance, whereas India has established a very sophisticated legal and institutional structure that includes enforceable zoning restrictions, DGCA standards, and judicial scrutiny. Notwithstanding these distinctions, both countries deal with the same challenges, limited community compliance, resource constraints at smaller local airports, and fast urbanization close to airports. The analysis reveals that India's strengths lie in its codified regulations and technological integration, whereas Bangladesh must focus on enacting binding zoning laws, strengthening inter-agency coordination, and introducing advanced monitoring systems. Both countries can benefit from holistic, evidence-based approaches that align aviation safety with ecological management and urban development.

The study concludes by highlighting the necessity of proactive and integrated approaches for local aviation safety, which combine innovative technology, enforced legal frameworks, participatory governance, and urban ecological design. In addition to lowering the risk of bird strikes, Bangladesh and India may set an example for aviation hazard management in the Global South by tackling legislative gaps, implementation difficulties, and socio-environmental limitations. This will guarantee safer skies and more robust aviation systems.

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HOMEWARD BOUND: EVALUATION OF RIGHT TO SHELTER OF TRANSGENDER COMMUNITY WITH SPECIAL REFERENCE TO 'GARIMA GREH'

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Dr. Madhumita Acharjee[**]

ABSTRACT

For transgender community in India, the attachment to one's "home" has often been effaced. Stigma, exclusion from families, and barriers in education and employment have forced many into cycles of homelessness and precarity. Although landmark steps, such as NALSA v. Union of India (2014) and the Transgender Persons (Protection of Rights) Act, 2019, have recognised their rights in law, the lived reality still reflects a constant struggle for safety, dignity, and belonging. Shelter, therefore, is not just about a roof—it is about affirming identity, offering security, and opening pathways to a dignified life. This study focuses on Garima Greh, the government's flagship scheme designed to provide safe housing and support for transgender individuals. While the initiative embodies a welcome shift in state responsibility, its promise is diluted by bureaucratic delays, limited capacity, the restrictive one-year stay rule, and reports of discrimination even within the very spaces meant to heal. The paper argues that for shelter to be meaningful, it must go beyond temporary arrangements and instead nurture long-term empowerment. Strengthened funding, transparent oversight, and policies sensitive to the intersectional realities of transgender lives are essential. Ultimately, the right to shelter must be realised not as charity or token recognition, but as a guarantee of dignity, security, and the chance to truly feel "at home."

I. Introduction

In 2014, *NALSA* v. *Union of India*,[1]marked a progressive departure from the regressive stand on the rights of transgender community in India. It acknowledged the need to extend legal recognition beyond the gender binaries. However, this departure is also reflective of the evolving gender politics across the globe spanning more than a century.

Initial understanding of the 'self' within empirical traditions in science often confines it to biological essentialism, or, in other words, human anatomy as the manifestation of the self,

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[1] AIR 2014 SC 1863.

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and therefore, it is disjointed from consciousness. Simultaneously, certain schools of thought, such as transcendentalism, viewed selfhood as the union of mind and body, encompassing the concept of apperception. Subsequently, following the observations by Simmel and Herbert, sociology and social psychology have evolved to focus on the way selfhood and identity unfold in the multitude of social situations. This conceptualization has evolved within a wide semantic field, where different dimensions of the self are emphasized in diverse ways, linking it to ideas of modernity, meaning, and difference.[2] Thereby, the semantic space has also accommodated the fluid and dynamic expressions of sexuality and gender. Such discourses have, among a catena of things, helped in understanding how sexuality and gender get marginalised in the social order. Wherein "marginalisation is understood as a process which[3] inhibits a person, a group, a section or a community from enjoying rights, privileges, opportunities and resources at par with the ordinary citizen. It may therefore be considered an incongruous equation between those who marginalise and those who are being marginalised. Accordingly, the term "marginalised" may be used synonymously with "oppressed," as articulated by Paulo Freire in his "Pedagogy of the Oppressed," with "proletariat" in Karl Marx's writings, "subaltern" in Gramsci's framework, or with "powerless" as elaborated by Michel Foucault. It may also correspond to terms such as exploited, vulnerable, discriminated, disadvantaged, subjugated, socially excluded, alienated, or downtrodden, as employed in various strands of existing literature.

Among many intersections, gender is a key site where marginalisation is reinforced. Cis-women and queer gender folks find themselves at the receiving end of it. There are multiple factors, such as environment or triggers, which could determine the gender marginalisation. For instance, the absence of penal provisions in relation to sexual offences against men in many legal systems is oppressive and tends to marginalise cis masculine gender. Similarly, discriminatory prohibition in many countries against the participation of trans persons in different employment, educational or political avenues denotes the aspects of marginalisation. For instance, the Census 2011 noted that transgender population in India stands at 4.88 lakh.[4] A significant population, and yet transgender persons face widespread discrimination. As evident in the low economic participation rate of only 38 per cent, according to a study

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2 Peter Wagner, "Self: History of the Concept" International Encyclopedia of the Social & Behavioral Sciences 13833 (2001).

3 Shalu Nigam, "From the Margins: Revisiting the Concept of 'Marginalized Women" SSRN Electronic Journal (2014).

4 Office of the Registrar General India, 'Census of India 2011 - Provisional Population Totals' *available at*: https://censusindia.gov.in/nada/index.php/catalog/42648> (last visited on Aug 28, 2025).

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conducted a year prior.[5] In fact, the National Human Rights Commission, a decade later, found that a staggering 96% of transgender individuals face discrimination in employment.[6] Many are pushed into low-paying and exploitative work, such as sex work and begging, with 92% being denied job opportunities.[7]

The last census had also revealed that only 46% of the Transgender population, as compared to 76% of the general population, were literate.[8] This marginalisation stems from the lack of inclusivity in educational institutions for gender-nonconforming children. The "other" gender category shows alarmingly high dropout rates and low academic performance, too.[9]. Bullying and discrimination against the community in schools is also rampant. A study revealed that within educational institutions transgender persons face bullying and discrimination wherein 15% held professors and 52% held peers to be responsible.[10] A poor employment rate, inadequate education, and limited visibility are indicative of the backwardness.

However, this does not take away the fact that the past decade has seen a tremendous rise in the potential to respect, protect and promote the human rights of transgender persons, as will be discussed shortly. But despite the recent developments**,** the transgender population has continued to live in a state of utter neglect and discrimination from society. Their marginalisation divests them of any interests in policies of growth and development.

It is due to circumstances such as these and others that people of marginalised communities live under constant struggle. It has a corrosive impact on the overall human rights like right to equality, freedom, nutrition etc. Interlinked with other rights, the right to shelter is also of primary concern. To begin with human dignity and fulfilment are dependent primarily upon it, and a denial of shelter or accommodation means grave consequences**.** A proper shelter or house is crucial for ensuring a good healthy life, along with security against trespass, excercising privacy etc. Whereas, the absence of which exposes one to vulenerabilities.

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5 UNDP, *Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion* (United Nations Development Programme 2010).

6 National Human Rights Commission (India), "Annual Report 2018-2019" (2019).

7 Nikita Begum Talukdar, "Workplace Inclusivity of Transgenders: A Critical Analysis of the Employment Laws of India" 8 *Rostrum's Law Review* (2024).

8 *Supra* note 4.

9 Leaving No One Behind: Transgender Inclusion in India's Sustainable Development *available at*: https://www.orfonline.org/expert-speak/leaving-no-one-behind (last visited on Aug 26, 2025).

10 *Supra* note 6.

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While there is no official record as to the extent of homelessness among transgender population, the UN Special Rapporteur on Adequate Housing has observed that the lack of physical property does not solely define homelessness, but also by its social dimensions. It can stem from the absence of a "secure place to establish a family or social relationships" or result from systemic discrimination and social exclusion."[11] UNAIDS reports that in India, more than 90% of transgender persons are either compelled to leave or forcibly displaced from their homes before reaching the age of 15.[12] Consequently, many are compelled to live on the streets without access to financial resources or education, often relying on sex work for survival.[13] Owing to multiple factors, LGBTQ (throughout the text interchangeably LGBT or LGBTQIA+ has also been used) persons in India are particularly vulnerable to homelessness. As documented, they are are always at the fear of expulsion from their family homes due to conflict, violence, or threats of violence[14].[15] Again, this creates a cycle of systematic degradation, where the absence of safe housing and improper livelihood, combined with a lack of support from home, prevails. The transgender community has been often seen to resort to begging and survival sex[16], which again makes them vulnerable to pimps, police and the public. Another study documented the case of a trans woman who would often commit minor offences to get incarcerated, as she found imprisonment as a temporary means to access shelter and safety. A better alternative than plying on the streets.[17] The inevitable consequences related to homelessness among transgender population are explained further in the next section.

Consequences of Failure to Secure Shelter

Transgender persons often become the subject of violence in both the private and public spheres. A study noted that owing to the fear of violence at the hands of family, property right

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[11] Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Cf15%ontext*, UN Doc. A/HRC/34/51, (2017), paras. 17(a) and 17(b).

[12] UNAIDS Launches Unbox Me to Advocate for the Rights of Transgender Children, *available at*: https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2022/march/20220330_unbox-me (last visited on Aug 28, 2025).

[13] UN News Global Perspective Human Stories, "Pride Month: UN's Transgender Rights Campaign goes Global" June 23, 2023 *available at*: https://news.un.org/en/story/2023/06/1138277 (last visited on June 11, 2025).

[14] Nikita Begum Talukdar, "Workplace Inclusivity of Transgenders: A Critical Analysis of the Employment Laws of India" 8 Rostrum's Law Review (2024).

[15] International Commission of Jurists, "Living with Dignity Sexual Orientation and Gender Identity based Human Rights Violations in Housing, Work, and Public Spaces in India" (2019).

[16] Shanna Kattari and Stephanie Begun, "Survival sex. On the Margins of Marginalized: Transgender Homelessness and Survival Sex" 32(1) Journal of Women and Social Work 92 (2017).

[17] Revisioning Shelter Homes in Meghalya *available at*: https://northeastnetwork.org/wp-content/uploads/2021/07/Revisioning-Shelter-Homes-in-Meghalaya-2019.pdf (last visited on Aug 28, 2025).

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owners, or landlords, a barrier has been created to prevent the redressal of their rights.[18] In a study, participants reported numerous and repeated experiences of physical and psychological violence, including so-called "corrective therapies,"[19] and involuntary registration to mental health institutions[20]. Securing a private and safe space limits the probability of violence being at the hands of a family member. In the Indian context, LGBTQ individuals frequently face threats of violence and harassment from landlords and property owners, which significantly undermines their ability to access and fully enjoy adequate housing.[21]

In the absence of provisions, the transgender community frequently faces widespread discrimination while seeking rented accommodation. Rent owners often refuse to let houses to LGBTQ individuals based on their actual or perceived sexual orientation or gender identity. Such discriminatory practices contribute to the segregation of LGBTQ persons in housing.[22] As a result, LGBTQ individuals are denied fundamental elements of the right to adequate housing, including proximity to workplaces, healthcare, and essential services; safe and liveable housing conditions; and access to infrastructure and facilities necessary to ensure health, security and comfort.

Lastly, an equal impact is visible upon the mental health of transgender persons as well, and the effect of exclusion cannot be underestimated: nearly two-thirds of LGBT youth experiencing homelessness struggle with mental health challenges, and research indicates they are more likely to report depression, bipolar disorder, and suicidal ideation or attempts.[23] They also face reduced access to healthcare and heightened vulnerability to alcohol and drug abuse.[24]

Therefore, an analysis of the vulnerabilities mentioned above resulting from the inability to secure housing for the transgender community highlights that the availability and accessibility of shelter homes are essential aspects of both the right to housing and the right to

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18 *Supra* note 14.

19 R. Jain, "Parents use 'corrective rape' to 'straight'en gays" *Times of India*, June 1, 2015, *available at* https://timesofindia.indiatimes.com/life-style/relationships/parenting/Parents-use-corrective-rapeto-straighten-gays/articleshow/47489949.cms (last visited on Aug 24. 2025).

20 *Supra* note 14 at 38.

21 *Id* at 49.

22 *Id* at 8.

23 Alex Abramovich, Nelson Pang, *et.al.,* "Investigating the Mental Health Outcomes among LGBTQ+ Youth Experiencing Homelessness in York Region, Ontario" 155 *Children and Youth Services Review* 107282 (2023).

24 *Ibid.*

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live with dignity. This is particularly crucial for LGBTQ individuals, who face a greater risk of violence and harassment in public spaces.[25]

Another important factor to be kept in mind is that there are provisions for housing for transgender persons in the Pradhan Mantri Awas Yojana Urban,[26] a scheme or other similar regional mechanisms. However, the direct focus of such schemes is not rehabilitation, integration or empowerment. Thus, little is strived to streamline the issues related to homelessness of transgender populations.

Also, while there are specific state policies which are striving to work for the rights of transgender populations, they are limited to the specific region and do not have a uniform and universal application across the country. Furthermore, multiple private bodies and NGOs also shelter homes on an individual basis, but as they are not part of public policies, it isn't easy to monitor their efficiency.

Again, although regional policies are significant, the primary focus of this paper is on union policies, which are uniformly applicable and thus even the less willing states will have to implement them. To understand the nuances of obligations related to the State, the following section presents a brief overview of international laws and policymaking followed by domestic approach.

I. Regulatory Framework

International Obligations

To understand the institutional and organisational framework related to shelter homes, it is crucial to evaluate the right to shelter as it has evolved within the international human rights framework, as well as in domestic legal systems. The oldest mention of the right to shelter dates back to 1948, when the Universal Declaration of Human Rights, in art.25[27], mentioned the right to housing in connection with the right to an adequate standard of living. It also equated and intersected these rights with, among other things, health and community services, leaving open the scope for other 'lack of livelihood' issues that are beyond a person's control. Furthermore, in 1996, International Convention on Economic, Social and Cultural Rights[28] reaffirmed the right to housing by adding it alongside the State's obligation to ensure

[25] *Supra* note 14 at 60.

[26] Pradhan Mantri Awas Yojana Urban Housing for All Scheme Guidelines *available at*: http://pmjandhanyojana.co.in/awas-yojana-housing-for-all-2022-scheme/ (last visited on Aug 21, 2025).

[27] Universal Declaration of Human Rights, 1948, art. 25.

[28] International Convention on Economic, Social and Cultural Rights, 1967.

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the continuous improvement of living conditions, and in doing so, followed the principle of minimum core obligation and non-retrogression. Additionally, CRC[29]and ICERD[30] also provide for the right to housing. CEDAW, mentions right to housing in the non-discriminatory clauses.[31] Although, International Convention on Civil and Political Rights does not directly mentions the right to housing or shelter but it makes noteworthy observation about the privacy of home and the that should not be intruded upon by unlawful attacks on one's honour and reputation.[32] This acknowledges the essential component of right to shelter wherein in context of marginalised gender it can be interpreted to mean the obligation upon the state to safeguard the dignity of the person and space. Further, adequate housing has been read as the right to live with peace security and dignity.[33]

It must be understood that the gender neutral terms that the mentioned provisions are clothed in imply that such rights are extended irrespective of any gender preferences. As it reflects clearly in the art.26[34] of the ICCPR which prohibits discrimination and extends equal protection to all. One of the grounds among which discrimination is forbidden is sex, which has been progressively interpreted as extending to transgender folx. Furthermore, art. 9[35] protects the right to liberty which includes LGBTQIA+ individuals. art. 12[36] of the International Convention on Economic, Social and Cultural Rights is also interpreted to recognise transgender people as a vulnerable group and thus requires extra measures to ensure the right to health.

Additionally, the Yogyakarta Principles of 2007 and 2017 have also helped in defining a series of rights and issues related to adequate housing. It becomes clear further from the fact that the UN Special Rapporteur on adequate housing explained the concerned right as: "The right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity."[37] The Istanbul Declaration and the Habitat

[29] Convention on the Rights of the Child, 1989, art. 27(3).
[30] International Convention on the Elimination of All Forms of Racial Discrimination, 1965, art. 5(e)(iii).
[31] Convention on the Elimination of All Forms of Discrimination against Women, 1979, art. 14(2)(h).
[32] International Covenant on Civil and Political Rights, 1966, arts. 12(1), 17(1).
[33] *Supra* note 14.
[34] *Supra* note 32, art. 26.
[35] *Supra* note 32, art. 9.
[36] *Supra* note 28, art. 12.
[37] UNHRC, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this context by Leilani Farha', UN Doc. A/HRC/34/51/2017.

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Agenda also emphasise that state governments must strive to ensure equal access to land for all, including women[38].

With the passage of time, the scope of the non-discriminatory provision has been expanded to include sexual and gender minorities as well. The progress is evident, starting from Human Rights Council Resolution 17/19 (2011), the UN has passed a series of resolutions. In 2023, the Office released a Technical Note aimed at States and relevant stakeholders, outlining UN recommendations concerning the rights of intersex individuals and highlighting effective implementation practices. Subsequently, in 2024, the Human Rights Council adopted a resolution focused on addressing discrimination, violence, and harmful practices targeting intersex people.[39] The resolution calls on the High Commissioner to submit a report and convene a panel discussion during the Council's sixtieth session. This discussion will explore discriminatory laws, policies, violent acts, and harmful practices affecting individuals with innate variations in sex characteristics across different regions. It will also examine underlying causes and highlight effective practices, particularly in promoting their right to the highest attainable standard of physical and mental health. From the discussion that has ensued so far about the indivisibility of human rights, it is easy to deduce that with wider acceptance of LGBTQIA+ rights, such as the right to protection against violence or the right to mental health, would naturally apply to, as was projected earlier, to the rights of housing or shelter as well.

Additionally, art.2(2)[40] read with art.11(1)[41] of the International Covenant on Economic, Social and Cultural Rights, as interpreted by the Committee on Economic, Social and Cultural Rights in General Comment No. 20 (2009), para 14, underscores the obligation of States to prevent discrimination in the enjoyment of economic, social, and cultural rights. The Committee notes that discriminatory practices are commonly observed across various areas of social life, including within households, workplaces, and broader community structures. In particular, the private housing sector often becomes a site of exclusion, where private landlords, loan providers, and even public housing authorities may engage in practices—either overtly or subtly—that restrict access to housing or financial services based

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38 *Id* at 50.

39 "Intersex People OHCHR and the Human Rights of LGBTI People" *available at:* https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people#:~:text=And%20in%202023%2C%20the%20Office,harmful%20practices%20against%20intersex%20people.

40 *Supra* note 28, arts.2(2),11(1).

41 *Id.,* art.11.

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on factors such as ethnicity, marital status, disability, or sexual orientation. Similarly, discrimination can manifest within families, for example, when girl children are denied educational opportunities. In light of such pervasive inequalities, States parties have a binding obligation to implement preventive and corrective measures, including enacting appropriate legislation, to ensure that both public and private actors uphold the principle of non-discrimination in all spheres of social and economic life.

Furthermore, the evolution and setting of Agenda 2030 also becomes relevant especially since it follows the principle of Leaving No One Behind and is ever inclusive in approach. So, Sustainable Development Goals in relation to eliminating multidimensional poverty (goal 1) , making education inclusive and accessible (goal 4) , gender equality (goal 5) , inclusive economic growth (goal 8) , reducing inequality and encouraging political participation (goal 10) or providing access to safe housing (goal 11) applies evenly to the trans persons when it takes an all-inclusive language. [42]

Indian Regulatory Framework

Since the passing of the punitive Criminal Tribes Act of 1871[43], transgender community across different regions in the country faced protracted criminalisation and kept at the margin of development. The denotification of tribes post-Independence did little to ensure the upliftment or integration of community members into the mainstream. On the contrary, the continued enforcement of punitive laws such as Section 377[44] of the Indian Penal Code and the Beggary Acts contributed to the persistent violation of fundamental rights guaranteed by the Constitution, thereby exacerbating the marginalisation of transgender individuals. However, this was to change in the years to follow. To assess that it is pertinent that first constitutional provisions are examined.

Constitutional Provisions

While, initially constitution did not provide specific relief to trangender population in terms od shelter, its provisions can be and have been expanded to accord the rights due to the community. All the provisions in Part III and Part IVof the constitution related to fundamental rights and directive principles apply squarely on them. Furthermore, art. 21[45] of the Indian

[42] United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res. 70/1, UN Doc. A/RES/70/1, (Sep. 25, 2015).
[43] Criminal Tribes Act of 1871 is Act No. 17 of 1871.
[44] The Indian Penal Code, 1860 Act No. 45 of 1860.
[45] The Constitution of India, art 21.

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Constitution recognises the right to life, not very dissimilar from 'an adequate standard of living' mentioned earlier. This also encompasses the right to shelter, which again has to be read in conjunction with the right to freedom provisions given under art. 19[46], right to equality in art. 14[47], non-discrimination in art. 15.[48] These guarrantees work as the foundation upon which policy, law and judicial decisions have emerged and been bolstered. In the forthcoming section, a dissection of law, judicial decisions and policies have been explained.

Legal Provisions

The first decades of evolution of rights of transgender population in India has been a amalgamation of judicial cases and statues leading to foundational changes in the status of transgender individuals, when in 1994 voting rights were officially extended to the transgender community. During the same year, AIDS Bhedbhav Virodhi Andolan filed a petition questionaing the constitutional validity of Section 377[49] of the Indian Penal Code, which criminalised and penalised homosexuality or associated gender expressions with it, but in vain. After the Suresh Kumar Koushal Case[50] reversed the Delhi High Court's ruling in the Naz Foundation Case[51], an enduring ray of hope came for the transgender community with the passing of the NALSA v. Union of India[52] in 2014, which recognised the rights of transgender persons and the subsequent Navtej Singh Johar v. Union of India[53] using right to privacy as the grounds to repeal Victorian baggage. This also led to the passage of the Transgender Act 2019[54] and the Rules 2020 which, among other things, also defined transgender persons as trans men, trans women, persons with intersex variations, gender-queer persons and persons with socio-cultural identities such as kinnar, hijra, aravani and jogta[55]. In other words, transgender was held to be the gender which is different from cis-gender and is recognizable as the gender status. Furthermore, the judgments mentioned above, along with the act, led to a wave of reforms in the socio-legal and socio-political spheres, resulting in a series of decisions by different high courts and public policies aimed at inclusion and empowerment.

[46] *Id.* art. 19.
[47] *Id.*, art. 16.
[48] *Id.*, art. 15.
[49] *Supra* note 43, s. 377.
[50] *Suresh Kumar Koushal & Anr v. Naz Foundation & Ors* AIR 2014 SC 563.
[51] *Naz Foundation v. Government Of Nct Of Delhi And Others* 2010 CRI. L. J. 94.
[52] *Supra* note 1.
[53] AIR 2018 SC (CRI) 1169.
[54] The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2000).
[55] *Id.* s. 2(k).

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Judicial Overview

Although the right to shelter has always been an inalienable human right, the Bombay High Court, in the Olga Tellis case[56], for the first time expressly stated that the payment dwellers have a right to dwell on the pavements or in slums and such a right is part and parcel of the right to life enshrined under art.21[57]. In Shantisar Builders v. Narayan Khimalal Totame[58] , it was held that food, clothing, and shelter are the most basic needs of a person. Furthermore, it was held that a suitable environment and clean accommodation must be met when considering the essentials mentioned above. Again, in State of Karnataka v. Narasimhamurthy[59], the Court recognised the right to shelter as a fundamental right and implicit in the art.19(1). Further, in P. G. Gupta v. State of Gujarat[60] , the right to shelter was read in conjunction with art. 19(1)(e) and art. 21 of the Indian Constitution and the guaranteed right to residence and settlement.

Finally, in PUCL v. Union of India and Others[61], it was emphasised that shelter homes for the homeless should remain operational regularly, and priority accommodation should be given to disadvantaged groups. However, the Court does not exhaustively describe what nexus is required to be included in the said group, instead leaving it to cater to the progressive and dynamic needs of society.

As it is clear from the abovementioned cases that although the Court has acknowledged the right to shelter of the marginalised group in general, there has not been an instance where a specific mention was made to the transgender persons. However, observations made in NALSA v. Union of India[62] leave no room for doubt that, in terms of even policy and planning, transgender people can be said to have been affirmatively included under marginalised groups. Thus, it prompts that observations made by the judiciary in terms of right to shelter as an entitlement and priority of the marginalised groups extend fairly to transgender population as well.

Evolution of Policies for Shelter Homes

[56] *Olga Tellis & Ors v. Bombay Municipal Corporation & Ors. Etc* 1986 AIR 180.
[57] *Supra* note 44, art.21.
[58] AIR 1990 SC 630.
[59] *State Of Karnataka & Ors v. Narasimhamurthy & Ors* 1996 AIR 90.
[60] *Shri PG Gupta v. State of Gujrat* 1995 SCC, SUPL. (2) 182 JT 1995 (2).
[61] AIR 1997 SC 568.
[62] *Supra* note 1.

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Shelter homes for adults, based on gender, were first used in India in the context of women, wherein they, were used as the centres of transient but emergency crisis. The aim was to provide rescue homes for women engaged in sex work primarily. The role of the State was paternalistic. However, with the advent of the feminist revolution in the 1980s, space was also created to shift from welfare to empowerment and development, focusing heavily on a rights-based, entitlement-focused approach within the developmental landscape.

The first such initiative came in 1969, as the short-stay homes was introduced by the Department of Social Welfare were intended to offer temporary shelter, care, and rehabilitative support to women and girls displaced by family breakdown, crime, violence, psychological distress, social exclusion, or coercion into prostitution. This was followed by another scheme in 2001: the Swadhar-A Scheme for Women in Difficult Circumstances, under the Ministry of Women and Child Development.. The objective of the scheme was to, among other things, provide counselling, legal aid, vocational training, and other support. The object shifted somewhat towards empowerment. In 2015, the Ministry of Women and Child Development ultimately underlaunched provisions for Swadhar Greh. The aim was to empower the women in unfortunate circumstances (such as fleeing from domestic violence) along with girls and women arising out of marital conflicts, rapid urbanisation and industrialisation, migration, etc, by extending institutional support which promotes rehabilitative measures. The scheme mandates that Swadhar Grehs should provide residential facilities in a dignified manner. It initiated models where civil organisations and NGOs, etc, are engaged to provide a nurturing environment.

In 2007, the Ujjwala scheme was introduced by the Minitsry of Women and Child Development to comprehensively provide for the shelter homes for the rescue, rehabilitation and reinitigaration of the sex trafficking survivor. Additionally, it also provides for vocational training for skill development and empowerment. Presently, both Swadhar Grehs and Ujwala schemes have been integrated under Shakti Sadan, serving the same purpose. Another initiative launched in 2015, known as One Stop Centre, provides facilities such as a 4-5 day stay, medical assistance, counselling, and legal aid to provide all in one place support to women affected by violence.

Since the recognition of rights of transgender persons in 2014 by the apex court, in 2017, a report by the United Nations Development Programme in collaboration with India's National AIDS Control Organisation highlighted the centrality of housing security as a key concern for transgender individuals, identifying it as the top priority among study participants.

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Despite this, at the time, there were very few targeted programs—either at the central or State levels—that addressed this urgent need. It was only three years later, in response to this persistent gap, that the Government of India introduced a dedicated scheme aimed at not only addressing the housing needs of transgender persons but also at fostering a sustainable and empowering environment to support their social, economic, and psychological well-being.

II. SMILE with a Pinch of Salt

The Fifteenth Five-Year Plan (2019–2024) emphasises inclusiveness as essential to socio-economic development, highlighting group equality as a path forward. It advocates for the empowerment of the transgender community through coordinated efforts by Ministries to improve their access to education, healthcare, skill development, employment, financial support and also–housing. Further, s.8 of the 2019 Act states that the State should adopt all measures to rescue, protect and rehabilitate the transgender community.[63] Recognising such obligations, the Ministry launched the SMILE scheme—Support for Marginalised Individuals for Livelihood and Enterprise. Under a sub-scheme Garima Greh, as part of its pilot phase, 12 shelter homes were established across nine states, including Delhi, West Bengal, Maharashtra, Gujarat, Chhattisgarh, Tamil Nadu, Odisha, Bihar, and Rajasthan.[64] Manipur was also included in this list, but owing to policy constraints following the pandemic, the state government had returned the funds.[65]

Garima Greh is designed to provide transgender individuals with necessities, including shelter, food, medical care, and recreational services, while also supporting their personal and professional development through capacity-building initiatives. It seeks to ensure the availability of proper lodging, boarding, clothing, medical and counselling services, and recreational opportunities. The scheme also focuses on maintaining consistency across shelter homes in terms of infrastructure, personnel, and services. In addition, it aims to protect the rights of transgender persons and safeguard them against violence and discrimination by engaging legal aid as well. By adopting uniform rules and ensuring a welcoming environment, Garima Greh aims to create a safe and inclusive space for all residents. Empowerment through skill development and upskilling remains a central goal of the program.

[63] *Supra* note 53, s.8.
[64] Garima Greh for Transgenders, Press Information Bureau *available at*: https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=1776457 (last visited on Aug. 21, 2025)
[65] *Ibid.*

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The Garima Grehs are a collaboration between the State and the central government to assist the transgender community in the empowerment measures and also ensure basic amenities are given to them for leading a dignified life with their accepted gender identity.

Since, its launch presently, Garima Grehs have been established across various states and Union Territories in India. Maharashtra has the highest number with three shelter homes, followed by West Bengal with 2. The remaining states and UTs—Delhi, Odisha, Tamil Nadu, Bihar, Chhattisgarh, Gujarat, Rajasthan, Andhra Pradesh, Assam, Karnataka, Punjab, Madhya Pradesh, and Uttar Pradesh—each have 1 Garima Greh.

To be admitted into a Garima Greh, an individual must first register on the National Portal for Transgenders and possess a valid Transgender Identity Card. The Primary Monitoring Committee oversees this registration process. Beyond these initial requirements, no additional formal legal documentation is needed, making the admission process relatively accessible. However, several significant challenges remain, which will be discussed later.

The official scheme guidelines outline a comprehensive budget and strategic framework designed not merely to provide shelter but to offer holistic support and care for transgender individuals in distress. The financial provisions include both one-time and recurring grants to ensure the effective functioning of each shelter. A one-time grant of ₹502,500 (approximately $6,019) is allocated to each selected Non-Governmental Organisation (NGO) to procure essential items, including furniture, beds, and kitchenware, for a 25-bed facility. In addition, an annual recurring grant of ₹3,144,000 is provided to cover operational expenses, including rent, utilities, and staff salaries.

Funds are disbursed in phases: 40% initially, another 40% after six months, and the remaining 20% at the end of the financial year. The administration and monitoring of the shelters are entrusted to a five-member Project Management Committee, comprising two representatives from the implementing NGOs or Community-Based Organisations and three independent members, such as the District Magistrate of the area where the shelter is located.

Every year, NGOs working prominently for queer rights are invited, through an 'Expression of Interest', to apply to run Garima Greh-Shelter home for transgender persons under support for marginalised individuals and livelihood enterprise.

A study conducted at one of the Garima Greh shelter homes in Rajasthan highlighted the scheme's significant role in safeguarding and promoting the rights of transgender

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individuals. All participants (100%)[66] reported feeling comfortable with the facilities provided. Currently, 40%[67] of respondents are earning a livelihood, while 80% expressed the intention to seek employment after completing their stay. Notably, 20% of the residents cited lack of shelter and necessities as the primary reason for residing in the shelter. Additionally, 95%[68] of the respondents found the skill development training offered at the home to be beneficial. However, the same study drew certain damaging revelations, which will be discussed in a later section. Further, in a recent judgment, the Madras High Court, while acknowledging the positive model of these Shelter Homes, directed the Union Government to extend the Garima Greh scheme to encompass the entire LGBTQIA+ community, rather than limiting it solely to transgender persons.[69] This indicates that transgender homes are still falling behind in the area of queer inclusivity. Such issues and others related to formulation and implementation will be examined in the subsequent section.

III. Dark Clouds over the Rainbow: A Critical Analysis of the Scheme

While the past decade witnessed a surge in policy and legal reforms, along with increased judicial oversight, the progress concerning the LGBTQIA+ community has been uneven—even within the community itself. Moreover, as Mendoza asserts, the rights of transgender individuals have been further eroded by the impacts of the recent pandemic.[70]

A 2017 report by the United Nations Development Programme and India's National AIDS Control Organisation emphasised that housing security was identified as the top priority by transgender individuals who participated in the study. However, despite this clearly articulated need, there were very few programs at either the central or state levels at that time addressing this concern.[71] This comes against the backdrop of findings that indicate sexual and

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[66] Swati Sharda and Marisport Anaikkutti, 'Homelessness, Poverty and Transgender Persons: Qualitative Evidence from the Garima Greh of Rajasthan under the SMILE Scheme, India.' 16 Krytka Prawa 1080 (2023).

[67] *Ibid.*

[68] *Ibid.*

[69] Sebin James, "Transgenders Only a Fraction of LGBTQIA+": Madras HC Directs Extension of Shelter Home Scheme to All, Requests Media to Follow Draft Glossary for the Community" *Live Law,* Dec. 27, 2021 *available at*: https://www.livelaw.in/top-stories/madras-high-court-garima-greh-scheme-for-entire-lgbtqia-transgenders-media-press-draft-glossary-for-addressing-community-188446 (last visited on Aug 23, 2025).

[70] Clarence Mendoza, "Evicted from Homes, Transgender Community Fights for Survival amid Coronavirus Lockdown" *CNBC TV 18*, April 20, 2020 *available at*: https://www.cnbctv18.com/healthcare/evicted-from-homes-transgender-community-fight-for-survival-amid-coronavirus-lockdown-5723661.htm (last visited on Aug. 29, 2025)

[71] UNDP, *Uptake of Social Protection by Transgenders*, (UNDP India, 13 February 2017). Jutta Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law", in Ulrich Beyerlin, Peter-Tobias Stoll, et.al. (eds.), Ensuring Compliance with Multilateral Environmental Agreements: A dialogue between practitioners and academia 1-24 (Martinus Nijhoff Publishers, 2006).

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gender minorities are two to four times more susceptible to violence due to exclusion from housing access, economic marginalisation, and heightened physical and behavioural health vulnerabilities.[72]

Additionally, other visible intersections within the transgender community face heightened risks of exploitation. For instance, transgender persons with disabilities—and among them, acid attack survivors—encounter even greater challenges in securing safe and adequate accommodation.

The Garima Greh subscheme was initiated to offer a ray of hope to the transgender community, with the government committing Rs 365 crore for a period of five years. However, the allocated funds, intended to be released in a 40-40-20 split, have not been fully distributed, as the final 20% instalment remains unpaid.[73] To complicate things further, the Garima Greh guidelines contain significant gaps, including the absence of provisions for essential amenities such as electricity. It is further worsened by the fact that there is a one-year cap on the stay of residents, which seems awfully short, actually, to empower them sustainably.

Though limited in number, Garima Greh has, since its inception, provided an alternative and affirming space for transgender individuals to live, grow, and thrive with dignity. However, there remains a significant lack of transparency regarding its accessibility, implementation, and the lived experiences of its residents. Information about the scheme seldom enters the public domain except through independent research and media reports. This opacity raises critical concerns about the efficacy and accountability of measures undertaken through public funding.

Representatives from the 12 Garima Greh shelters informed CNN that they are barely operational due to significant delays in receiving the funds promised by the government, amounting to millions of rupees (tens of thousands of dollars). As of the 2021–2022 financial year, these shelters had received less than 20% of their initial funding allocation. Although the government denied, in a parliamentary response, that any Garima Greh shelters had ceased operations, reports suggest that, due to the non-disbursement of funds, the NGO Gokhale Road Bandhan was allegedly forced to shut down its shelter in Kolkata.[74]

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[72] M.V.L. Badgett, S.K. Choi, *et.al.*, "LGBT Poverty in the United States" in J.A. Reich (ed.), The State of Families 385–387 (Routledge Books, 2021).

[73] Riddhi Dastidar, "Backed by Modi's government, NGOs Set Up Shelters for Trans People in India. Then, the NGOs say, the Government Left Them Hanging for Funds" *CNN available* at: https://edition.cnn.com/interactive/asequals/trans-shelters-india-government-funding-as-equals-intl-cmd/#:~:text=Inside%20a%20trans%20shelter%20in,to%20send%20but%20 (last visited on Aug 28, 2025)

[74] *Ibid*.

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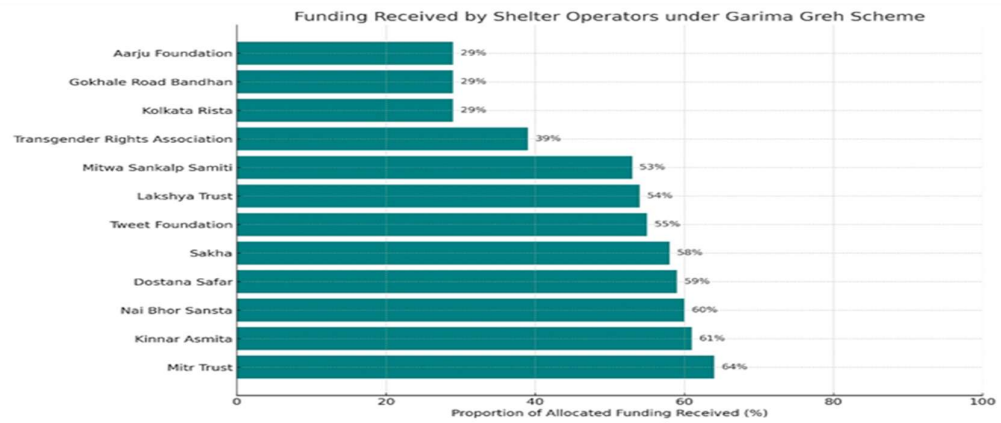
Furthermore, the current research indicates that shelter home facilities are experiencing significant delays in the disbursement of funds, to the point that some of the Garima Grehs are reducing the number of occupants as much as 20%.[75]

The graph below represents the amount of funding received by each NGO[76] so far.



As is visible, there have been serious lapses in the disbursement of funds to the point that the Aarju Foundation has received only 29% of the funding so far. Further, despite its initial irregularity in the disbursement of funds, the government has been releasing 'expression of interest' demanding applications for the shelter homes. This prompts a research inquiry into the status of Garima Grehs.

In response to a legislative query, it was revealed that a total of 654 transgender individuals have benefited from the Garima Greh projects.[77] The government also stated its intention to establish additional Garima Grehs following the guidelines, emphasising that this will be an ongoing effort. Therefore, with the expected proliferation, it is more pertinent than ever that information regarding their efficacy should be accessible for organisational and academic research purposes.

Garima Greh with all the scope for empowerment offers only a limited stay of one year which does not seem reasonable enough as upskilling or reintegration can take time. In a study,

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[75] *Supra* note 66.

[76] Bhaswati Sengupta, "Garima Grehs Crippling: Government Stops Funding for Trans Shelter Homes" *The Probe* July 28, 2023 *available at*: https://theprobe.in/stories/garima-grehs-crippling-government-stops-funding-for-trans-shelter-homes/ (last visited on Aug 12, 2025)

[77] Garima Greh Scheme For Benefit Of Transgender Persons *available at*: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1896997#:~:text=Department%20has%20setup%2012%20Garima,Garima%20Grehs%20as%20per%20guidelines.

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it has also been noted that the scheme lacks regular government oversight. In addition to inconsistencies in funding, there is a lack of systematic reviews or stock-taking measures. This negligence puts the lives of Garima Greh residents at risk, particularly those undergoing hormonal therapy, who are more vulnerable to medical neglect.[78]

Additionally, it has been found in a report that, even inside Garima Greh, there have been instances of sexual violence, police brutality or discrimination. In some cases, the parents of transgender persons have been allowed to enter the premises and forcibly take their child away.[79]

Upon their visit, the National Human Rights Commission has also observed that many Garima Greh shelters lack adequate resources to facilitate the effective rehabilitation of transgender persons.[80] There have been persistent delays in the disbursement of funds, and even when released, the amounts are often insufficient—particularly for shelters operating in large metropolitan cities. In the absence of timely and adequate financial support, community-based organisations are usually left to manage expenses independently.

Lastly, for stock-taking mesures earlier, a WhatsApp group was also formed, however, currently there has been a lack of responsiveness in the designated WhatsApp group created for coordination, as well as there has been an abrupt discontinuation of routine Zoom meetings previously held between state authorities and the NGOs involved in implementing the scheme.[81]

IV. Conclusion: Challenges and Responses

In its 31st session, the United Nations Human Rights Council emphasised that "discrimination is both a cause and a consequence of homelessness."[82] The report identified gender as a key axis along which rights are reinforced or denied, further noting that homelessness compounds other forms of vulnerability and discrimination. Transgender individuals are disproportionately represented among the homeless population and face heightened risks of violence. In the Indian context, transgender persons are often rejected from

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78 *Supra* note 76.

79 Prarthana Chaudhary, "One Step Forward, Two Steps Back: Temporary Housing For Trans People and the Garima Greh Crisis" *Gaysi* Jun 4, 2024 *available at*: https://gaysifamily.com/lifestyle/one-step-forward-two-steps-back-temporary-housing-for-trans-people-and-the-garima-greh-crisis/ (last visited on Aug. 26, 2025).

80 *Supra* note 6.

81 *Supra* note 76.

82 UN Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.* A/HRC/21/54 (Dec. 30, 2015).

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admission into gender-neutral shelter homes, which diminishes their scope of survival. In response, the Special Rapporteur on Adequate Housing recommended collecting gender-disaggregated data and promoting allied research to understand better and address these issues. As a member of the Human Rights Council, India bears a heightened responsibility to implement the observations and recommendations made by the Special Rapporteur on the situation of human rights in the country. The National Human Rights Commission has also reminded the government of its obligation to ensure the timely disbursement of funds to initiatives like Garima Greh.[83]

Further, there has been a call for input by the OHCHR, prompting research interventions related to the situation of the LGBTQIA+ community when it comes to protection against violence and discrimination based on sexual orientation and gender identity in relation to forced displacement[84]. As is clear by now, reports on discrimination against community members would encompass discrimination related to shelter, as well as the issues of violence and discrimination connected with such shelters. However, there has been a lack of enthusiasm, if not absence, in the organisational and academic research in this sphere.

Nonetheless, the progress towards securing a nurturing environment which reinforces the right to shelter of the transgender community in India has been steady, even if slow. Garima Greh, despite the multiple challenges, has been a 'safe and secure' option for shelter for many, as evident from the satisfactory remarks of 100% of the respondents.[85] It has also been shown above that the same study and others have pointed out glaring shortcomings that have the potential to undermine what these homes represent and protect. Therefore, a structure of resilience and sensitivity needs to be established and sustained, which ensures regular funding allocation, stock-taking, revised policy planning, and a determination that translates into action.

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[83] "NHRC issues an Advisory to ensure welfare of Transgender Persons", *Press Release National Human Rights Commission*, Sep. 26, 2023 *available at:*https://nhrc.nic.in/media/press-release/nhrc-issues-advisory-ensure-welfare-transgender-persons (last visited on Aug 12, 2025).

[84] UN Human Rights Council, Call for Input: Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity in relation to Forced Displacement by Independent Expert on Sexual Orientation and Gender Identity UN General Assembly, Report of the Economic and Social Council for 2005, UN GAOR, UN Doc A/60/3/Rev.1 (July 2, 2025).

[85] *Supra* note 65.

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COPYRIGHT PROTECTION OF FAN FICTIONS IN INDIA: A STUDY

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ABSTRACT

Fanfiction has transpired itself into a popular form of creative expression, giving authors an arena to redefine and reinvent the fictional characters and narrations in their own unique style. It gives them a platform to express their distinctive ideas and thoughts thereby promoting creativity and innovation, aligning with the objectives of the Copyright legislation of various jurisdictions. Regardless of the transformative nature of fanfiction, it is often considered to violate the economic and moral rights of the creators because of its employment of the pre-existing copyright protected characters. The paper attempts to examine whether fanfiction is entitled to copyright protection or is it viewed as a copy of copyrighted work. It firstly looks into the legal protection offered to fanfiction in different jurisdictions, particularly the UK and US and then examines the legal standing of fanfiction under the Indian Copyright Act 1957. It contends that while fanfiction does offer creative freedom and has a transformative utility, its legal recognition specifically depends upon its non-commercial usage and its application under the narrow contours of the fair dealings' exceptions given under the Copyright Act. It thereby highlights the need of a clear legal structure to balance the interest of copyright holders and the promotion of the advancing framework of transformative innovativeness.

I. Introduction

Certain fictional characters have become very popular in recent times. Fans borrow characters and elements from a previous work and create a 'new story.' This new story is unique and creative in itself. In many cases it is a homage of a fan.[1]Fan fiction usually entails fitting familiar characters in unconventional scenarios, or present them with different obstacles that was not previously used. Fan fiction allows 'creative experimentation' and also allows 'expression of distinct interpretations of fans.'

Copyright laws grant exclusive rights to the owners of copyright, but the 'ownership lines are blurred by the transformative nature of fanfiction.' Thus, fanfiction has many copyright considerations.

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[1] Kiran Mary George, "The Murky World of Fan Fiction and Copyright", *available at:* https://spicyip.com/2015/01/14526.html. (last visited on November 30, 2023).

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Different jurisdictions in the world treat fan fiction differently; some countries have given protection to fan fiction while others have not. Thus, it becomes important to find out if fan fiction which is a derivative work can be given an independent copyright. The paper attempts to look into the copyrightability of fan fiction. The important question is (i) if fan fiction could be given copyright protection or (ii) it is considered to be a copy of copyright work. The paper focuses on the Indian copyright position so far as fan fiction is concerned.

II. Legal Issues Surrounding Fan Fiction

One of the chief concerns surrounding fan fiction is the question of whether characters can be copyrighted and if yes, then aren't the fan fictions copyright infringed works? Or can we consider fan fictions to be transformative work capable of copyright protection. A work is considered "transformative if it adds something new to the original, with a further purpose or different character, and does not merely substitute for the original work."[2] It essentially means that "the new work has transformed the content in such a way that it imparts a new meaning or message, differing from the original. Both transformative and derivative works involve changes to the original copyrighted work, but derivative works mostly expand upon the original work in such a way that it is not transformative necessarily. To cite an example, a sequel to a novel will be considered to be a derivative work, however, it might not be transformative until and unless it imparts a new message or a new meaning which is different from the original work."[3] The other legal issue is if we can consider fan fictions under fair use/ fair dealing provisions.

III. Protection of Fan Fiction in other jurisdictions

Position in the United Kingdom

In UK, the CDPA 1988 is the legislation dealing with copyright. The question whether fan fiction will be considered infringement or non-infringement has to be judged from the perspective of whether it comes within the 'fair dealing' provisions of UK or whether transformative works are given independent protection in UK.

Coming first to the 'fair dealing' provisions, fair dealing as per the UK legislation includes an enumerated list of what constitutes exception to copyright or fair dealing. Fair dealing as per the UK legislation includes acts of use of copyright works for "making of

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2 "Copyright Transformative vs Derivative", *available at:* https://bytescare.com/blog/copyright-transformative-vs-derivative ((last visited on November 30, 2023).

3 Jupi Gogoi, "'Fair Use Controversy' Revisited: Can Copyright Exist in Works Relating to Mathematics and Science?", JILI (2025).

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personel copies for private use, research and private study, making temporary copies for transient or incidental uses, making of copies or data analysis for non-commercial research, criticism, review or reporting of live events, caricature, parody or pastiche, various uses of the copyrighted work in educational institutions, library exceptions in certain cases, exceptions in context to artistic works, use by authorized or statutory bodies, certain incidental uses, broadcasting related exceptions, exceptions for disabled persons etc."[4]Thus, if the fan fiction comes within the category of parody or pastiche, it will come under the fair dealing provision.

The UK legislation does not explicitly include transformative work within its provisions. However, "UK copyright law includes a 'substantial part' doctrine, which on some views allows transformative work. UK copyright law restricts acts of copying to the work as a whole or any substantial part of it. Where the subsequent work does not retain a substantial part of the prior work, the secondary work is protected: as long as what has been taken from a prior work has been changed enough so that no 'substantial part of the plaintiff's work survives in the defendant's work', a defence will stand."[5]

Moreover, in addition to the lists provided under the Fair Dealing provisions, the UK courts have applied the Fair Use principle to ascertain if certain acts can be exempted from infringement of copyright. Thus, UK "courts are said to examine the 'object and purpose' of the use of a work, thus protecting the fair use of a copyright work."[6] Hence, with the fair use concept being brought in, transformative work may be considered as non-infringement. Thus, if a fan fiction falls within the understanding of transformative work, then it would not be considered infringement.

USA Approach to Fan Fictions

In USA too, fan fiction has to be looked through the lens of originality of transformative work (thus being an independent copyright work) or fair use provisions. Coming to fair use in USA, "originally Fair Use was a common law doctrine but it got a statutory recognition when the U.S. Congress passed the Copyright Act of 1976 and included it in 17 U.S.C § 107."[7] Under section 107 of the US Copyright Act, "in determining whether the use of a prior work constitutes fair use under copyright, it asks courts to look to four factors: 1) the character of the

4 UK Copyright, Designs and Patents Act 1988, Chapter III.

5 Kim Treiger-Bar-Am, "Copyright, Creativity, and Transformative Use", *available at:* https://lawexplores.com/copyright-creativity-and-transformative-use/ (last available at January 31, 2024).

6 *Ibid.*

7 *Supra* note 3.

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use; 2) the nature of the work; 3) the substantiality of the use; and 4) the market effect of the use."[8] In a leading case *Campbell v. Acuff-Rose* in USA pertaining to the parody of Roy Orbison's "Oh, Pretty Woman" by 2 Live Crew, the SC "ruled that the law favours transformative use, even if the modified version is commercial. The inquiry pertains to whether the novel work solely supplants the objects of the initial creation or introduces novel elements with a distinct objective or character, thereby modifying the original work with fresh expression, significance, or communication."[9]The Court in this case analysed the "purpose and character of the use. It acknowledged that parody, which involves the utilisation of the heart of the work may not be detrimental to the defendant, as the art of parody is rooted in the interplay between an established original and its parodic counterpart."[10] However, the SC recommended that "the courts at the local level should still scrutinise whether the derivative work utilised an excessive amount of the original material beyond what was essential for its intended purpose."[11]

Also, in America whether fan fictions are infringement or not will be decided based on the other conditions given under section 107. For example, if the nature of the fan fiction is different from the actual one, like in the form of a parody it is easier to determine fair use. Similarly, the question of portion of use and possible effect on market could be other factor to determine fair use.

When we look into the question of whether fan fiction can be given an independent copyright or not, the question of originality plays a crucial part. Since fan fictions are also a type of derivative work, originality always plays an important role when judging derivative works. "Even for derivative works which might infringe other previous copyrighted works, if their original parts could reach the requirement of originality, these parts could be protected as well. For derivative works, if they could show substantial differences while being compared with former works, they could be considered original."[12] Thus, to gain copyright protection, fan fiction should be transformative enough. It has to have sufficient degree of originality to have a copyright. For "fan writers who want to gain copyright protection, they must add a

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8 *Supra* note 4.

9 Saharsh Dubey, "Expounding the Relationship Between Fan-Fiction and Copyright Laws: A Study", Unpublished LLM Dissertation, NLUJAA.

10 *Ibid.*

11 *Ibid.*

12 Chenxuan Li, "Originality to Derivative Works: How to Use "Transformative" Rules to Judge Them", 12(4) *International Journal of Social Science and Humanity* 303-309 (2022). Also *available at:* doi: 10.18178/ijssh.2022.12.4.1107 (last visited on January 31, 2024).

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considerable degree of creation to their re- creations. In theory, if these new-creating things are not trivial, they could be protected."[13]

IV. Can Fan Fiction be allowed in India as permissible use of copyrighted works? Issues and Concerns in India

The Indian Copyright Act lacks specific provision so far as fan fiction is concerned which has resulted in ambiguity. Hence, similar to the other jurisdictions fan fiction has to be looked from the angle of being an independent copyright subject matter in itself or whether copyright is an infringed work or can it come within fair use/ fair dealing doctrine.

Originality concept

Coming to the first question of being capable of copyright protection, the Indian copyright Act allows literary, dramatic, musical and artistic work to be copyright protected only when it is original. In case of films, it is considered to be a copyright work 'if a substantial part of the film is not an infringement of the copyright in any other work' and in case of sound recording, it will be granted copyright protection if the literary, dramatic or musical work based on which the sound recording is created is not infringed. The concept of originality has been interpreted by the Indian judiciary[14] through leading judgment that to be original, it should not be a slavish copy of another or that the work should be substantially different from the existing work. Coming to derivative works, the supreme court in the case of *Eastern Book Company* v. *D.B. Modak*[15] said that, "the Copyright Act is not concerned with the original idea but with the expression of thought…...Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author."[16] Thus, in this case, the supreme court said that minimal creativity is too strict a test for copyright protection and mere investment of labour and capital is too less to give copyright protection. Thus, the supreme court applied the skill and judgment test and said that, "the derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments

[13] *Ibid.*
[14] *Agarwala Publishing House v. Board of High School, Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd.*
[15] 2008 (36) PTC SC
[16] *Id.*, para 38

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delivered by the court."[17]It is this distinguished features and flavour to raw texts that will be given copyright protection.[18]Thus, although unlike America, transformative work is not as such recognised and the judgments only refer to derivative work, it is quite complicated to understand what is the Indian position. Transformative work differs from derivative work as it transforms the work to an extent that it gives a new meaning altogether. Thus, referring to the *Eastern Book Company* case, the portion of the fan fiction that gives a distinguish features and flavour can be given independent copyright. However, the clouds of doubt still remain as *Eastern Book Company* entailed use of judgments of supreme court whereas fan fiction can be based on existing copyright work.

Are fan fiction infringed works or can Fan Fiction come under exceptions to Copyright law?

Infringement of copyright work

When it comes to infringement of copyright protected work, the utilisation of the 'lay observer test' or 'doctrine of fading in memory' has been adopted by the Indian Courts as a mechanism to ascertain potential instances of copyright infringement. This assessment is based on the observation of a layman of reasonable intellect and imperfect recollection. This test examines "if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original."[19]

Fair dealing/ Fair use of copyright work

There are certain uses of the copyrighted works which are permitted during the subsistence of the copyright law. Such permitted uses are called fair use in certain regimes and fair dealing in others. Fair use and Fair dealing do not connote the exact same thing. Fair use

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17 *Ibid.*

18 *Id.,* para 42 of judgment, "The task of paragraph numbering and internal referencing requires skill and judgment in great measure. The editor who inserts para numbering must know how legal argumentation and legal discourse is conducted and how a judgment of a court of law must read…….Making paragraphs in a judgment could not be called a mechanical process. It requires careful consideration, discernment and choice and thus it can be called as a work of an author…… The said principle (skill and judgment) would also apply when the editor has put an input whereby different Judges' opinion has been shown to have been dissenting or partly dissenting or concurring, etc. It also requires reading of the whole judgment and understanding the questions involved and thereafter finding out whether the Judges have disagreed or have the dissenting opinion or they are partially disagreeing and partially agreeing to the view on a particular law point or even on facts. In these inputs put in by the appellants in the judgments reported in SCC, the appellants have a copyright and nobody is permitted to utilize the same."

19 *R.G.Anand v. Deluxe Films*

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was a concept that was developed in America. Along with certain purposes which are allowed that includes "teaching, scholarship, research, news reporting, comment and criticism", the American position lists out a four-factor test to determine if a use is a fair use or not. The four-factor test includes: "i. the purpose and character of the use, including whether it's of a commercial nature or for nonprofit educational purposes; ii. the nature of the copyrighted work; iii. the amount of the copyrighted work used in relation to the copyrighted work as a whole, and iv. the effect of the use upon the potential market for or value of the copyrighted work."[20] The Fair Dealing position which is followed by United Kingdom and India is basically consists of an elaborate list of acts which are permitted. Broadly, in India, the fair dealing provisions which are included in section 52 contains: "Permitted Reproduction;[21] Permitted Publications;[22] Permitted Performance;[23] Exceptions in case of sound recording and films;[24] Library exceptions;[25] Exceptions in case of Artistic work;[26] Architectural work exceptions;[27] Exceptions in case of Computer works;[28] Exceptions for benefit to specially abled persons[29]etc." Examining the aforementioned grounds given in section 52, it will be very difficult to fit it in any of the grounds. Two of the grounds however are criticism or review[30] of the work but fan fiction cannot be strictly called criticism or review but rather it is an "inspirational" work.

There are many works that are largely influenced or inspired by another work. The later work can be accused of being infringing work. Adaptation rights are given within the bundle of rights to the copyright owner. Thus, to adapt a work, consent of the copyright owner is required. Else, it will be considered to be infringement. However, in many regimes, "transformative works" are allowed and are not considered to be infringement.

Although in India fan fictions are not mentioned but if 'the fan fiction' can be considered to be transformative work, it may be permitted. In the Rameshwari photocopy[31]

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20 17 U.S. Code § 107.
21 Indian Copyright Act, 1957, s. 52 (1)(d), (e), (f), (i), (m), (p), (q).
22 *Id.* at s. 52 (1) (h). (r), (s), (t).
23 *Id.* at s. 52 (1) (j), (za), (g), (l).
24 *Id.* at s. 52 (1) (k), (u), (y).
25 *Id.* at s. 52 (1) (n), (o).
26 *Id.* at s. 52 (1) (v), (w).
27 *Id.* at s. 52 (1) (x).
28 *Id.* at s. 52 (1) (aa), (ab), (ac), (ad), (b), (c).
29 *Id.* at s. 52 (1) (zb).
30 *Id.,* s. 51(1)(a)(ii).
31 RFA(OS) No.81/2016

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case, the supreme court said, "It is true that there has to be fairness in every action, and irrespective of a statute expressly incorporating fair use, unless the legislative intent expressly excludes fair use, and especially when a person's result of labour is being utilized by somebody else, fair use must be read into the statute."[32] In the instant case relating to the debate of photocopying by students as fair use, the court further said, "A plain reading of clause (i) would show that the legislature has not expressly made fair use a limiting factor while permitting reproduction by a teacher or a pupil during course of instruction. Therefore, the general principle of fair use would be required to be read into the clause and not the four principles[33] on which fair use is determined in jurisdictions abroad and especially in the United States of America."[34] Thus, fairness of use has been recognised as a ground of permitted act in India although the meaning of fair use is not limited to the four principles of USA.

Thus, if fan fiction although a derivative work is transformed to an extent that it does not normally interfere with the work or is different from the nature of the original work and thus be considered 'fair, it can be considered to be a non-infringing work.

Can fan fiction be called fair dealing in India?

The legal doctrine of fair-dealing allows for the limited use of copyrighted material for specific purposes such as critique, commentary, research, or educational pursuits. The assessment of fair-use is "contingent upon a multitude of considerations, encompassing, albeit not restricted to, the intention, essence, quantity, and effect on the market of the primary work."[35] Transformative works refer to a category of artistic creations that involve altering or expanding upon an existing work in order to generate a novel and unique piece of art. as the nature of the work is different.

In the *R.G.Anand* v. *Deluxe Films*[36] case, it was mentioned by the court that, "a derivative work that is inspired by an original work may be considered fair-dealing if it substantially modifies the original work and presents new perspectives or insights."[37]In another case *Blackwood v. A.N. Parasuraman,* the Court held that "in order to constitute fair dealing, there must be no intention on the part of the alleged infringer to compete with the copyright

32 *Id.,* para 31.

33 the purpose and character of your use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and, the effect of the use upon the potential market.

34 *Supra* note 31 at para 31

35 *Supra* note 9.

36 AIR 1978 SC 1613

37 *Ibid.*

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holder of the work and to derive profits from such competition. Further, the motive of the alleged infringer in dealing with the work must not be improper."[38]In another case, *Civic Chandran* v. *Amminu Amma,*[39] there was a dispute that a particular drama was a copyright infringement of another drama as "substantial portions of the work including a reproduction of the characters" was there in the later drama. The Court in this case after examining the facts and by analysing scene by scene came to the conclusion that the intention behind the second drama was to criticise the first drama and hence declared it to be non-infringing. The Kerala High Court also laid down "a three condition test, referred to as the Substantiality Test, to determine the legality of parodies as follows, i) determine the quantum and value of the matter taken in relation to the comments or criticism; ii) the purpose for which it is taken, and iii) the likelihood of competition between the two works."[40] Hence as per the High Court "if a work is copied to criticise it, it is not infringement and can be considered to be fair dealing."[41]In another case[42] pertaining to parody the Patna High Court allowing the parody stated that not allowing it would be a violation of freedom of speech and expression.

A gist of the aforementioned discussions indicates that a transformative work be, be it a parody or a fan fiction would be considered to be fair if it is not in competition with the copyright protected work. If the second work is not a substitutable or competitive work as the nature is different, it can be considered to be a fair use.

V. Conclusion

Fanfiction is a unique genre of creativity. If the creator of fan fiction utilises the previous work after the copyright has expired then there is no concern so far as infringement of economic rights (copyright) is concerned. During the subsistence of copyright, if permission/ consent is given there is no concern. Concern comes when fan fiction is created during the subsistence of copyright and the permission is not taken.

Creation of a copyrighted work entails hardwork, dedication, creativity, labour and capital. Others cannot be given a 'piggy back' ride on the hard work and creativity put in by the original creator. However, saying that, fan fiction is unique. It allows fans to imagine in an entirely different way. With the increase of prevalence of fan fiction, 'there is a conflict

[38] AIR 1959 Mad. 410
[39] 1996 PTC 670 (Ker HC)
[40] *Id.* para 9.
[41] *Id.,* para 23.
[42] *Shri Ashwani Dhir* v. *The State of Bihar*

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between fan communities and copyright holders.' Thus, solving the legal issue becomes crucial.

In the Indian scenario, if we look at independent copyright protection to fan fiction, it is only possible for those fan fiction which are based on non-copyright or copyright expired work and that too only to the portion which adds distinguished features and flavours to the existing work.[43] Further, coming to the question of infringement, making fan fiction without permission of fan fiction would be considered infringement in most cases barring cases which could come within the fair dealing provisions under section 52.

[43] Refer to Part III of this paper.

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SOCIO-LEGAL IMPLICATIONS OF CRIMINAL JUSTICE SYSTEM ON WOMEN AND CHILDREN IN MIZORAM

Dr. Rebecca Lalrindiki[*]

ABSTRACT

Criminal justice system plays an important role in moulding the experiences of vulnerable sections of society such as women and children who comes into contact with it, whether they are victim of crime or defendant. Although there has been progress in recent decades, the barriers and challenges they face still continues within the criminal justice system. This research deals with the socio legal implication of criminal justice system specifically on women and children. It discussed the criminal justice system with respect to women and children in Mizoram by specifically dealing with offences against children through the law dealing with Protection of Children from Sexual Offences Act 2012 (POCSO Act) and Crimes against women. Crimes are usually committed under the category laid down by the Indian Penal Code and the special and local laws. The datas of the court disposal of crime against women and children in Mizoram was collected and analysed where the total number of cases was collected. In this research, the victim compensation in Aizawl judicial district is analysed in order to see the socio legal aspect of criminal justice system in Mizoram.

I. Introduction

Crimes against women and children is worldwide problem. Although there has been advancements and steps taken, women continues to be victim of different atrocities across the world. The United Nations declaration on exclusion of crime against Women[1] (1993) states that "crime against women is an expression of traditionally imbalanced power relations between men and women, which have led to command over and discrimination against women by men and to the anticipation of the full development of women." Article 1 of United Nation declaration on elimination of violence against women defined, “Any act of gender based violence that results in or is likely to result in physical, sexual or psychological harm of suffering to women, including threats of such acts, coercion, arbitrary deprivations of liberty whether occurring in public or private life.” Article 2 of United Nation declaration clarifies

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[1] Declaration on the Elimination of violence against women proclaimed by the General Assembly Resolution 48/104 of 20th December 1993.

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and make list on some forms of violence as, "Violence against women should encompass, but not limited to acts of physical, sexual, psychological violence in the family and the community. These acts include battering, sexual abuse of female children, dowry related violence , marital rape and traditional practices harmful to women, female genital mutilation. They also include non spousal violence, sexual harassment and intimidation at work and in educational institutions, trafficking of women, forced prostitution and violence perpetrated or condoned by the state such as rapes in war."

Likewise millions of children are exploited, abused and discriminated against worldwide. These include children who should be cared for and by adults were among the most vulnerable and defenseless victims. Emotional and physical abuse, exploitation which amounts to child pornography or human trafficking all amounts to crime against children. Parents, relatives, guardians and others entrusted with care and guidance of children are often perpetrators of child related crimes.

Women and children who are victims of crimes faced unique challenges, which includes difficulty in reporting crimes due to stigma or fear of retaliation, and lack of sensitivity and understanding from law enforcement and others of criminal justice. Additionally, there is constant fear among these victims that the system might fail to recognize and address specific types of crimes, experienced by them viz. domestic violence and sexual assault, and they may be subjected to victim blaming, as a result, often crimes against them go unreported. Any form of violence against women and children amounts to serious violation of Articles 14[2], 15[3], and 21[4] of Indian Constitution, which safeguard their human rights and fundamental rights.

This research focuses on criminal justice system with respect to women and children in Mizoram by taking into consideration the offences against children through the law of Protection of Children from Sexual Offences Act 2012 (POCSO Act) and crimes against women. Also it deals with the victim compensation disbursed on these victims as it is imperative to protect the victim by providing sufficient compensation and service where it can heal and develop through it.

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2 According to Article 14 of the Indian Constitution, *"The state shall not deny to any person equality before the law or equal protection of the laws within the territory of India."*

3 Article 15 of the Indian Constitution prohibits discrimination on grounds of religion, race, caste, sex, place of birth or any of them.

4 Article 21 of the Indian Constitution held that, *"No person shall be deprived of his life or personal liberty except according to procedure established by law."*

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II. Crime against women and children

Crime against Women

In order to uphold and implement the Constitutional mandate, the state has enacted various laws and taken measures intended to ensure equal rights, check social discrimination and various forms of violence and atrocities. Although women may be victims of any of the general crimes such as murder, robbery, cheating, only the crimes which are directed specifically against women i.e. gender specific crimes are characterised as Crimes against women. According to the National Crime Record Bureau Report (NCRB)[5], crimes against women can be broadly classified under two categories:

Crime heads under the Indian Penal Code

These comprise of the following crimes such as

i. Rape[6]
ii. Attempt to commit Rape[7]
iii. Kidnapping & Abduction of Women[8]
iv. Dowry Deaths[9]
v. Assault on Woman with Intent to Outrage Her Modesty[10]
vi. Insult to the Modesty of women[11]
vii. Cruelty by husband or his relatives[12]
viii. Importation of Girl from Foreign Country[13] (up to 21 years of age)
ix. Abetment of Suicide of Women[14]

Crime heads under Special and Local Laws (SLL)

5 National Crime Record Bureau.(2021).*Crime in India 2021* (Ministry of Home Affairs, Govt. of India) https://ncrb.gov.in/crime-in-india.
6 Sec 376 of the Indian Penal Code
7 Sec 376 of the Indian Penal Code r.w Sec 511 of the Indian Penal Code.
8 Sec 363, 364, 364A, 365, 366 to 369 of the Indian Penal Code.
9 Sec 304B of the Indian Penal Code.
10 Sec 354 of the Indian Penal Code.
11 Sec 509 of the Indian Penal Code.
12 Sec 498A of the Indian Penal Code.
13 Sec 366B of the Indian Penal Code.
14 Sec 306 of the Indian Penal Code.

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Special Acts enacted for protection and safety of women have been clubbed under the SLL. These gender specific laws in which criminal cases recorded by police throughout the country are –

i. The Dowry Prohibition Act ,1961.
ii. The Indecent Representation of Women (Prohibition) Act ,1986.
iii. The Commission of Sati Prevention Act ,1987.
iv. The Protection of Women from Domestic Violence Act, 2005
v. The Immoral Traffic (Prevention) Act, 1956

Crime against Children

Crimes against children include physical and emotional abuse, neglect and exploitation, such as through child pornography or sex trafficking of minors. Indian penal code and various protective and preventive special and local laws specifically mentioned offences wherein children are victims. The age of child varies as per the definition given in the concerned Acts but age of child has been defined to be below 18 years as per the Juvenile Justice (Care and Protection of Children) Act, 2015. Therefore, an offence committed on a victim under the age of 18 years is considered as crime against children for the purpose of analysis in this research. For crime against children, the list of offences is mainly categorised under the Indian Penal Code and the Special and Local Laws.

The crime against children under the Indian Penal Code comprise of

i. Murder[15]
ii. Attempt to commit murder[16]
iii. Infanticide[17]
iv. Rape[18]
v. Unnatural Offence[19]
vi. Assault on Girl Child with Intent to Outrage her Modesty[20]
vii. Insult to the Modesty of Women[21] (Girl Child)

[15] Sec 302 of the Indian Penal Code.
[16] Sec 307 of the Indian Penal Code.
[17] Sec 315 of the Indian Penal Code.
[18] Sec 376 of the Indian Penal Code.
[19] Sec 377 of the Indian Penal Code.
[20] Sec 354 of the Indian Penal Code.
[21] Sec 509 of the Indian Penal Code.

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viii. Kidnapping & Abduction (Section 363, 364, 364A, 365, 366, 367, 368 &369 IPC).

ix. Foeticide[22]

x. Abetment of Suicide of Child[23]

xi. Exposure and Abandonment[24]

xii. Procuration of Minor Girls[25]

xiii. Importation of Girls from Foreign Country who are under 18 years of age[26]

xiv. Buying of Minors for Prostitution[27]

xv. Selling of Minors for Prostitution[28]

xvi. Crime against Children under Special and Local Laws(SLL)

xvii. There are many laws that deals with crime against children under Special and Local Laws.

xviii. The Prohibition of Child Marriage Act, 2006

xix. The Transplantation of Human Organs Act, 1994(for persons below 18 years of age)

xx. Child labour (Prohibition & Regulation) Act, 1986

xxi. The Immoral Traffic (Prevention) Act, 1956

xxii. The Juvenile Justice (Care & Protection of Children) Act, 2015[29]

xxiii. The Protection of Children from Sexual Offences Act, 2012.[30]

III. Crime Position of Women and Children in Mizoram

Women and children are considered to be vulnerable sections of society. According to the census 2011, population of women and children in Mizoram is 5,41,867 and 1,68,531[31] respectively. This comprises of more than half of the population out of 1,097,206 of the total population. In this research, the researcher analyses the status of woman and children taking into consideration under two heads such as- Crime against woman and Protection of Children

[22] Sec 315 & 316 of the Indian Penal Code.

[23] Sec 305 of the Indian Penal Code.

[24] Sec 317 of the Indian Penal Code.

[25] Sec 366A of the Indian Penal Code.

[26] Sec 366B of the Indian Penal Code.

[27] Sec 373 of the Indian Penal Code.

[28] Sec 372 of the Indian Penal Code.

[29] The main object of this Act is to consolidate and amend the law relating to children who are in conflict with law and who are in need of care and protection.

[30] An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

[31] Directorate of census operation, Mizoram.(2011).

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from sexual Offences Act 2012 (POCSO). Total number of cases, the number of convictions, the number of cases disposed and the number of cases pending have been analysed and are useful for analysing the socio-legal aspect of the work done by the judiciary. In order to do the analyses, the researcher collects datas from the courts of different districts of Mizoram and analyse the disposal of cases made by the courts during the last seven years. Datas are collected and analysed from the latest report of the National Crime Record Bureau as the National Crime Record Bureau has recorded the detailed status of crime against women and crime against children in Mizoram as below:

Table 1 COURT DISPOSAL OF CRIME AGAINST WOMAN IN MIZORAM

Year	No of cases	No of Conviction	No. of cases disposed	Cases pending trial at end of the year	Conviction Rate	Pendency rate
2022	953	87	128	825	68	86.6
2021	863	45	55	808	81.8	93.6
2020	791	72	97	694	75.8	87.7
2019	742	98	111	631	88.3	85.0
2018	642	55	62	580	90.2	90.3
2017	512	100	140	372	71.4	72.7
2016	382	71	80	302	88.8	83.2

Source: The National Crime Record Bureau,2022.

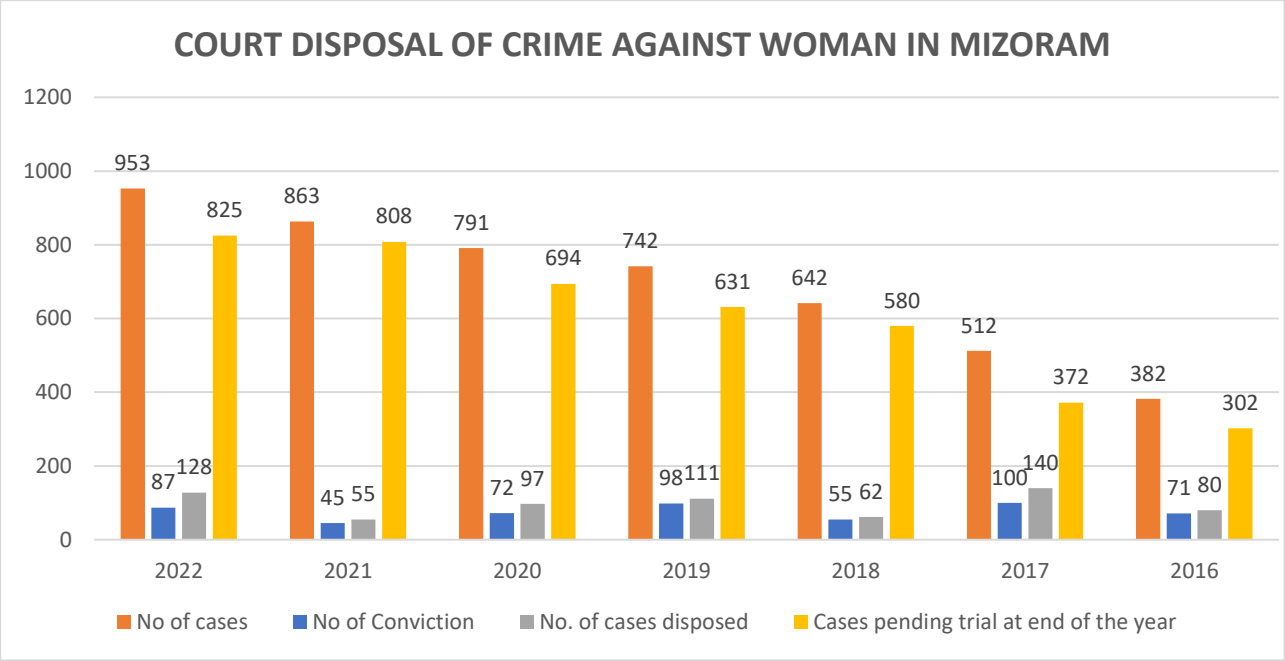

Figure 1: Court disposal of crime against women in Mizoram

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In the table number 1, the status of court disposal of cases in the different districts of Mizoram since 2016 till 2022 is shown. It is a report of the court disposal status on Crime against women in Mizoram during the last seven years. In the crime against women, the latest report available is the year 2022. In 2022 the number of cases taken up by the court is 953. Out of these 128 cases have been disposed and 825 cases are pending. The conviction rate is 68% and the rate of case pendency in the same year is 86.6% which is very high. In the previous year i.e. 2021, the total number of cases taken up by the court is 863. Out of these only 55 cases have been disposed and 808 cases are pending. The rate of case pendency is calculated as 93.6%. This shows that the number of cases pending is very high. High rate of case pendency is one factor which determines the inefficiency of the criminal justice system. In 2020, the number of cases is 791 out of which 97 cases are disposed and 694 cases are pending. This pendency rate of cases is 87.7%. In the year 2019, out of the total 742 cases, 111 cases have been disposed while 631 cases are pending. Though the pendency rate decreases and falls at 85% but the rate is still very high . In 2018, the number of cases is 642. Out of these, 62 cases have been disposed whereas 580 cases are pending. This rate of case pendency has again increases at 90.3%. In 2017, out of the total cases of 512, the number of cases disposed is 140. During this year 372 cases are pending and the rate of case pendency is 72.7%. In the year 2016, out of the total cases of 382 , the number of cases disposed is 80 and 302 cases are pending in a court of law. The rate of case pending is 83.2.

The above data depicts that in all the years given above, out of the total number of cases in a year, the number of cases disposed is very less whereas the cases pending at the end of each year is enormous. The rate of case disposal is not in proportion with the case pendency rate. This shows that the criminal justice system is slow and lacking which needs to be improved and brings justice to the victim i.e. women in this case.

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Table 2: Court Disposal of Crime Against Children in Mizoram

Year	No of cases	No of Conviction	No. of cases disposed	Cases pending trial at end of the year	Conviction Rate	Pendency rate
2022	741	63	84	657	75.9	88.7
2021	646	31	36	610	86.1	94.4
2020	606	53	71	535	75.7	88.3
2019	559	72	80	479	90.0	85.7
2018	484	37	42	442	90.2	91.3
2017	512	61	83	429	73.5	76
2016	388	63	65	323	96.9	83.2

Source : The National Crime Record Bureau,2022.

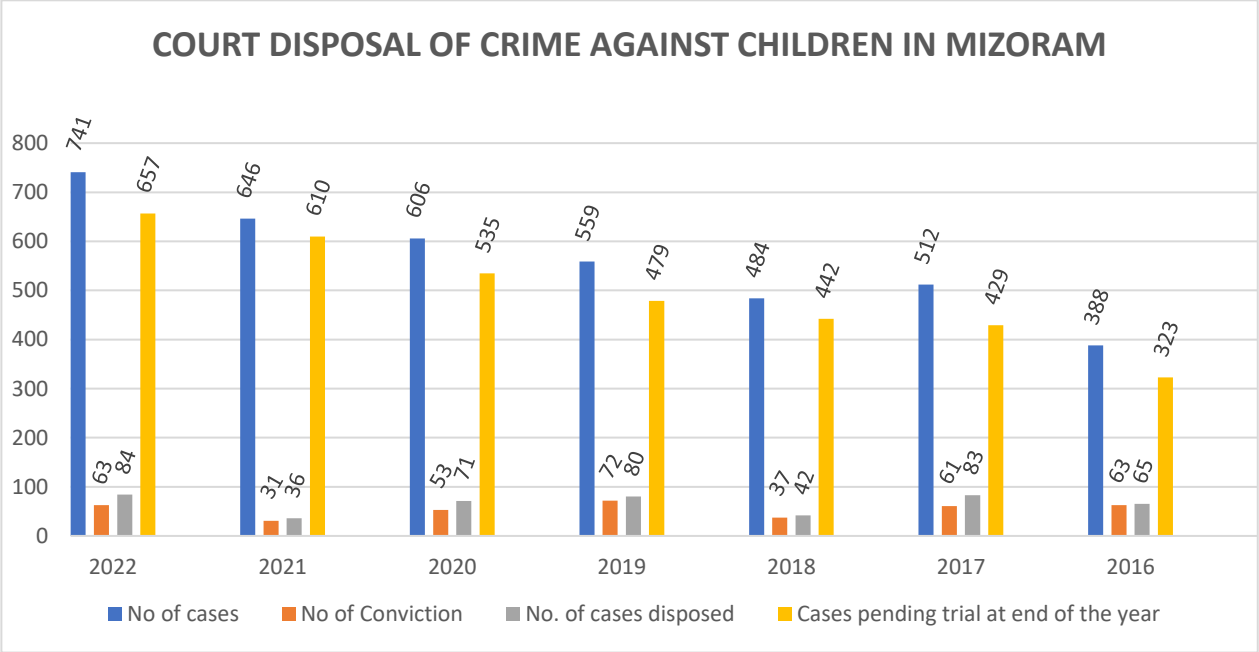

Figure 2: Court disposal of crime against children in Mizoram

The table number 2 deals with the disposal of crime against children by the judiciary from the year 2016 to the year 2022 in Mizoram. In the year 2022, the total number of cases on crimes against children is 741. Out of the total number of cases, 84 cases are disposed and 657 cases remains pending. The pendency rate during the year is 88.7 %. In the year 2021, the total number of cases on crime against children amounts to 646. Out of the total 646 cases, 36 cases have been disposed and 610 cases remains pending. The pendency rate during the said year is 94.4%. In 2020, out of the total 606 cases, 71 cases have been disposed and the rate of cases pending is 88.3% which is 535 nos. In 2019, the total number of cases is 559. The number

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of cases disposed is 80 and the number of pending cases is 479. The pendency amounts to 85.7% of the total cases. In the year 2018, out of the total number of 484 cases, 42 cases have been disposed and the number of pending cases is 442. The rate of case pendency is very high amounting to 91.3%.In 2017, out of the total of 512 cases, 83 cases have been disposed and 429 cases are pending. The pendency rate of cases in the year is 76%. In 2016, out of the total 388 cases, 65 cases are disposed. The number of pending cases during the year is 323. The rate of pendency of cases during the year is 83.2%

From the above datas , it is clear that the rate of pendency of cases was very high for each year as compared to the number of cases and cases disposed. This shows that the rate of case disposal was low for crime against children. This may be due to various factors. However, it is clear that the criminal justice system was not upto the expected level in disposal of cases and bringing out justice . As the rate of case pendency was very high, it is clear that justice was delayed through the justice delivery system which eventually leads to injustice among the innocent victims. According to the Justice Malimath Committee Report[32] on criminal justice system, it held that huge pendency of cases and poor rate of convictions are the twin problems of judiciary which needs to be improved.

IV. Analysis of Criminal Justice System in Aizawl Judicial District

In the field of judiciary, Mizoram is broadly divided under three judicial districts. Earlier, in exercise of powers conferred by sections 3 to 6 read with all other enabling provisions of the Mizoram Civil Courts Act,2005 as amended, and in prior consultation with the Gauhati High Court, the Governor of Mizoram had constituted two Judicial Districts[33] in the State of Mizoram, namely,

i. Aizawl Judicial District which comprised of the areas covered by existing administrative and revenue districts of Aizawl, Champhai, Kolasib, Mamit and Serchhip.

ii. Lunglei Judicial District which comprised of the areas covered by the existing administrative and revenue district of Lunglei for the time being.

[32] Govt. Of India, Ministry of Home Affairs(2003). *Committee on Reforms of Criminal Justice System.*p.133.

[33] Vide Notification No. A 12011/32/06-LJE, the 7th January, 2008 published in the Mizoram Gazette, Extra Ordinary Vol. XXXVII, 8.1.2008 Pausa 17, SE 1929, Issue No.2

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However, in the year 2021 a new judicial district was set up at Champhai which becomes Champhai Judicial District[34] covering the administrative and revenue districts of Champhai and Khawzawl.

In exercise of the powers conferred by law[35] the Governor of Mizoram, after consultation with the Gauhati High Court, had constituted the following Sessions Division in the state of Mizoram, namely[36]:-

i. Aizawl Sessions division comprised of the areas covered by the existing administrative and revenue districts of Aizawl, Champhai, Kolasib, Mamit and Serchhip.
ii. Lunglei Sessions division comprised of the areas covered by the existing administrative and revenue district of Lunglei, Lawngtlai and Saiha.
iii. Champhai Session division comprised of the areas covered by the existing administrative and revenue district of Champhai and Khawzawl.

Strength of Judges under the Aizawl Judicial District

The strength of judges greatly determines the speedy disposal of cases. In the Aizawl judicial district which comprises of four districts namely Aizawl, Mamit, Kolasib and Serchhip the number of judges are allotted as under-

Table 3: Criminal Court Under Aizawl Judicial District

NAME OF COURT	NUMBER OF COURT SANCTIONED	ACTUAL NUMBER OF COURT/JUDGES
AIZAWL		
1. District & Session Judge	1	1
2. Addl District & Session Judge	3	3
3. Chief Judicial Magistrate	1	1
4. Judicial Magistrate	7	3
KOLASIB		
1.Addl District & Session Judge	1	1
2.Chief Judicial Magistrate	1	1
3. Judicial Magistrate	3	2

[34] Vide Notification No. A 12011/32/2016-LJE, the 11th Nov 2021

[35] Sections 6,7,9,11 and 12 of the Code of Criminal Procedure 1973 (Act No.2 of 1974).

[36] Vide Notification No. A.12011/32/06- LJE, the 2nd June 2008 published in the Mizoram Gazette, Extra Ordinary Vol XXXVII, 12.6.2008, Jyaistha 22, S.E 1930, Issue No. 197 and amended under even No. Dated Aizawl 7th Oct 2008 vide , the Mizoram Gazette, extra Ordinary Vol XXXVII, 24.10.2008 Kartika 2, S.E 1930, Issue No. 430 with the approval of the Hon'ble High Court vide No. HC VII-14 (PT)/2007/8467/A dated 25th August 2008.

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MAMIT		
1. Chief Judicial Magistrate	1	1
2. Judicial Magistrate	1	1
3.Sub-Divisional-Judicial Magistrate	1	0
SERCHHIP		
1.Chief Judicial Magistrate	1	1
2. Judicial Magistrate	1	1
3.Sub-Divisional-Judicial Magistrate	1	0

Source: Appointment Section, Gauhati High Court Aizawl Bench

In the Aizawl Session division, one Court of Sessions Judge, three courts of Additional Sessions Judges, one Court of Chief Judicial Magistrate, and seven courts of Judicial Magistrate of the First Class at Aizawl is sanctioned. However, from the table number 4.3, it is clear that there is shortage of four judicial magistrate in the Aizawl judicial district as only three posts are created. In Kolasib ,one court of Additional District & Session judge, one court of Chief Judicial Magistrate and two courts of Judicial Magistrate of the First Class is present. Here also, the number of court for judicial magistrate existing is lesser than the number of court sanctioned. In Mamit district, one Court of Judicial Magistrate of First Class and one court of judicial magistrate first class is present. In Serchhip, one court of Chief judicial magistrate and one Court of Judicial Magistrate of the First Class is present.

It is observed and seen that in the Aizawl Judicial District the actual number of court or judges is lesser as against the number of court sanctioned. This can be one factor for high rate of case pendency.

Criminal Justice System with respect to the Protection of Children from Sexual Offences Act[37] 2012 in Aizawl Judicial District

POCSO

The Protection of Children from Sexual Offences (POCSO) Act, 2012 enacted by Govt of India provides safeguards for children against sexual abuse. The POCSO Act 2012 provides for establishment of Special Courts for the purpose of ensuring speedy trial. Further, as per the Act, evidence of the child shall be recorded within a period of 30 days of the Special Court taking cognizance of offence and the Special Court shall complete the trial, as far as possible,

[37] Hereinafter the POCSO Act.

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within a period of one year from the date of taking cognizance of offence[38]. The Act was amended in 2019 to introduce more stringent punishment including death penalty for committing sexual crimes on children, with a view to deter the perpetrators and prevent such crimes against children.

In Mizoram, the Government of Mizoram appointed Special Public Prosecutor to deal with POCSO on 21st May 2013[39]. But the actual functioning of the POCSO Act takes place after a year when Special Court was set up in the two judicial districts of Aizawl and Lunglei in the year 2014 where the court of District & Sessions Judge was appointed as Special Courts.[40]

In the year 2019, three Fast Track Special Courts were constituted in the interest of public service and as per the directions given by the Supreme Court of India and with approval of the Gauhati High Court to be effective from 30.12.2019[41]. The following courts have been constituted as under:

i. One Court exclusively for cases under POCSO Act in the Aizawl.
ii. One Fast Track Special Court for cases of rape and/or under POCSO Act in the Aizawl.
iii. One Fast Track Special Court for cases of rape and/ or under POCSO Act in Champhai.

Table No 4: The list of Special Judges[42] under Aizawl Judicial District since its inception

Sl No	Name of Special Judge	Period
1.	Lucy Lalrinthari, MJS	24.6.2014 to 11.01.2018
2.	Joel Joseph Denga, MJS	12.01.2018 to 07.04.2019
3.	R.Thanga, MJS	08.04.2019 to 30.06.2020
4.	Joel Joseph Denga, MJS	01.07.2020 to 07.04.2021
5.	Marli Vankung, MJS	08.04.2021 to 12.10.2021
6.	Lalbiakzama, MJS	13.10.2021 to 15.11.2021
7.	Lucy Lalrinthari, MJS	16.11.2021 to 31.12.2021
8.	Lalbiakzama, MJS	01.01.2022 to 31.10.2022
9.	Vanlalenmawia,MJS	01.11.2022 to 27.09.2023
10.	Joel Joseph Denga, MJS	28.09.2023 to June 2024
11.	Helen Dawngliani, MJS	July 2024 to till date

Source: Court of District & Session Judge, Aizawl

Table No 5: List of Judges under Fast Track Special Court under POCSO are

[38] Section 35 of the POCSO Act 2012.
[39] Vide Memo No. A.45012/3/2011-LJE dated Aizawl, the 21st May 2013.
[40] Vide Memo No. A.45011/1/2008-LJE, the 27th June 2014.
[41] Vide Memo No. A.40011/2/2020-LJE dated Aizawl, the 17th June 2020.
[42] Section 28 of POCSO Act 2012.

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Sl No	Name of Special Judge	Period
1.	P.Singthanga, Judge, Court for Cases only under POCSO Act, Aizawl	Since June 2020
2.	R.Lalthazuala, Judge, Fast Track Special Court in Aizawl (Rape & POCSO Act)	Since June 2020
3.	R.Vanlalena, Judge Fast Track Special Court, Kolasib	Since 2016

Source: Court of District & Session Judge, Aizawl

The status of cases under the POCSO Act in the Aizawl Judicial District since its inception is laid down as below.

Table 6: POCSO CASES IN AIZAWL JUDICIAL DISTRICT[43]

Year	Opening	Instituted during the year	Cases Disposed	Transferred to other court	Cases Pending at year end
2014	11	26	-	-	37
2015	37	131	6	-	162
2016	162	164	61	-	265
2017	265	186	145	-	306
2018	306	100	95	-	311
2019	311	-	9	-	302
2020	302	72	82	-	292
2021	292	78	79	62	229
2022	229	86	72	50	193
2023[44]	193	44	32	41	164

Source: Judicial Branch, Aizawl District Court

[43] Data obtained from Judicial Branch, Aizawl District Court.

[44] Till August 2023.

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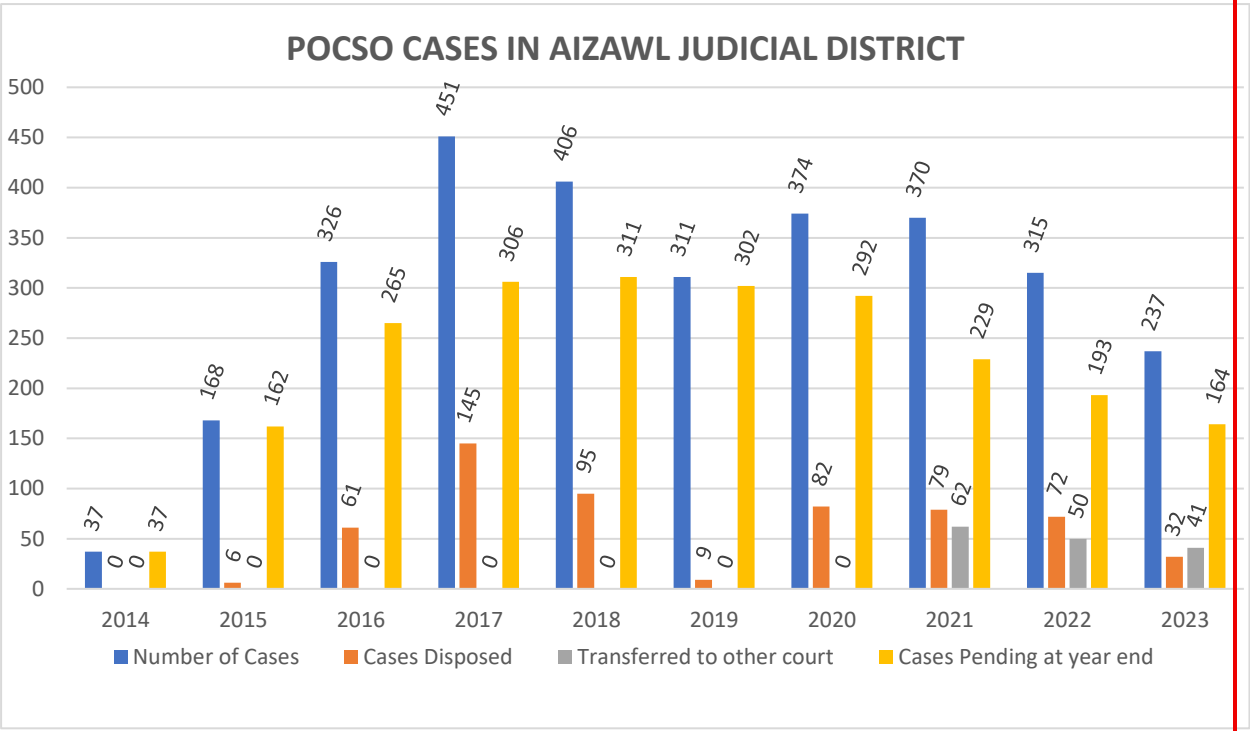

Figure 3: *POCSO cases in Aizawl Judicial District*

In the table number 6[45], the statistics of crime against children with respect to POCSO Act 2012 is laid down. In Mizoram , the POCSO Act 2012 was effective from the year 2014. Initially only 26 cases have been instituted. In 2014, the number of cases pending is 37. In 2015, the number of cases pending has risen up to 162. In the year 2016, out of the total 326 cases, 61 cases have been disposed and 265 cases are pending. In 2017, out of the total 186 cases, 145 cases have been disposed and 306 cases are pending. In 2018, total number of cases is 406. Out of these 95 cases have been disposed and 311 cases are pending at the year end. In 2019 out of the 311 cases 302 cases are pending at the year end. In the year 2020, out of the total cases of 374, the number of case disposed is 82 and 292 cases are pending at the year end. In 2021, total number of case is 370. The number of cases disposed is 79 and the number of pending cases is 229. In the same year as the Champhai judicial district have been created, therefore 62 cases have been transferred to the Champhai judicial district. In the year 2022, out of 315 number of cases 72 cases have been disposed, 50 cases have been transferred to Champhai Judicial district and 193 cases have been pending at the year end. In the year 2023 the data have been collected till August. The number of cases till August is 237. The number

[45] As shown in Table 6.

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of cases disposed is 32 and 41 cases have been transferred to Champhai judicial district. The number of cases pending is 164.

With respect to the analysis of POCSO cases in Aizawl judicial district, since the inception of POCSO court in Mizoram in 2014, it was found that the case pendency rate was very high as against the number of cases filed and the number of cases disposed. During the last ten years it was found that pendency of cases were high. This is in contradiction with the recommendations laid down by the Justice Malimath Committee Report[46] on criminal justice which held that huge pendency of cases and poor convictions should be reformed in order to make an efficient criminal justice system. One of the reason could be the presence of less court and judges to deal with POCSO crime as Aizawl Judicial district comprises of four administrative district with special court present only in Aizawl and Kolasib district.

Criminal Justice System with respect to crime against women in Aizawl judicial district

For the purpose of this research, crime against women data have been collected from district court Aizawl covering for the Aizawl judicial district. Under crime against women, the offence of rape i.e Section 375 of the IPC and the Offence of Assault or criminal force to woman with intent to outrage her modesty under Sec 354 of the IPC is taken up for research. Section 354 IPC punishes an assault or use of criminal force on any woman with the intention or knowledge that the woman's modesty will be outraged. The amendment of the Criminal Law in 2013 introduced four additional subsections to Section 354 of the IPC which broaden its scope. They are:

i. Section 354A: Sexual harassment and punishment for sexual harassment
ii. Section 354B: Assault or use of criminal force to woman with intent to disrobe
iii. Section 354C: Voyeurism

[46] Committee on Reforms of Criminal Justice System was constituted by Government of India, Ministry of Home Affairs by its order dated 24 November 2000, inorder to consider measures for revamping the Criminal Justice System. The terms of reference for the Committee includes:

i. To make specific recommendations on simplifying judicial procedure and practice and making the delivery of justice to common man closer, faster, uncomplicated and inexpensive;
ii. To suggest sound system of managing, on professional lines, pendency of cases at investigation and trial stages and making Police, Prosecution and Judiciary accountable for delays in their respective domains;

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iv. Section 354D: Stalking

Data of crime against women[47] under the Aizawl Judicial District have been laid down as below:

Table 7: CRIME AGAINST WOMEN CASES IN AIZAWL JUDICIAL DISTRICT

Year	Opening	Instituted during the year	Cases Disposed	Transferred to other court	Cases Pending at year end
2016	55	43	47	-	51
2017	51	28	34	-	45
2018	45	47	20	-	72
2019	72	13	11	-	77
2020	77	28	26	-	79
2021	79	48	19	2	106
2022	106	39	39	12	94
2023	94	21	39	0	76

Source: Data obtained from Judicial Branch, Aizawl District Court and Appointment Section Gauhati High Court, Aizawl Bench.

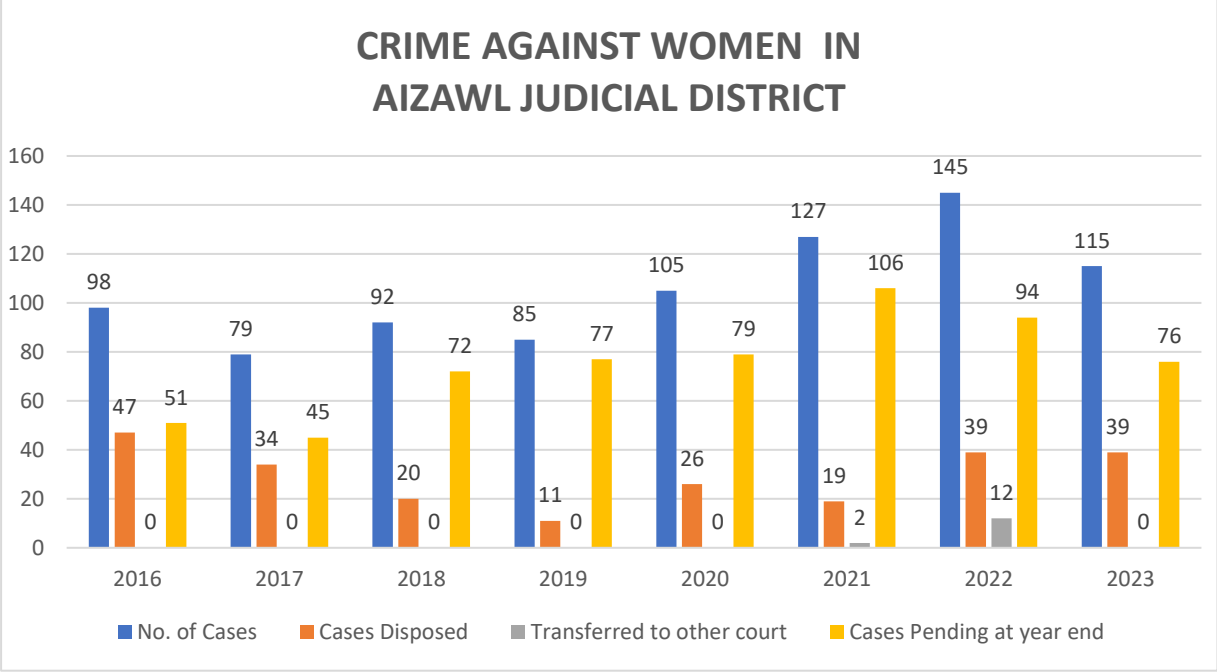

Figure 4: *Crime against women cases in Aizawl Judicial District*

[47] Collected from the Judicial Branch, Aizawl Judicial district and the Appointment Section, High Court Gauhati ,Aizawl Bench.

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The above data in table number 7[48] shows the status of crime against women in the Aizawl judicial district which comprises of four districts of Mizoram namely-Aizawl, Kolasib, Mamit and Serchhip. Till the year 2021, district of Champhai was included under Aizawl judicial district. In 2016, the total number of cases for crime against women is 98. From these, 47 cases have been disposed. At the year-end 51 cases are pending. In 2017, the total number of cases is 79. Out of these, 34 cases have been disposed. The number of cases pending at the year end is 45. In 2018, the number of cases is 92. The number of cases disposed is 20. The number of cases pending at the year end is 72. In 2019, the number of cases is 85. Out of these, 11 cases have been disposed. The number of pending cases is 77. In 2020, total number of cases is 105. Out of these, 26 cases have been disposed. The number of pending cases is 79. In 2021, the number of cases is 127. From these, 19 cases have been disposed. Two cases have been transferred to Champhai Judicial District. At the end of the year, 106 cases have been pending. In 2022, the total number of cases is 145. Out of these, 39 cases have been disposed and 12 cases have been transferred to Champhai Judicial district. 94 cases are pending at the year end. In 2023, the number of cases till August 2023 is 115. The number of cases disposed is 39 and the number of pending cases at year end is 76.

With respect to the analysis of crime against women in the Aizawl judicial district the research takes into consideration the offence of rape under Section 375 IPC and the offence of Assault or criminal force to woman with intent to outrage her modesty under Section 354 of the IPC. From analysis of court disposal of crime against women , it was found that since the last eight years i.e till 2023 the disposal rate of crime against women is less whereas the cases pending in courts is high. Whereas in a criminal justice system, quick disposal of cases or speedy trial is very essential inorder to meet justice for the victim. Therefore the laws which deals with crime against women in the criminal justice system of Mizoram needs to be improved.

V. Criminal Justice with Respect to Victim Compensation in India

Victim compensation refers to the payment made to the victim by the government. Although the term is not defined under any law, victim is defined as 'a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and it includes his guardian or legal heir'.[49] According to the UN declaration of

[48] As shown in Table 7.

[49] Sec 2(wa) of Code of Criminal Procedure, 1973.

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basic principles of justice for victims of crime and abuse of power, 1985 victim means person who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws operative within member State including those laws prescribing criminal abuse of power.[50] Compensation refers to a form of reparation[51] which connotes restoring justice, atoning and making good for a wrong committed.[52]Therefore, victim compensation could be defined as an award given to an individual victim or his/her family monetarily in order to compensate the injury or loss suffered through a competent institution.

In the criminal justice system, victim had occupied a very important position. There are various victim compensation laws and victim compensation schemes in order to deal with and assist victim of crimes. In India, there are legislations dealing with victim compensation such as the Code of Criminal Procedure 1973 under Sections 357,357A[53],358,359 and 372. There are other provisions which also deal with victim compensation such as Sections 237,250, 265A to 265L, 406 and 407 under the Code of Criminal Procedure 1973. Other legislations such as Probation of Offenders Act, 1958, Protection of Children from Sexual Offences Act 2012 and Protection of Women from Domestic Violence Act 2005 deals with compensation of victims.

Therefore victims occupied the central core of criminal justice system and it is the essential requirement of the criminal justice system to rehabilitate and provide compensation to victims of crime inorder to bring out justice in the criminal justice system.

VI. Victim Compensation Scheme in Mizoram

In Mizoram, in the exercise of power conferred by Sec 357A of Code of Criminal Procedure, 1973, a scheme is framed in coordination with the Central government for giving funds for purpose of compensation to victims of crime in particular acid attack victims or their dependents who have suffered loss or injury as a result of crime and who require rehabilitation known as Mizoram Victims of Crime Compensation Scheme 2011. This scheme is used for all

50 Article 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

51 According to The Basic principles & Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) reparation include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

52 Antonio Buti.(2009).The Notion of Reparations as a Restorative Justice Measures. https://www.researchgate.net/publication/226758263_The_Notion_of_Reparations_as_a_Restorative_Justice_Measure.

53 Sec 357A of the Code of Criminal Procedure 1973 was inserted in 2008 when the 154th Law Commission recommended for empowering Court to direct the State to pay compensation to the victim.

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kinds of compensation to make fund provision for the purpose of compensation to the victims of crime or their dependants who have suffered loss or injury due to crime and requires rehabilitation. With this, there shall be a constituted fund from which the amount of compensation under this scheme shall be paid to victims or their dependants who have suffered loss or injury as a result of crime and who require rehabilitation.[54]

Whenever recommendation is made by court or an application is made by victim or his dependant under Sec 357A (2) of the Act[55] to District Legal Services Authority, the latter shall examine the case and verify contents of the claim with regard to loss or injury caused to victim and after verifying the said authority shall award compensation within two months in accordance with the scheme.

In this research, in order to analyse the status of criminal justice with respect to women and children, status of victim compensation awarded to victims of crime in different districts of Mizoram was collected. The victims compensated are mainly children and women victim. By looking at the status of crime and amount received for compensation, the extent of justice dispensation through monetary compensation and relief could be seen and proper observation could be made. The amount of justice dispensation through compensation in different districts of Mizoram could be seen as below:

Table 8 Victim Compensation in Mizoram[56]

Year	No. of Victims Compensated	Amount Disbursed
2012-2013	1	Rs 40,000/-
2013-2014	2	Rs 2,00,000/-
2014-2015	9	Rs 7,00,000/-
2015-2016	20	Rs 11,09,500/-
2016-2017	50	Rs 49,67,500/-
2017-2018	52	Rs 1,69,20,000/-
2018-2019	90	Rs 3,13,95,000/-
2019-2020	58	Rs 2,54,90,000/-
2020-2021	Nil	Nil
2021-2022	Nil	Nil
2022-2023	30	Rs 1,00,00,000/-
2023-2024	33	Rs 97,75,000/-

Source: Mizoram State Legal Services Authority, Aizawl Mizoram.

[54] Section 4(a) of the Mizoram Victim Compensation Scheme, 2011.

[55] The Criminal Procedure Code, 1973.

[56] Obtained from Mizoram State Legal Services Authority on October 2023.

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The table 8 contains the list of victims compensated since the inception of Mizoram Victim compensation scheme 2011 in the entire state of Mizoram and the amount of compensation given out. During the last 12 years i.e since 2012 the total number of victims compensated is 312 numbers. The amount of compensation during these years from 2012 to 2023 is Rs 9,08,22,000/-. During the year 2020 to 2022, victim compensation could not take place due to the Covid pandemic.

During 2012 to 2024 in the Aizawl Judicial District women and children victims are compensated. As the Champhai judicial district was under Aizawl till the year 2021, therefore it was included till the year 2021. In the year 2012-2013, one woman was compensated who was a victim of rape under Section 376 of the IPC. In 2013-2014,one minor was compensated who was a victim under Sec 304A of the IPC. In 2014-2015, out of the five victims compensated, two victims were from Aizawl and three victims from Mamit. Victims compensated from Mamit were women who are victims of rape under the IPC. In the year 2015-2016, two victims were given compensation from Serchhip who are women, five victims from Kolasib and five victims from Mamit due to POCSO case. In 2016-2017,total cases is 48 out of which 11 cases falls under POCSO from Aizawl, seven cases of rape from Champhai, six cases of POCSO from Serchhip, two cases of rape from Serchhip, one case of cruelty by husband from Kolasib, 11 cases of POCSO from Mamit, one case of rape from Mamit. In 2017-2018 out of 65 victims compensated, two cases of rape and 43 cases of POCSO from Aizawl,10 cases of POCSO from Kolasib. In 2018-2019 total victims compensated is 53. Out of it one case of unnatural offences from Aizawl, 28 cases of POCSO from Champhai, one case of rape from Champhai, 17 cases of POCSO from Mamit and two cases of rape from Mamit were found and compensated. In 2019-2020, out of 34 cases of victim compensation, one case of rape from Serchhip, two cases of POCSO from Serchhip,13 cases of POCSO from Kolasib, one case of rape from Kolasib, 14 cases of POCSO from Mamit were compensated. In the year 2020-2021 and 2021-2022 due to the breakout of Covid pandemic worldwide, the compensation is nil as activities could not takes place. In 2022-2023 only two cases of POCSO victims were compensated.

The number of victim compensation received with respect to women and children under Aizawl Judicial district can be summarised as:

Table 9: HEADWISE COMPENSATION OF WOMEN AND CHILDREN

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Year	Offences against Children (POCSO)	Amount of compensation (in Rs)	Crime against Women (Sec 376 & 498 IPC)	Amount of compensation (in Rs)
2012-2013	-	-	1	40,000
2013-2014	-	-	-	-
2014-2015	-	-	3	1,50,000
2015-2016	10	5,20,000/-	1	1,50,000
2016-2017	28	20,00,000/-	11	13,00,000
2017-2018	55	2,00,50,000/	2	6,00,000
2018-2019	50	2,31,75,000/	4	12,75,000
2019-2020	43	1,11,40,000/	5	7,00,000/
2020-2021	-	-	-	-
2021-2022	-	-	-	-
2022-2023	2	2,75,000/-	-	-
Total	**188**	**5,71,60,000/-**	**26**	**42,15,000/**

Source: The Mizoram State Legal Services Authority, Aizawl Mizoram

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VII. Observation and Conclusion

It is observed that the victim compensation in Mizoram was taking place and Criminal justice System with respect to women and children was not very high in terms of victim compensation. On analysis of crime against children , it is found that offences against children with respect to POCSO was very high. One factor could be the introduction of Fast track court & Special Court specially meant for the POCSO case. Aizawl judicial district has four Special courts meant for trial of POCSO cases. This automatically encourage victims to come forward and file a case. During the last twelve years, it is seen that out of the total 312 victims compensated, 188 victims were children who were victims of sexual offences under the POCSO Act 2012. The amount spent on victim compensation during these twelve years amounts to Rs 5,71,60,000/- which is a large amount. For compensating crime against women, during the last twelve years 26 victims could be given monetary compensation which amounts to Rs 42,15,000/-. These crimes are mostly rape and cruelty against women. It could be seen that comparing to crime against children the number of women compensated is lesser. Thus one can see that status of women and children in criminal justice system of Mizoram is not bad looking into their compensation status. However, looking into the crime rate and pendency of cases, a lot of improvement needs to be made. A large number of pending cases and low rate of convictions are the two problems of judiciary. One solution for addressing the problem for this is by increasing the number of judges working who are efficient in dealing with these cases. In the case of *All India Judges Association* v. *Union of India*[57], the Supreme Court has examined this issue and given directions to increase the judge strength from the existing judge population ratio of 10.5 or 13 Judges per million of people to 50 Judges per million people in a phased manner within five years in its decision. As delay is a denial of justice which results in injustice therefore courts must realize that it is their responsibility to take the initiative to eliminate delay . It is the responsibility of the authorities to look into this matter and takes action promptly inorder to bring out justice to the people in general and to women and children in particular.

[57] (2002) 4 SC 247.

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PENAL REGULATIONS FOR ONLINE SPEECH: TENSIONS BETWEEN EXPRESSION AND NATIONAL SECURITY

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ABSTRACT

For a country like India, the right to access information and expression is seen as the backbone of democracy and as a propagator of its national interest, as this helps citizens, promote accountability and encourage diverse views of its people. That's the reason is constitution provides freedom of speech and expression in part 3 of the constitution under art. 19(1) but rights are not absolute rather subject to reasonable restrictions which are explicitly given under article 19(2). Today we live in connected world facilitated by information and communication technology. With growing technology and the virtual world, the traditional boundaries of free expression have been narrowed down. However, now online platform being used to spread harm, misinformation and upsurge of terrorism and hate speech as post of media can reach millions of people on just on click. In this article we will see how different penal regulations are used by the government against such speech and expression and how such regulations are being used as a weapon by the government to curb free speech in India and growing trend of over criminalising online speech.

I. Introduction

The Internet is history's largest anarchist experiment. It is a source of immense good and potentially awful evil, and we are only now beginning to see its effects on the global stage. India is known to be a successful and robust democracy for over decades. Individual freedom is integral part of any democracy. Among those freedoms, freedom to speech is one of the most important rights. The ability to freely communicate and get information from others is central to free speech. It is considered the mother of all liberties and is recognized as the most fundamental civic freedoms, which are freedoms that defend against repression. Right to

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speech and expression is guaranteed under art. 19(1)(a)[1] of the constitution. It is wide enough to embrace not only verbal speech but representation of one's ideas, feelings, opinion and thoughts through any communication means or visual display such as sign, gesture, symbols etc. Right to freedom of speech and expression is not only a constitutional right but also a human right under article 19 of the Universal declaration of human right (Hereinafter referred to as UDHR)[2]. In article 19 of international covenant on civil and political right (Hereinafter referred to as ICCPR)[3] also recognise the right to hold opinion and right to freedom of expression, seek and impart information.

However, the right to speech and expression unlike America, in India it is not absolute rather subject to the reasonable restriction as outlined in art. 19(2)[4] of the constitution.[5]

II. Digital Speech and Challenges to National Security

Nowadays, social media has become an integral part of people's life. By different internet and social medias like Facebook, WhatsApp, Twitter etc. as have allowed People across the world to connect instantaneously and have revolutionised the way earlier information being shared with one another. Internet has had a positive impact on society like it has enabled people to improve their creativity and enhanced easy communication and sharing of knowledge.

In digital era digital communication is seen as part of free speech and expression. In *Shreya Singhal* v. *Union* case,[6] Section 66A of the Information Technology Act of 2000 specifically addressed the freedom to speech and expression in the digitalized world. (Hereinafter referred to as IT act) was found to be unlawful and invalid. It was also stated that the internet is the food for the burgeoning digital or cyber web.

Further in the *Anuradha Bhasin* v. *Union of India,*[7] the court decided that the right to information is a essential component of the right to free speech and expression, and that online expression is the quickest and most broad means of information distribution. The court further

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1 The Constitution of India, art. 19(1)(a).

2 Universal Declaration of Human Right, 1948, art. 19.

3 International Covenant on Civil and Political Right, 1966, art. 19.

4 The Constitution of India, art. 19(2).

5 Criminalisation of online speech, *Media Legal Defence Initiative* (2022), *available at:* https://www.mediadefence.org/ereader/wp-content/uploads/sites/2/2022/12/Module-3-Criminalisation-of-online-speech-Dec-2022.pdf (Last visited on November 19, 2023).

6 AIR 2015 SC 1523.

7 AIR 2020 SC 1308.

added that the freedom given by article 19(1)(a) extends to the internet, therefore a total internet shutdown would have a negative impact on the circulation of free speech and expression.

India is the most populous country with second largest number of internet user globally. In 2022, there are around 470.1 million active social media users. In 2023 there are around 448.8 million Facebook users, around 252.41 million Instagram users.[8] YouTube, Google's video-sharing service, receives 60 million views every month in India. Twitter has 22.2 million users in India, giving it the world's third-largest user base. These numbers are rapidly increasing and have significant implications for security, law, and order.

The advancement of information and communication technologies gives enormous promise for successful participatory government efforts in India. But technology is a two-edged sword. It allows for new problems in the field of law and order. A serious challenge is the threat to national security. As internet is a conducive environment for evil forces to function because of its vase breadth, immense size and potential for user anonymity. The content posted is capable of generating ill feelings and violence among people against the government. Hate speech in the times of internet spreads like fire and its hurts collectively. Internet has brought an explosion of offensive, extreme expression, exacerbated by the online norm of anonymity. The issue of hate speech, violent and anti-national speech because these are creating a great challenge to the national security. Hate speech can sometimes be the fundamental cause of terrorism.

In today's world, terrorism poses the greatest threat to humanity's survival. Terrorists are using information technology to spread their tentacles in remote locations. In 2022, I&B ministry, for spreading fake news and disinformation blocked 78 YouTube channels and various twitter and Facebook accounts on the sensitive grounds of national security, foreign relations and public order.[9]

Online Speech versus Offline Speech

[8] Social Media in India - 2023 Stats & Platform Trends (Last Updated: October 30, 2023), available at: https://oosga.com/socialmedia/ind/#:~:text=Social%20Media's%20User%20Demographics%20in,of%20users%20has%20grown%204.2%20%25. (Last visited on November 19, 2020).

[9] Devesh K. Pandey, "Social Media Exploited to Promote Anti- India activities", *The Hindu,* April 16, 2022 *available at:* https://www.thehindu.com/news/national/capacity-building-vital-for-countering-online-threats-say-experts/article65324361.ece (Last visited on November 19, 2023).

With the growing digital era, online speech is becoming a major challenge to the national security. The reasons why online speech is more challenging than the offline hate speech is:

Anonymity

People who use the internet as a medium of communication are not obligated to reveal portions of their offline identities unless and until they choose to do so. As a result, people can express themselves freely without worrying about how others will react.

Instantaneous

With the emergence of internet, it provides the people opportunity to publish their thoughts and words instantly. With just one click person can publish anything.

Coverage

Now a days, almost every person is active online and number of users is also increasing. That is the reason that moment one post is uploaded on any social media platform, it in minutes reached to vast population.

Community

One measure issue is that in online speech the member of community who otherwise would have engaged into offline hate speech. Chances are there that even they will also respond to it.[10]

Due all such reasons the threat of online speech against the national security becomes more challenging. Leading to increase in incidence of violence, public disorder and anti – national activities.

Recently on 12th September 2023, violence broke out in Pusesevali village in Khatav taluka of Maharashtra's Satara district. The violence was erupted in response to an objectionable social media post which said "Pakistan Zinabad" and also slandered Indian freedom fighter. This post ignited tensions between two communities and lead to one person dead and several injured. [11]

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[10] Alexander Brown, What is so special about online (as compared to offline) hate speech?, *available at: https://ueaeprints.uea.ac.uk/id/eprint/64133/1/Accepted_manuscript.pdf* (Last visited on November 30, 2023).

[11] Sayantani Biswas, "Satara Communal Violence Claimed One Life, Injured Ten Others Over A Social Media Post.", *LiveMint,* September 12, 2023, *available at:* https://www.livemint.com/news/india/satara-

In May 2023, communal clash broke out in Akola district of Maharashtra between two groups. The violence broke out following Instagram post, allegedly making remarks about the founder of Islam after the film "The Kerala story". Although the post was deleted but due to reach of social media that too in short span of time. This led to death of one and many got injured. [12]

In past also we can see similar incidence where because of social media offensive clips and hate message disturbed the national security and caused unrest.

In 2012 government blocked various webpages, including Facebooks, goggle and twitter to avoid panic among northeast migrant living across the country. As on these websites inflammatory and harmful content, particularly morphed images and video which were used to incite Muslims to target people form northeast. In text messages it was claimed that people from the north east will be targeted after Ramzan. This caused a feeling of insecurity among the northeast persons and led to mass departure of northeast migrants from various states.[13]

In 2013 western Uttar Pradesh witnessed large scale political violence between two communities. Social media added fire to Muzaffarnagar clashes. A controversial video clip purportedly depicts a Muslim mob lynching two Hindu youths. Due to which later on police suspected to be from neighbouring countries Pakistan or as was filmed in an unrelated event in Sialkot in 2010. Video stirred unease, deepening hatred between Muslims and Hindus.[14]

In mid-December of 2014, Mehdi Masroor Biswas, a 24-year-old from Bangalore, India, who ran the Twitter account, @Shami Witness, was arrested. The account sent out around 1,30,000 tweets, the most of which were in support of the IS. Mehdi was charged of distributing messages, recruiting, and propaganda. A review of his account activity revealed that it was founded in 2009 and has around 18,000 followers. The account was most popular

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communal-violence-claimed-one-life-injured-ten-others-over-a-social-media-post-all-you-need-to-know-11694870126380.html (Last visited on November 19, 2023).

[12] Maharashtra: Communal clash over Instagram post allegedly 'insulting prophet' in Akola, one dead & several injured, *organizer voice of the nation,* May 15, 2023, *available at:* https://organiser.org/2023/05/15/174100/bharat/maharashtra-communal-clash-over-instagram-post-allegedly-insulting-prophet-in-akola-one-dead-several-injured/ (Last visited on November 19, 2023).

[13] "Assam Violence: Cyber War Continues, Government Block 89 More Web Pages to Avoid Panic", *The Economic Times,* August 12, 2012, *available at:* https://economictimes.indiatimes.com/news/politics-and-nation/assam-violence-cyber-war-continues-government-blocks-89-more-web-pages-to-avoid-panic/articleshow/15580063.cms (Last visited on November 19, 2023).

[14] Zia Haq, "A dangerous trend: Social media adds fire to Muzaffarnagar clashes", *Hindustan Times, 3* December, 2013 *available at: https://www.hindustantimes.com/india/a-dangerous-trend-social-media-adds-fire-to-muzaffarnagar-clashes/story-qWmUteMPV1ZkPZkoAlRyDK.html* (Last visited on November 19, 2023).

in the Middle East and Britain, according to mapping and analysis of its followers. Such messages cause threat to national security and leads to radicalisation. [15]

In September 2015, an Indian woman accused of recruiting individuals for ISIS was deported by the UAE and later apprehended in Hyderabad. Afsha Jabeen, also known as Nicky Joseph, 37, has been using social media to recruit young people for ISIS while posing as a Bri tish national.

All such incidence reflects that boundaryless social media which has eased our life beyond the level, is also responsible for causing unrest and threat to national security. By just one post on the social media can turn hamper the national security and can bring thousands of people do violent act.

Modern terrorism is primarily reliant on the internet. Operation via the internet does not require significant investment and is not easily traceable. The internet is being used to support false proxy conflicts, recruit fighters, and promote information and ideas. So, it is need to the time to curb all such messages or videos on social media and to regulate them.

III. Legal Regime for Regulating Such Online Speech

At international level, article 20 of the ICCPR requires governments to ban by legislation the advocacy of national, racial, or religious hatred that involves incitement to violence, discrimination, or hostility. Art. 19(3) further empowers states to make legislation prohibiting speech for respect of others' rights or reputations, national security, public order, public health, or morality.

In India, government regulate such speech by various laws. In 2008, Section 66A was added to The Information Technology Act 2000 (IT act) to penalize online hate speech. The clause was made applicable to any information sent by any computer or communication equipment that is excessively offensive in nature or that can produce menace, or any false information with the intention of causing irritation, inconvenience, danger, insult, harm, enmity, hatred, or ill will. However supreme court in Shreya Singhal v. Union of India[16] held this provision unconstitutional and order to struck down it. Section 66F of IT act, empowers to impose life imprisonment, If a person refuses authorised personnel access to a computer resource or seeks to penetrate or access a computer resource without authorization with the

[15] *Mehidi Masroor Biswas* v. *The State of Karnataka,* Crl. Petittion No. 8749 of 2016.
[16] *Supra* Note 7.

intent to endanger India's unity, integrity, security, or sovereignty, or to instill fear in the people or any portion of the people. The section is imposed by the government whenever there is online tweet or post which goes against the national security. however, the issue in this section is that it has specifically mention the categories of act which need to be done to be to be charged under this section. But in those categories of acts it does not mention the online tweet or post. Although in Mehidi Masroor Biswas v. The State of Karnataka[17], he was charged under the IT act section 66F besides other acts. Section 69A[18] of The IT Act, empowers the government to block or filter or restrict access to any website or sources on the internet.

Section 144[19] of The Code of Criminal Procedure (Sec163 BNSS 2023) (Hereinafter referred to as CrPC) authorizes the district magistrate to impose an internet shutdown in their territory. In Madhua Limaye v. Ved Murti[20], The constitutionality of Section 144 was challenged before the Supreme Court, but the court refused to accept this argument, ruling that even the possibility of a provision being exploited is insufficient grounds for striking it down. However, The Supreme Court stated that the objective of the clause is to handle an urgent

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17 *Supra* note 18.

18 *Supra* note 19, S. 69A Power to issue directions for blocking for public access of any information through any computer resource. -(1) Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2) for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

19 The Code of Criminal Procedure, 1973. S. 144 (1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity, or a riot, or an affray.(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.(4) No order under this section shall remain in force for more than two months from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

20 1971 SCR (1) 145.

problem in order to avoid damages. The threat expected must be actual rather than hypothetical or based on likelihood. [21]

Section 124A of The Indian penal code 1860 Or (Sec152 of BNS) (Hereinafter referred to as IPC) which deals with sedition specify that whosoever by speech, whether spoken, written, by sign, or by visual representation incites the people to violence against the constituted authority via hatred, contempt, or stimulation of disaffection toward the government established by law. Section 153A[22] of IPC, criminalises words either spoken or writing or sign or visual representations that promote enmity between different groups on grounds of race, caste, religion, community etc. and doing any act prejudicial to maintenance of harmony. Section 153B of the IPC supplements the above section as it extends liability to publishers as well as those who reiterate the content. Section 504[23] of IPC Or Sec352 BNS, which provides that anyone who threatens, insults, or seeks to provoke another person with the goal of effecting peace through email or any other electronic form will be held accountable under this provision.

Apart from above penal provisions, government can also… anti-terrorism laws against online slogan and speech which are against national security these are The National Security Act, 1980 (Hereinafter referred to as NSA), under which section 3, grants the state huge authority to arrest a person if there is concern of danger to national interest or public order. Apart from these other legislations used are The Unlawful Activities Prevention Act

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[21] Mehvish Ashraf, "Online Hate Speech in India: Issues and Regulatory Challenges", 3 *International Journal of Law Management & Humanities* 919 (2020).

[22] The Indian Penal code, 1860. S. 153A Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.- (1) Whoever--(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities, or (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity,

[23] *Ibid. S. 504* Intentional insult with intent to provoke breach of the peace. - Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

(hereinafter referred to as UAPA). Section 13[24], 16[25], 18[26], 18B[27], 38[28] and 39[29] of UAPA enabled special procedure to handle terrorism related activities pertaining to individuals and organisation. The act extends exceptional power and jurisdiction to detain and arrest people.

Presently the issue with the current provisions of UAPA, the act was formulated with the aim to deal with the activities undermining the integrity and sovereignty of India. However, presently government using the provisions of such a stringent act to curb the online speech. The issue with the provisions is that nowhere online speech is mentioned in the provision and there is not clarity what type of online speech will be covered under it. All this leading to excessive use of the act and curbing the online speech which are not even against the national

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[24] The Unlawful Activities (Prevention) Act, s. 13 Provides that, (1) Whoever— (a) takes part in or commits, or (b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years and shall also be liable to fine.
(2) Whoever, in any way, assists any unlawful activity of any association, declared unlawful under section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

[25] *Id.,,* S. 16 provides, Punishment for terrorist act. (1) Whoever commits a terrorist act shall,— (a) if such act has resulted in the death of any person, be punishable with death or imprisonment for life, and shall also be liable to fine; (b) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

[26] *Id.,* s. 18 provides, Punishment for conspiracy, etc.—Whoever conspires or attempts to commit, or advocates, abets, advises or 3 [incites, directly or knowingly facilitates] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

[27] *Id.*,, s. 18B provides, Punishment for recruiting of any person or persons for terrorist act - Whoever recruits or causes to be recruited any person or persons for commission of a terrorist act shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

[28] *Id.*, s. 38 provides, Offence relating to membership of a terrorist organisation.—(1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation: Provided that this sub-section shall not apply where the person charged is able to prove— (a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and (b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation. (2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

[29] Offence relating to support given to a terrorist organisation.—(1) A person commits the offence relating to support given to a terrorist organisation,— (a) who, with intention to further the activity of a terrorist organisation,— (i) invites support for the terrorist organization; and (ii) the support is not or is not restricted to provide money or other property within the meaning of section 40; or (b) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is— (i) to support the terrorist organization; or (ii) to further the activity of the terrorist organization; or (iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or (c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity. (2) A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

security or anti-terrorism. leading to its misuse. As a result, it prohibits dissent and criminalizes mere political ideas that produce dissatisfaction with the state. Certain words in the provisions used in the act like word advocate, abets or incite are very broad and there is no clarity when in online speech it will amount to abet or advocate or incite.

Recently on 20th November 2023 the Jammu and Kashmir and Ladakh High Court, while giving bail to writer Fahad Shah, the founder editor of the erstwhile news portal 'The Kashmir Walla', who has been in detention for nearly two years following accusations of terrorism relating to the publication of an article titled 'The shackles of slavery will break' published in his magazine in 2011. Court observed that an arrest under the UAPA 1967 without 'legal justification' would violate the Constitution's guarantee of equality and liberty. The court also emphasized that, while the investigating agency has discretion in making arrests under the anti-terror law, a compelling rationale must be provided after the arrests, rooted in the concept of a 'clear and present danger' posed by the accused to society, especially if released on bail.[30]

This all is also because of the lack of clearance in the act when to charge a person under the act for online speech.

Section 8[31] of the Jammu and Kashmir Public Safety Act, 1978 has been used by government several times to control the post or speech which misguides the common masses by circulating fake news against the government and its policies. The provision allows for a person's detention without trial for up to two years. On the basis of preventing the suspect from behaving in any manner harmful to the security of the state or the maintenance of public order.

So, there are penal regulations to dealt with such online speech and slogan which cause threat to national security and public order. But all are general legislation dealing with general

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[30] Human Rights Watch, India: Kashmiri Journalist Held Under Abusive Laws, February 8, 2022, available at https://www.hrw.org/news/2022/02/08/india-kashmiri-journalist-held-under-abusive-laws. (Last visited on December 01, 2023).

[31] The Jammu and Kashmir Public Safety Act, 1978. S. 8 Detention of certain persons. —(1) The Government may— (a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to— (i) the security of the State or the maintenance of the public order
"acting in any manner prejudicial to the maintenance of public order" means— (i) promoting, propagating or attempting to create, feelings of enmity or hatred or disharmony on ground of religion, race, caste, community, or region ; (ii) making preparations for using, or attempting to use, or using, or instigating, inciting, provoking or otherwise abetting the use of force where such preparation, using, attempting, instigating, inciting, provoking or abetting, disturbs or is likely to disturb public order ; (iii) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of, mischief within the meaning of section 425 of the Ranbir Penal Code where the commission of such mischief disturbs, or is likely to disturb public order ; (iv) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of an offence punishable with death or imprisonment for life or imprisonment of a term extending to seven years or more, where the commission of such offences disturbs, or is likely to disturb public order.

hateful speech and in this legislation, there is no such provision which explains in details when such slogan or online post will be seen as threat to national security and public security.

Because of all such ambiguity's that when to treat online speech and slogan as threat to national security and public order it gives the government a tool to criminalise all type of dissent and speech. Which is leading to overcriminalisation of speech.

IV. Overcriminalisation of Speech

Now a days government is directly resorting to national security law like UAPA, NSA or PSA to charge the people, journalist for any form of speech or slogan. Not even properly analysing whether in actual it is against the national security or not. Government now fencing themselves as a whole nation and any statement in their criticism as seen as a threat to public order. So, laws for security of nations are now being used by government in cases if the slogan or speech hurt their personal sentiments also. [32]All this is leading to overcriminalisation of speech and hampering the democratic attribute of the nation.

In L. Raghumani v. District Magistrate West District Manipur[33], a Manipuri activist was arrest by police for uploading a Facebook post contending that "the cure for corona is not cow dung or cow urine. The cure is science and common sense. Professor ji RIP". District magistrate smacked the National Security Act against the activist. It was argued that Facebook post was to incite political, social and religious agitation among people. The top court released the activist and ruled that a person cannot be detained in detention for such an offense. If the detention continues, it would violate the right to life and personal liberty. So, here such a draconian law was used by the government not because it was harming the national security or public order. Rather it used against a citizen because it was challenging and criticizing the government on corruption.

Similarly, in Jasbir Singh v. State of Punjab[34] also, government charged the person for positive criticism. where the defendant was arrested because he went live on Facebook and criticised the governments for the way they handling the COVID situation. Government alleged that all this utterance is against the integrity of the nation and can cause communal disaffection. Supreme court in this case held that although defendant criticised the government functioning

[32] Shreya Rawat, National Security Laws in India Against Freedom of Speech and Expression Uttaranchal University, Dehradun, *Supremo Amicus* (2022). *available at:* https://supremoamicus.org/wp-content/uploads/2022/07/Shreya-Rawat-1.pdf (Last visited on November 19, 2023).

[33] WP(Crl) 266/2021.

[34] Crl. Misc. No. M-19376 of 2020

and that too in intemperate and abusive language, but same does not amount to exciting disaffection towards the government and will not amount to disruption of communal harmony. So, he was released after spending 6 months and 14 days.

In Sanskar Marathe v. The State of Maharashtra[35], where Assem Trivedi, who is a political cartoonist and social activities. Through his cartoon which he uploaded on his Facebook page and his website, mocked the parliament and corruption in administrative machinery. In the cartoon, he showed the parliament as a national toilet, the national insignia as wolves instead of lions with the subtitle wolf with the sign of danger, and Bhrashtameva Jayate instead of Satyameva Jayate. The allegation against him were for defaming parliament, constitution and Ashok emblem and also for spreading hatred and disrespect against the government. He was charged under section 124A IPC. Court observed that a citizen has a right to say or write whatever by way of criticism or comment, so long it does not incite people to violence against the government or with intention of creating public disorder. As a result, there is a need to define a line of demarcation between the scope of citizens' fundamental rights under article 19(1)(a) of the constitution and restrictions based on state security and public order.

Growing restriction on media freedom and increasingly arrest of journalist on charge of terrorism and sedition. By using penal legislations government routinely targeted critics and independent news organisation.

Siddique Kappan was detained due to his religious identification and reporting on religious freedom issues, when he was on his way to cover a rape case of a Dalit girl. He was being investigated for sedition under section 124A, fostering hatred between various groups on the basis of religion, race, place of birth, domicile, etc, section 153 IPC, knowingly possessing property earned or received from the commission of a terrorist act, section 14 of UAPA, raising funds for terrorist act section 17 UAPA. While held that Kappan had no work at Hathras when he was arrested.

In 2020, Umar Khalid and Sharjeel Imam were chargesheet on ground of pre-planned violence against the state in the case related to larger conspiracy in Delhi through social media for large scale indoctrination a mobilisation of youth for chakka Jaam as protest against the citizenship amendment bill.

[35] 2015 SCC OnLine Bom 587.

From all such cases it is clear that using the veil of national security and public order. Government misuses such draconian laws in which all procedure from starting to end is under the control of the government to curb the dissent against it. Using such laws not only infringement right of speech and expression and right of doing positive criticism which makes any country real democracy. It also infringes liberty of a person but putting them behind bars or by labelling them as terrorism.

Looking on all such case, one important question arises is whether all online speech, slogans are anti-national speech or not.

A nation's citizens are more than just animals. They have at least some basic human rights to have a meaningful existence. India, as a democratic country, protects basic human rights by protecting freedom of speech and expression under Article 19(1) of the Indian constitution. In name of national security and peace government arbitrary declare the even reasonable speech and slogan of criticism as anti-national.

Although it is not easy to define and categorise that which online post or slogan can cause threat to national security or not. Defining hate speech is one of the most perplexing issues of the present, especially because its definition is dependent on the impact that the speech produces. Given the inherent intersection with freedom of expression, there is scant agreement on what constitutes hate speech. The challenges of identifying hate speech become even stronger with the increasing use of the internet as a means of communication, because it may be utilized by anybody anywhere in the world and targeted at anyone anywhere in the world.

YouTube, which permits free sharing of video content on its service, erased 25,000 films in one month alone. All such hate crime has led to horrendous hate crimes like communal riots, series of violent clashed between religious communities. Incidents of gruesome killings took place due to hate against another community or mob lynching. As in above cases like recent incidents in Maharashtra were slogan such as 'Pakistan zindabad' or commenting against the Islam foundation can cause violence on such a large level. That it took precious live of a person. So, such slogan or speech can be seen as anti-national and threat to national security.

However, in cases like Mohammad Niyaz v. State of U.P.[36] where the petitioner wrote on his Facebook page "I Love You Pakistan, I miss you Pakistan" and in case Nazir Hussain

[36] Crl. Misc. Bail Appl. No. 56050 of 2021.

@ Bittu v. State of UP [37]where the accused was arrested and spent five months in prisoner for posting a flag of Pakistan on his Facebook page. FIR were lodged against them on ground of anti-national post, but court granted him bail as never tried to create any social disturbance or done any anti national activity. So, such post is not seen as serious as did not led to any kind of violence or disturbed the public order.

Although it is not easy to classify speech or slogan as hate speech or one which will threaten the national security. However, judiciary in different cases tried to classify whether particular slogan is anti-national or not. It also directed government to distinguish between anti-government slogan and anti-national slogans. It tried to make is clear that mere shouting slogan or posting a slogan cannot be seen as threat to national security. intention behind it or was it the reaction of public at large towards such slogan or post is also need to be considered. Moreover, to apply proportionality test whenever government uses reasonable restrictions provision to curb the right to free speech and expression. To ensure that it does not infringe the right ensured to citizens.

In Brandenburg v. Ohio[38], in which a leader made a speech at a rally that advocated violence. He was charged under Ohio criminal syndicalism act which prohibited individuals from advocating for crime, sabotage, violence or unlawful method of terrorism as means of political reform. The United States Supreme Court ruled that Ohio's legislation violated Brandenburg's right to free expression. Speech may be restricted if it is intended to encourage or generate immediate lawless action and is likely to do so. Mere abstract debate is not the same as actually preparing or persuading individuals to engage in unlawful acts.[39]

In Balwant Singh v. state of Punjab[40], in which two appellants in public were charged under section 124A of IPC for raising slogan such as "Khalistan Zindabad" and "Raj Karega Khalsa" when rioting erupted across the country following the assassination of Indian Gandhi. They also sang, "Hindustan Murdabad.". The supreme court decided that casual raising of slogans once or twice by two individuals alone cannot be considered to be aimed at stirring or attempting to inspire hatred or disaffection against the government, and hence the offence of section 124A would not be triggered.

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37 Crl. Misc. Bail Appl. No. 26129 of 2020.

38 395 U.S. 444 (1969)

39 "Brandenburg v. Ohio", Global Freedom of Expression Columbia University, *available at: https://globalfreedomofexpression.columbia.edu/cases/brandenburg-v-ohio/ (*Last visited on November 19, 2023)

40 AIR 1995 SC 1985.

The Supreme Court justice Deepak Mishra, addressing at an event "democracy and dissent" organized by the Supreme Court Bar Association, remarked that insulting the government is not the same as disrespecting the nation, in same way all anti-government slogans are not anti-nation.

Hence, Indian citizens have right to critics the government. If we suffocate such criticism and dissent against government, then it's better to be police state instead of being a democracy. His words are significant because they come against the backdrop of a prevailing trend in which everyone who does not agree with the administration or is against any law and expresses his or her discontent against the government through posts and slogans is labeled as being anti-national.

In State of Maharashtra v. Sangharaj Damodar Rupawate[41] it was held that the impact of the words used in the offending material must be measured by the standards of sensible, strong-minded, resolute, and courageous men, rather than those of weak and vacillating minds, or those who see danger in every opposing point of view. The type of readers for whom the book is primarily intended would also be relevant in determining the likely repercussions of the writing. Although, art. 19(2) provide state absolute immunity if it restricts the right to speech and expression on the ground of national security. But these restrictions are qualified by word reasonable.

In Chintaman Rao v. state of Madhya Pradesh[42], The court ruled that fair restriction implies that the limitation should not be arbitrary or excessive, but should be reasonable and applied with intelligent care and decision. Therefore, it is very important that doctrine of proportionality must be seen, which was expounded by supreme court in Modern dental college & Research centre v. State of MP.[43]

In Anuradha Bhasin v. Union of India[44] The case dealt with internet and movement restrictions enforced in the Jammu and Kashmir region in the interest of public order. The Supreme Court has recognized that permanent suspension of internet service is unlawful and violates the freedoms of speech, expression, and the practice of a profession. The court ruled that internet shutdowns should comply to necessity and proportionality.

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41 (2010) 7 SCC 398.
42 AIR 1951 SC 118.
43 (2016) 7 SCC 353.
44 *Supra* Note 8.

V. Way Forward and Conclusion

There is a saying that "haters are going to hate," but that does not mean society should passively listen and allow threats to the nation and its security to grow unchecked. It is necessary to take concrete steps to prevent the spread of hatred. Although India currently lacks a stringent, specialized law on the issue, the formulation of such legislation must be seen as a long-term measure. At present, it is not easy to define precisely what constitutes hate speech and to lay down its essential ingredients.

In the short term, alternative measures are required, such as educating citizens, strengthening social and political cohesion, and fostering an "aware citizenry." Public awareness itself can act as a powerful deterrent against dangerous online speech that threatens national security and societal harmony. Equally important is the involvement of non-state actors, particularly private social media platforms. These entities must ensure that speech inciting disharmony is curbed at the earliest and that no material capable of destabilizing society is allowed to circulate.

At present, legal provisions used by the government to address online speech remain unclear and often inadequate. For instance, s. 66F of the IT Act has been invoked against tweets and online statements, even though the provision does not explicitly mention online speech. Similarly, provisions of the UAPA are sometimes used against journalists, despite the Act lacking a clear definition of what kind of online expression qualifies as anti-national or as an act of terrorism. Such ambiguities invite misuse. Therefore, the government should introduce amendments and clarifications to prevent these laws from being arbitrarily applied against legitimate dissent.

At the same time, it must be remembered that the Internet is a vital medium for exercising the constitutional right to freedom of speech and expression. Excessive restrictions on this right are unjustified and amount to a violation of civil liberties. A balance must therefore be struck between protecting national security and upholding free speech. Stringent laws should not be misused to suppress anti-government views under the guise of protecting national security. In a true democracy, it is the government's duty to perform its functions responsibly, and if it fails, it must remain open to criticism from the people. That is how democracy sustains itself.

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THE INTERSECTION OF TRADITIONAL KNOWLEDGE WITH INDIAN INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

The Article brings to the legal discourse the rights in traditional knowledge; how do we define traditional knowledge and who do we deem the ownership of such knowledge, the Government or the indigenous communities that have developed, curated and refined this knowledge through years of dedication towards their art and discipline and how does law protects the rights of communities and the traditional knowledge itself from exploitation. When we look at the Intellectual Property Rights and their framework in this country, does it strive to provide exploitative and enrichment rights to these communities or the system set up as of yet simply pushes back any individual from achieving exploitative rights by recognizing traditional knowledge as public wealth. This phenomenon of the loss of the rights of indigenous rights over their own cultural knowledge and practices, is the one which is being witnessed all over the world and now that the economy is stepping towards a global market, loss of one community is being felt by the fabric of all the indigenous communities. However, with the objective to bring to light the invisible hands that have birthed the traditional and indigenous knowledge, several steps are being taken by policy and law makers, to ensure that such communities are no longer vulnerable to bio-piracy, cultural misappropriation or economic exploitation. These movements are spearheaded by activist and organizations who have always celebrated the indigenous communities and their rights over their own cultural knowledge and this is being done by bringing law and its implementation and awareness in the grassroots of the communities of India.

I. Introduction

Humanity is a community-based species, surviving not as isolated individual experiences but as a group bound by shared wisdom. Wherein the methods of surviving and thriving have been passed down generations with folklore, customs and knowledge deliberately preserved as traditional knowledge. This knowledge is often not codified but woven into rituals, tales, recipes, songs and healing practices. And with the strength and faith in the knowledge, the community continues to breathe life in itself.

India in particular, with its vast geographical structure and mosaic of communities and ethnicities, stands tall with traditional knowledge. Just as soon the language of the people changes from village to village, so does the cultural identity, which is shaped by its indigenous

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way existing and surviving. This is applicable to every aspect of life, be it language, farming, clothing, artwork, medicine, storytelling or culinary experiences. The entirety of the nation is a living breathing spirit of traditional and indigenous knowledge.

Law, as a discipline, has always aspired to be the mirror of human existence, seeking to act as a regulatory link between not only the people and the State but also acting as an invisible thread of culture, memory and collective wisdom that sustain societies. In this sense, law does not merely functions as an arbiter of disputes but also as a custodian of preserving the lifeline of communities. This is where intellectual property steps in, by providing statutory recognition to the traditional knowledge would could potentially remain vulnerable to exploitation or appropriation. The Intellectual Property framework in India is evolving and provides protection through the Patents Act, the Geographical Indications Act, the Biological Diversity Act, or initiatives like the Traditional Knowledge Digital Library. This is a step closer to weave traditional knowledge into the protective fabric of law as living rights with economic and cultural significance.

In the global economy, traditional communities as well as traditional knowledge find itself vulnerable to bio-piracy, cultural misappropriation and economic exploitation. Goods and processes developed in indigenous communities are often exploited and commodified by people outside of the indigenous community, which in turn strips the indigenous community of commercial growth and financial exploitation. The present article will focus on the paradox of authentic source identifiers of knowledge which could be deemed "traditional" which often remains unprotected under conventional Intellectual Property law.

II. Our Understanding of Traditional and Indigenous Knowledge

On April 01, 2022, a Bill was introduced in the Lok Sabha which stipulated protection of traditional knowledge by Indian legal frameworks. The Bill attempted to define "traditional knowledge"[1] as "knowledge and expression of culture, which may subsist in codified or oral or other forms, whether publicly available or not, that is dynamic and evolving and is passed on from generation to generation, for at least three generations, whether consecutively or not, which is associated with group or groups who are maintaining, practicing or developing it in traditional cultural context and includes know-how, skills, innovations, practices, learning, medicinal preparations, method of treatment, literature, music, art forms, designs and marks

[1] Section 2(ix), The Protection of Traditional Knowledge Bill, 2022

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but does not include any traditional knowledge covered by any law for the time being in force providing for its preservation, promotion, management or unauthorized commercial exploitation;".

There, however, is no discourse in the legal field in the distinction between traditional knowledge and indigenous knowledge. Both the knowledge is understood as ancestral, community held and developed knowledge.

The Bill however, stipulates that the traditional knowledge is beyond the reach of Intellectual Property law and should not be exploited by any individual as it is deemed that Government shall be the owner of the traditional knowledge. The Bill further clarifies that "No patents or any other form of intellectual property protection shall be granted or applied for by any person, within India or abroad, on any traditional knowledge or aggregation thereof, on any traditional knowledge obtained or derived from India, whether in the custody of the knowledge society or in public domain."[2]

Thus, the traditional knowledge wears the clothes of "*publici juris*", which remains to be outside the scope of protection by the Intellectual Property law granted within the Indian framework.

While the Bill intends to act as an barriers against individuals or corporates from monopolizing and exploiting traditional knowledge, it is imperative to turn our gaze towards the communities that are the true architects of the said knowledge. Whether the act of deeming Government as the owner of traditional knowledge would install a bar on the communities and hinder them from exploiting their own knowledge on their own terms which would better safeguard their heritage.

III. Existing Legal Battles with the Indian Traditional Knowledge

One of the most celebrated cases[3] was the fight over patent rights of turmeric and its healing properties. In this instance, the United States Patent and Trademark Office (USPTO) had granted a patent to the University of Mississippi Medical Center for "*Use of turmeric in wound healing*". The authors of the patent were two Indian individuals. This patent was soon thereafter challenged by the Indian Council of Scientific and Industrial Research (CSIR) and CSIR requested the USPTO to re-examine the grant of patent by submitting that turmeric as a

[2] Section 8, The Protection of Traditional Knowledge Bill, 2022

[3] Patent Number: 5,401,50

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healing agent has been part of the traditional knowledge, which has been practiced in India for centuries. To substantiate its position, CSIR relied upon ancient codified texts such as the Ayurvedic Samhitas as well as historic medicinal journals that meticulously documented turmeric's long-standing use as a healing herb. The USPTO, upon re-examination, acknowledged that the claimed patent lacked novelty and inventive step, as turmeric's medicinal properties were already part of the "prior art". It is pertinent to note that this the decision underscored that even in the absence of formal registration of such patent in the name of any single entity, the very existence of such knowledge in the public domain rendered the patent invalid. The revocation of the patent came as a big win for India as well as highlighted the vulnerability of traditional knowledge when viewed through the lens of conventional Intellectual Property law.

Another important case that added to the legal discourse of the tug between traditional knowledge and conventional Intellectual Property law was the case widely recognized as the Neem Patent Case[4]. The neem tree has long been celebrated in Indian ancient texts and medicinal knowledge for centuries for its medicinal and agricultural properties. In the mid-1990s, a patent was granted by the European Patent Office (EPO) to the U.S. based corporation W.R. Grace and the U.S. Department of Agriculture for a method of controlling fungi in plants by the use of neem oil. This grant was perceived in Indian agriculturists as a glaring instance of biopiracy, where the knowledge of Neem properties were cultivated, refined and preserved by communities over generations was being appropriated under the guise of scientific innovation. Several Indian activists and civil society organizations, most prominently the Research Foundation for Science, Technology and Ecology (RFSTE), spearheaded by Dr. Vandana Shiva, alongside international supporters such as the International Federation of Organic Agriculture Movements (IFOAM) and the European Green Party vehemently opposed the grant of the patent. Their central argument was that the antifungal properties of neem oil were neither novel nor inventive, but had been known and utilized traditionally for centuries, documented not only in Ayurvedic scriptures but also in customary farming practices that relied on neem extracts as a natural pesticide and fungicide. The EPO, after years of deliberation and examination of the documents provided by Indian activists including ancient Sanskrit texts, botanical treatises, and community records, revoked the patent in 2005. The decision marked

[4] European Patent No. 436257

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an important moment for protection of Indian traditional knowledge, even if such knowledge had been transmitted orally or regionally rather than through formal scientific publications.

And lastly, the controversy involving Basmati rice highlighted the struggles between Indian traditional knowledge and intellectual property rights. Basmati rice is much more ingrained in the general populace of the Indian subcontinent as a culinary jewel. It has been a prized possession of the Indian people owing to its lasting aroma and delicate flavour. For generations, farmers in Punjab, Haryana, and Uttar Pradesh have cultivated Basmati as a geographical and cultural marker of identity, embedding it in festivals, cuisine, and cross-generational livelihoods. In 1997 when RiceTec Inc., a Texas-based American company, was granted a patent[5] by the United States Patent and Trademark Office (USPTO) over certain strains of Basmati rice and the method of producing rice lines with Basmati-like characteristics. RiceTec marketed its patented varieties under names such as "Texmati," "Jasmati," and "Kasmati," branding them as premium rice alternatives to traditional Basmati. The patent contained broad claims that appeared to cover not only the rice lines developed by RiceTec but also characteristics traditionally associated with Indian Basmati.

The grant was recognized as a blatant act of misappropriation and bio-piracy, which threatened the economic and cultural interests of Indian farmers. The patent was looming threat to provide exploitative rights to the American company meanwhile diluting the source identifiers of Basmati – Indian farmers. The Government of India, joined by agricultural experts, farmers' organizations, and trade bodies, opposed the grant while producing documents to substantiate their claims including centuries-old agricultural records, geographical data, and scientific studies that documented the unique agro-climatic conditions of the Indo-Gangetic plains as essential to producing authentic Basmati. This dispute raised questions regarding both patent law as well as geographical indications (GI). Eventually, RiceTec was constrained to significantly narrow several of its patent claims. While the USPTO did not revoke the patent in its entirety, the revised claims were restricted to specific rice lines bred by RiceTec and no longer extended to the generic characteristics of Basmati.

These cases acted as a catalyst for India to institutionalize protective measures for traditional knowledge of the Indian subcontinent. These measures included establishing the Traditional Knowledge Digital Library (TKDL), which documents and translates ancient texts of traditional knowledge into formats accessible to international patent offices, thereby

[5] Patent No. 5,663,484

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fortifying the evidentiary base of traditional knowledge against future misappropriation. It also reaffirmed the principle embodied in Indian statutes such as the Biological Diversity Act, 2002 and the Patents Act, 1970, which mandate disclosure of origin of biological material and safeguard against biopiracy.

The Delhi High Court, in its judgment[6] debated the profound issue personal rights vis-à-vis cultural rights of a nation with respect of Intellectual Property Rights and held that "*Authorship is a matter of fact. It is history. Knowledge about authorship not only identifies the creator, it also identifies his contribution to national culture. It also makes possible to understand the course of cultural development in a country. Linked to each other, one flowing out from the other, right of integrity ultimately contributes to the overall integrity of the cultural domain of a nation. Language of Section 57 does not exclude the right of integrity in relation to cultural heritage. The cultural heritage would include the artist whose creativity and ingenuity is amongst the valuable cultural resources of a nation. Through the telescope of section 57 it is possible to legally protect the cultural heritage of India through the moral rights of the artist…Cultural property from developing countries is the focus of a highly lucrative international trade in art. It's negative feature is illicit export from countries of origin.*"

IV. Intellectual Property struggles over Traditional Knowledge faced by countries outside India

The cases highlighted above are not isolated incidents faced by Indian communities but by communities all over the world. In Australia, there are ancient communities of its native people being Aboriginal and Torres Strait Islander people, who like Indian communities have cultivated, preserved, and developed knowledge about the medicine, food, folklore, etc. These knowledge stretches to the its rich flora and fauna. In the case of the Kakadu plum, emu oil or native tobacco lies the fabric of Indigenous cultural heritage. However, in recent years, several patents filed in relation to these resources have sparked similar debates. Patents concerning formulations derived from Kakadu plum, medicinal uses of emu oil, and processing techniques involving native tobacco have been criticized for effectively appropriating Indigenous knowledge without adequate recognition or benefit-sharing. The Australian Intellectual Property law recognized these challenges, and took the step of facing them by its initiative of establishing the Indigenous Knowledge Initiative which sought to embed sensitivity toward

[6] Amar Nath Sehgal vs. Union of India (UOI) and Ors. [2005(30)PTC253(Del)]

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traditional knowledge within the broader Intellectual Property framework. This involves not only training examiners to recognize when a patent claim may in fact be based on long-established Indigenous uses and traditional knowledge, but also improving documentation, databases, and mechanisms for Indigenous communities to assert their custodianship over knowledge.

Presently, we are a witness to the ongoing struggles between the boost of Matcha and its Japanese identity. For centuries, Matcha has been more than a powdered green tea; it is the soul of the Japanese chanoyu (tea ceremony), a cultural ritual and expression which is preserved by generations of tradition. In the global economy, Matcha has rapidly transcended cultural borders to become a thriving international product and has found its way to the Indian café houses as well. Matcha originates from Japanese villages Uji in Kyoto and Nishio in Aichi, which largely remain hidden in this commercial explosion of the tea in the global markets. While geographical indications (GIs) is a way to protect the identity of producers and communities established in these villages, enforcement abroad remains tricky. Japan is now actively pushing in international forums, including the World Intellectual Property Organization (WIPO), for stronger recognition of cultural Geographical Indicators and traditional knowledge systems, aligning its struggles with the countries having rich traditional knowledge.

These struggles that are even faced by countries that have a stronger Intellectual Property framework, bring forth the lacunae of a more integrative model of governance where the Indigenous cultural practices ought to find protection in the heart of lawmaking and policy. The trajectory of these initiatives and efforts will heavily rely on the exercise of the World Intellectual Property Organization (WIPO) to be able to find a way to balance economic exploitation, and cultural preservation.

V. Existing Legal Mechanisms

The Uttarakhand High Court in one of its decisions[7] recognised the rights of the indigenous communities while opining that "*the local and the indigenous communities in Uttarakhand, who reside in the high Himalayas and are mainly tribals, are the traditional "pickers" of this biological resource. Through ages, this knowledge is preserved and passed on to the next generation. The knowledge as to when, and in which season to find the herb, its*

[7] Divya Pharmacy vs. Union of India and Ors. [2019(2)UC1226]

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*character, the distinct qualities, the smell, the colour, are all part of this traditional knowledge. This knowledge, may not strictly qualify as an intellectual property right of these communities, but nevertheless is a "property right", now recognised for the first time by the 2002 Act, as FEBS. Can it be said that the Parliament on the one hand recognised this valuable right of the local communities, but will still fail to protect it from an "Indian entity". Could this ever be the purpose of the legislature***? "Biological resources" are definitely the property of a nation where they are geographically located, but these are also the property, in a manner of speaking, of the indigenous and local communities who have conserved it through centuries**." (emphasis added) The judgment also highlighted the crucial role Nagoya Protocol plays in protection of traditional knowledge.

The Nagoya Protocol brings the important subject of Fair and Equitable Sharing of Benefits Arising from their Utilization to the conversation. The central objective of the Nagoya Protocol was to create legal certainty and transparency for both providers and users of genetic resources, thereby fostering conditions for mutually agreed terms (MAT) between indigenous communities and commercial agents, as well as ensuring compliance with prior informed consent (PIC) requirements. The Protocol also extends protection towards traditional knowledge associated with genetic resources (TKGR), thereby recognizing that indigenous communities and their contributions are not merely auxiliary but often central to the discovery and application of biological resources. The Protocol mandates that any benefits derived from the utilization of such traditional knowledge, must flow back in fair and equitable forms to the indigenous communities that have developed, nurtured and safeguarded this knowledge.

The Convention on Biological Diversity (CBD) was concluded at the Earth Summit in Rio de Janeiro in 1992, representing a landmark moment in the international recognition of the intrinsic link between biodiversity and the cultural practices of indigenous communities. The Convention on Biological Diversity does not simply concern itself with the conservation of biological resources in the abstract; rather, it firmly acknowledges the sovereign rights of states over their natural resources. The Convention on Biological Diversity explicitly mandates the contracting parties to “respect, preserve, and maintain” the knowledge, innovations, and practices of indigenous and local communities that are relevant for the conservation and sustainable use of biodiversity.

The World Intellectual Property Organization approved and adopted a treaty being WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional

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Knowledge on May 24, 2024 which ties Intellectual Property Rights with genetic resources and associated traditional knowledge. This mandatorily requires patent applicants to disclose the origin of their claims in relation to the source identifier being a country, or in the event of the claim consisting of any aspect which could be considered traditional knowledge of any indigenous community, then that has to be disclosed. The act does not stop at mere disclosure but even safeguards the interest of indigenous communities by accrediting them and proposing financial arrangements for their participation.

In India specifically, there are several digital libraries that function as a conveyor and collector of traditional knowledge with the sole objective of its protection. There are preparation of Community Biodiversity Registers which will document the knowledge and cultural practices prevalent in villages. The Traditional Knowledge Digital Knowledge initiative in the database created and maintained by the Government of India aimed towards the preservation and protection of indigenous traditional knowledge in various languages, enabling Intellectual Property systems of other countries to have easier access when determining if the applications received by them is sourced from the traditional knowledge of India. Further, there are several NGOs and foundations that are spearheading the effort of bringing the traditional knowledge of indigenous communities to the light by directly approaching villagers that are the source of such practices, like the Gene Campaign, Jaiv Panchayat or the HoneyBee Network, all working towards the common goal of protecting traditional knowledge.

VI. Conclusion: The way forward towards an overall protection

The struggles are at large evident on the face of the conventional Intellectual Property Rights framework and with alleged progress in the law, the challenges seem to be growing along side it. *Firstly,* while the present Intellectual Property rights are individualistic in nature with the objective of providing exploitation rights to one source identifiers, traditional knowledge or more appropriately community knowledge which is arising from indigenous communities are a collective, which are finding difficultly in being recognised in law to provide rights to their source identifiers. *Secondly*, while the initiatives being taken by the Indian Government by establishing libraries like Traditional Knowledge Digital Library, these texts may make the knowledge vulnerable to further experimentation and hiding the misappropriation. *Thirdly*, with the rise of Artificial Intelligence tools, there arises a fresh batch

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of concern over exposure of traditional knowledge without the consent of the source community.

Traditional and indigenous knowledge stand at the crossroads of past and future. The traditional knowledge has built the system under which we presently exist, yet, the survival of traditional knowledge and protection of community rights is dependent upon reconciling communal custodianship with modern Intellectual Property frameworks.

The introduction of the Bill in India is a step forward towards the recognition of traditional knowledge as a crucial asset of our country that desperately needs protection. However, the Bill has certain concerns. By deeming the Government as the owner of the traditional knowledge, the discourse is again shifted away from community ownership of traditional knowledge and towards State ownership. This opens the gates for undermining the agency of local Indian communities. The Bill further sidelines crucial aspects like prior informed consents of local communities and rights of the local community in the benefit sharing from the traditional knowledge. Unlike international standards such as the Nagoya Protocol, which mandates prior informed consent (PIC) from indigenous and local communities, the Bill lacks any requirement for prior consent from such communities. This omission is particularly troubling as it weakens procedural safeguards critical to equity and transparency. The Bill further shifts the focus towards facilitating commercial exploitation of traditional knowledge without providing any safeguards to local communities, who are the custodians of the traditional knowledge or cultural preservation. These are the systematic flaws that need attention, which can be addressed by instilling into place a conversation with the indigenous and local communities directly.

Further, the focus on the existing Intellectual property laws should take initiatives like the Australian Intellectual Property frameworks, by training the examiners in recognizing and appreciating traditional knowledge and building stronger provisions that provide explicit benefit-sharing. There is a requirement for strengthening the Geographical Indicator rights, which attempts to cover traditional artwork, traditional medicinal processes as well as oral traditions. It is always empowering when there is a paradigm shift towards communities themselves, with teaching and training them on Intellectual Property rights and how to register, enforce, and exploit the rights, which would be beneficial in the growth of the community itself. An additional step would be to ensure that commerce platforms have a way to support indigenous artisans by creating certification processes that are a mark of authenticity that

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assures customers that the products are being created by the source identifiers. Lastly, there has to be a big step towards incorporating respect for traditional knowledge amongst the general public of the Indian populace.

The Delhi High Court concluded one of its judgment[8] with opinion that a lack of guidance and awareness in the public including the indigenous community provides the Authorities with unbridled powers, "*India consists of peoples of diverse cultures and ethnicities in differing geographical locales with varied ecologies, who have practiced agriculture since antiquity. From terrace farming to plantations, developing new strains of grains to harvesting forest produce on a systematic basis to introducing newer practical and cost effective methods of agriculture, Indian farmers have innovated in the agricultural field, from time immemorial. These indigenous "innovators" have bred seeds, hybridized and used them to better yields and improve efficiencies. Indigenous use of plants and varieties for insecticides, herbs and traditional knowledge of uses of locally available breeds with collective memory and sharing of these resources are the hallmark of Indian culture. The Traditional Knowledge Repository, known as the Traditional Knowledge Digital Library (TKDL) consists of 34 million pages in the public domain and includes 80000 formulations of Ayurveda, 1,00,000 formulations of Unani and 12,000 formulations of Sidda schools of medicines. Given the importance of the Act, there is enormous danger in empowering authorities with unguided and uncanalized power through provisions that can implicate livelihoods and limit or impair food access to tens of thousands- potentially hundreds of thousands of farmers and users of plant varieties. The existence of a large section of farmers unschooled in provisions of the Act and unaware of their rights renders unethical bio-prospecting practices and spurious claims to development of new or other registrable varieties, entitled to registration, a real possibility.*"

India is the root of a vast repository of traditional knowledge, inclusive of Ayurveda, Yoga, agriculture methods, Indigenous handicrafts, folklore, and biodiversity-based practices. Yet, the exploitation of traditional knowledge through misappropriation and biopiracy has repeatedly raised concerns about the inadequacy of existing Intellectual Property law to safeguard community rights. To preserve both the moral and economic dignity of indigenous knowledge systems in India, the legal framework must recognize indigenous communities not merely as passive custodians but as rightful owners and active stakeholders of their heritage. This balance is possible to achieve only through appropriate statutory recognition of

[8] Prabhat Agri Biotech Ltd. and Ors. vs. Registrar of Plant Varieties and Ors. [2016:DHC:7792-DB]

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community ownership, mandatory prior informed consent, and strict disclosure of origin requirements in Intellectual Property applications. By integrating these initiatives, India can move past the act of mere preservation and towards the empowerment of Indigenous communities.

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BARRIERS TO TRANSPARENCY: ACCESS TO INFORMATION THROUGH DLSAs IN UTTAR PRADESH

Yogi Chaudhary[*]

ABSTRACT

This paper analyzes the accessibility of information through District Legal Services Authorities (DLSAs) in Uttar Pradesh (UP), The study, based on 71 identical Right to Information (RTI) applications filed with DLSAs across UP, finds significant barriers to transparency, including procedural opacity and regulatory confusion. A primary issue is the lack of digital inclusion; DLSAs in UP are not part of the state's online RTI portal, forcing applicants to use a more costly and burdensome offline process. Furthermore, the study identifies a major conflict between two sets of rules: the Allahabad High Court Rules, 2006 and the Uttar Pradesh Right to Information Rules, 2015. This conflict results in regulatory misinformation, with at least 45% of DLSA Public Information Officers (PIOs) being unaware of the correct rules, leading to the rejection of applications based on incorrect fee requirements or the volume of information sought. A significant number of applications (23.9%) received no response at all. The findings point to a systemic failure to uphold transparency in an institution crucial for access to justice, particularly concerning the Victim Compensation Scheme. The paper concludes with suggestions for legislative and administrative changes, including the harmonization of conflicting rules, the creation of a dedicated online portal for DLSAs, and enhanced training for PIOs. These measures are necessary to dismantle procedural barriers and ensure the RTI Act functions as a formidable tool for accountability and public trust in DLSAs.

I. Introduction

Right to Information has been recognised as a fundamental right.[1] The Right to Information Act, 2005 (hereinafter RTI Act) fulfils the constitutional mandate of Article 19(a), freedom of speech and expression. In *CBSE* v. *Aditya Bandopadhyay*,[2] the Supreme Court, highlighting the importance of the right to information, observed:

> "The right to information is a cherished right. Information and the right to information are intended to be formidable tools in the hands of responsible citizens to fight

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1 State of Uttar Pradesh v. Raj Narain and Others (1975) 4 SCC 428; PUCL v. Union of India (2004) 2 SCC 476.

2 (2011) 8 SCC 497.

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> corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption."[3]

The RTI Act provides for a vast scope of accessible information and a comprehensive institutional setup for providing information to the citizens. A public authority is responsible for providing information to the applicants. According to section 2(h) of the RTI Act, "public authority means any authority or body or institution of self- government established or constituted— (a) by or under the Constitution; (b) by any other law made by Parliament; (c) by any other law made by State Legislature; (d) by notification issued or order made by the appropriate Government".

A District Legal Services Authority (hereinafter 'DLSA') is a district-level institution created under the Legal Services Authorities Act, 1987. It is constituted by the State government in consultation with the Chief Justice of the concerned High Court and comprises the District Judge as chairperson and other members possessing the prescribed qualification.[4] Since it is an authority created by an Act/statutory authority, it falls within the purview of the RTI Act. Among multiple functions, DLSAs provide compensation to the victims of crimes.[5] They receive recommendations of trial courts or the application of victims for compensation and decide the quantum of compensation.[6] As DLSAs play a crucial role in facilitating legal aid and victim compensation, transparency in their functioning is essential for ensuring effective access to justice.

This paper critically analyses the challenges faced by an applicant while filing an RTI application with the DLSAs in UP. It also studies the legal barriers to accessing such information. The paper first discusses the research methodology/design used, the RTI rules applicable to DLSAs in UP, the findings of the empirical study highlighting the issues and lastly suggests measures for improvement.

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[3] *Id., para 66.*

[4] The Legal Services Authorities Act, 1987 (Act 39 of 1987), s. 9.

[5] The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023) (hereinafter, BNSS), s. 396.

[6] BNSS, s. 396(2)

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II. Research Methodology

For the purposes of assessment, the researcher has used an empirical study with the DLSAs in UP. The state of UP is the largest in India in terms of population. There are seventy-one DLSAs in UP.[7] Therefore, seventy-one RTI applications were filed with all the DLSAs addressed to the PIO of DLSAs in each district. Since the DLSAs are not part of the online portal of the UP government, the RTI applications were filed through offline mode. The applications sought identical information relating to the implementation of Victim Compensation Scheme from all the DLSAs, comprising of following questions:

i. What are the sources from which fund is received for the Victim Compensation Scheme by the DLSA?
ii. What is the amount of funds received from the UPSLSA by the DLSA for the Victim Compensation Scheme from 2014 to 2024, year-wise?
iii. What is the amount of funds disbursed to the victims by the DLSA from 2014 to 2024, year-wise?
iv. What are the heads and categories of the crimes to which the Victim Compensation Scheme applies?
v. What is the number of applications received by the DLSA for victim compensation under section 357A(2) of the Code of Criminal Procedure (CrPC), 1973/ section 396(2) of the Bharatiya Nagarik Suraksha Sanhita (BNSS),2023 from trial courts from 2014 to 2024, year-wise?
vi. What is the number of applications received by the DLSA for victim compensation under section 357A(4) CrPC/ Section 396(4) of the BNSS, 2023 from victims or dependents year-wise?
vii. What is the number of applications accepted for victim compensation from 2014 to 2024 year-wise?
viii. What is the number of applications/orders marked/directed for victim compensation from 2014 to 2024 year-wise?

[7] About Us, *available at*: https://upslsa.up.nic.in/about_us.htm (last visited on September 1, 2025).

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ix. What is the number of applications forwarded to UPSLSA for giving compensation from 2014 to 2024 year-wise?

x. What is the number of applications pending under various categories of crime for the victim compensation till [t] December 31,2024?

The uniformity of RTI questions helped control for PIO discretion and reduce external variables. Each RTI application contained ten questions. The total word count of each application was 209 words. RTI applications were filed in the first and second week of May 2025. The applications were accompanied by a photocopy of the Aadhar Card of the applicant and a postal order of Rs. 10. Out of the total 71 applications, a total of 54 responses were received, including 11 answered, 41 rejected, 2 returned as not received, and the remaining 17 were neither returned nor rejected.

III. Identifying Indicators for Assessment of RTI Act

A study by a non-governmental organization (NGO) called Participatory Research in Asia (PRIA) in August 2006 assessed the success of the RTI Act in 12 states on indicators namely the constitution of State Information Commission and its role, role of Nodal agencies, appointment of PIOs, experience of seeking information from PIOs, mandatory disclosure under section IV of RTI Act and role of government in educating people under section 26 of the Act.[8] Another study in December 2007 was conducted by Pragati Abhiyan, a civil society organization, working on the implementation of development schemes in Maharashtra in eighty-four government offices in Nashik. It made an assessment of the compliance of section 4 of the Act, including the parameters such as publication of information by public authorities, and availability of this information to the public, locating the PIO and the time required to locate.[9] Other studies highlight issues such as multiple visits to PIOs for filing RTI Application, cost of filing, apathetic attitude of PIOs, and lack of awareness among PIOs regarding disclosures by their department.[10] A 2023 study based

8 Participatory Research in Asia (PRIA), '*Tracking progress of RTI - PRIA'* (August 2006) *available at*: https://cic.gov.in/sites/default/files/rti_study_reports/Tracking%20progress%20of%20RTI%20-%20PRIA.pdf (last visited on September 1, 2025).

9 Ashwini Kulkarni, "Governance and the Right to Information in Maharashtra", 43 *Economic & Political Weekly*, 15 (2008).

10 Sudhir Naib, *Right to Information Act 2005: A Handbook*, 45 (OUP, New Delhi, 1st edn., 2011)

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on responses from 200 citizens who sought information in the past three years finds that there is a lack of training and awareness, administrative burden, poor record management and fear of repercussions among the PIOs.[11]

For the purpose of this study, the researcher has identified the indicators including the (a) mode of filing RTI application; (b) clarity of application RTI rules among the DLSA PIOs; (c) issue relating to application fees; (d) grounds of application rejection; (e) mode of replying to applications; (f) time taken to reply; (g) non-reply to applications; (h) other miscellaneous issues including reply by wrong office, refusal to accept applications and enquiry about the applicant.

IV. Findings

Mode of filing: Online and Offline

In UP, an RTI application can be filed both online and offline. The online mode provides the list of PIOs where an online application can be filed. The DLSAs and UPSLSA are not included in the online portal. Due to this reason, the applicant had to file offline RTI applications. In some of the other larger states, including Bihar, Gujarat, Rajasthan and Madhya Pradesh, the situation is similar; they have not included SLSA or DLSAs in their online RTI portals.[12] On the other hand, in Delhi, the Delhi Legal Services Authority is part of the online portal, though the DLSA are not included there also.

For offline RTI in UP, the application has to be submitted before the concerned PIO. The UPSLSA has notified that for the purpose of the RTI Act, the Civil Judge (Senior Division)/Secretary of the concerned DLSA shall be the PIO, and his jurisdiction extends to the concerned Legal Services of the District and the Tehsil. Additionally, the District Judge of the concerned district shall be the appellate authority.[13] The researcher personally visited the UP SLSA Office located in Lucknow and consulted the concerned officer regarding the filing of an RTI

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[11] Harshit Singh & Praveen Kumar Chauhan, "Evaluating the Implementation of the Right to Information Act: An Analytical Perspective on its Administrative Impact", 29(1) *Educational Administration: Theory and Practice*, 863 (2023)

[12] Refer to RTI portal of respective states.

[13] Notice no. 460/SLSA-122/05 dated March 9, 2011. *Available at*: https://upslsa.up.nic.in/list%20appellate%20&%20public%20info%20officers.jpg (last visited on ᵗ September 1, 2025).

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application with the UPSLSA and the DLSAs. The researcher was informed that an application on plain paper, along with a postal order of Rs. 10, can be filed for obtaining information from the UPSLSA or DLSAs. The application should be addressed to the PIO/Secretary DLSA of the concerned district.

Nature and quality of responses to RTI

Out of the total 71 applications, 15.5% (11/71) of DLSAs answered the RTI applications. 11.2% (8/71) DLSAs including DLSAs at Maharanjganj,[14] Gautambudh Nagar,[15] Bulandshahr,[16] Rampur,[17]Siddharthnagar,[18] Barabanki,[19] Balrampur,[20] and Chitrakoot[21] answered the questions completely. DLSA Gonda answered all the questions, but did not provide year-wise data for 5 questions (Q5 to Q9),[22] DLSA Mainpuri did not provide year-wise data for one question (Q5),[23] DLSA Moradabad[24] did not answer two questions (Q4 and Q8), stating that the information sought is not clear, and did not provide year-wise data for two questions (Q2 and Q5).

Conflict over Applicable RTI Rules

Conflict arose between two sets of rules, namely, the Allahabad High Court RTI Rules 2006 (2006 Rules) and Uttar Pradesh Right to Information Rules 2015 (2015 Rules).

The 2006 Rules were notified on September 20, 2006. Rule 2(e) defines 'applicant' as a person making a request for any information or inspection under the Act. Rule 3 provides that every application shall be made for one particular item of information only. Rule 4 provides that each application shall be accompanied by cash, draft, or pay order of Rs. 500 drawn in favour of the Registrar General, High Court, Allahabad, or the District Judge of the concerned District Court,

[14] Letter no. 316/DLSA/M./Date- June 12, 2025.
[15] Letter no. 316/DLSA/Gautambudh Nagar dated June 16, 2025.
[16] Letter no. 1049/DLSA-33 RTI (03/46) L dated May 26, 2025.
[17] Letter no. 378/25-DLSA-1/25 dated May 29, 2025.
[18] Letter no. 131/DLSA/2011 dated May 20, 2025.
[19] Letter no. 349/DLSA, Barabanki- dated June 05, 2025.
[20] Letter no. 338 dated June 30, 2025.
[21] Letter no. 310/four/DLSA/Chitrakoot dated July 2, 2025.
[22] Letter no. 213/DLSA/GD-25 dated June 2, 2025.
[23] Letter no. 609/DLSA-RTI/2025 dated May 31, 2025.
[24] Letter dated June 13, 2025

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as the case may be. The rule was amended in 2012, and the fees were reduced to Rs. 250.[25] Rule 4 was again amended in 2013 and the fees was classified into two categories (i) Rs. 250 if the requested information relates to tenders/documents/bids/quotations/business contract or requested information is in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in any electronic form. (ii) Rs. 50/- if information is obtained from sources other than above.[26]

The 2015 Rules were notified on December 3, 2015, in exercise of the powers conferred by section 27 of the RTI Act, 2005. Rule 4(1) of the rules provides that a person can file RTI application before the State PIO of the public authority concerned. The information can be sought in writing or through electronic means.[27] The request should be made in the format provided with the rules. However, if the application is made on plain paper, providing all the details required in Form 2, then the requirement of format can be waived off. Rule 4(2)(c) provides that the request for obtaining information shall not exceed five hundred words. Rule 5(1) provides that the application shall be accompanied by an application fee of Rs. 10 by way of cash against proper receipt, or by demand draft, or by bankers' cheque, or by Indian Postal Order payable to the concerned public authority.

Thus, the 2006 Rules and 2015 Rules differ, *inter alia*, on issues of application fees and the content of the application. This conflict of rules led to two major grounds of rejection of applications: (a) fee-related rejections and (b) rejection on the volume of information sought.

Fee-related rejection

The RTI Act, 2005 does not prescribe any fees; rather, the determination with the "competent authority".[28] In the case of the 2015 Rules, the state government and, in the case of the 2006 Rules, the Allahabad High Court, respectively, are the competent authorities. Both of the authorities have prescribed different fees which creates the confusion.

[25] The Allahabad High Court (Right to Information) (Amendment) Rules, 2012.
[26] The Allahabad High Court (Right to Information) Rules, 2013.
[27] Form 2 of the UP RTI Rules 2015.
[28] The RTI Act, 2005 (Act 22 of 2005), s. 28.

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Out of the total 71 RTI applications, 15.4% (11) of the applications were answered, and 45.1% (32/71) of the applications were rejected on the ground that the applicant paid less fees than prescribed. 63% (20/71) of those rejecting cited the 2006 Rules, while 25% (8/71) of the DLSAs cited the RTI Act 2005.

5.6% (4/71) of the DLSAs, including DLSA Bulandshahr, Balrampur, Barabanki and Ghazipur, considered the application and replied after clarification regarding the applicable rules. The applicant received a telephone call from Bulandshahr[29] and Barabanki[30] regarding clarification of rules. The researcher clarified the applicable rules, and the RTI applications were replied to. The DLSA Balrampur, at first, rejected the application, saying that the requisite fees had not been paid and the RTI application had not been signed, and this order was mailed.[31] The applicant replied to the email clarifying the rules. The RTI application was answered subsequently.[32]

An email received from the District Court of Ghazipur[33] stated that the RTI application was rejected on the grounds that a postal order of Rs. 10 only was required, and then they cited the 2006 rules. The application was not rejected outright, but rather the DLSA gave the applicant three days' time to pay the requisite fees and file separate RTIs for each question. Since the order was emailed, the applicant replied clarifying the applicability of rules, the court considered the argument and transferred the application to the Secretary of DLSA.[34] An email received from the DLSA Balrampur rejected the application for lack of fees.[35] The applicant clarified the issue, and the application was accepted, and information was received.[36]

Rejection on volume of information and confidentiality of information

2.8% (2/71) DLSAs, including the DLSAs of Meerut and Bareilly, rejected RTI applications because multiple items of information were asked. The DLSA, Meerut rejected stating

[29] The telephonic conversation was made with the PIO Bulandshahr on May 21, 2025.
[30] The telephonic conversation was made with the PIO Barabanki on May 28, 2025.
[31] Letter dated May 28, 2025.
[32] Letter dated June 30. 2025.
[33] Letter dated May 28, 2025.
[34] Order dated May 30, 2025.
[35] Letter dated May 28, 2025.
[36] Letter no. 338 dated June 30, 2025.

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that the information asked is too vast. It also said that the applicant must pay the requisite fees and state the reasons for seeking such information.[37] The DLSA, Bareilly rejected the RTI application on the ground that the information sought is too vast and contravenes rule 4(2)(b)(v) of the 2015 Rules. The said rule says that the information sought should not be so vast that its collection involves disproportionate diversion of resources affecting the efficient operation of the public authority concerned. It is important to mention that the researcher received the relevant information from ten DLSAs on the identical RTI applications. It is submitted that every DLSA maintains a record of victim compensation, and providing such information does not lead to "disproportionate diversion of resources".

1.4% (1/71) DLSA, Kanpur Dehat rejected the RTI application on two grounds; firstly, that the Victim Compensation Scheme is regulated by the home department (police division), and secondly, the applicant has sought personal information about the victims and keeping in mind their secrecy, it is not permissible to provide such information.[38] The RTI Act under section 8(1)(g) exempts disclosure of information affecting the life and safety of any person. However, the research did not seek any information relating to the victims; rather, the information sought purely related to the figures of cases related to the Victim Compensation Scheme.

Resolving the conflict of rules

After receiving the rejections on 2006 Rules and to resolve the issues relating to the conflict of rules, the researcher filed an RTI application[39] with the Hon'ble Allahabad High Court to seek clarification on the following two issues:

i. Do the Hon'ble Allahabad High Court (RTI) Rules, 2006 apply to the UP SLSA and DLSAs?
ii. If not, then which rules apply to the UPSLSA and DLSAs for filing RTI applications?

The above RTI application was transferred by the Hon'ble Allahabad High Court to the PIO of the Hon'ble Chief Secretary of UP.[40] The application was returned by the latter, saying that

[37] Letter dated May 20, 2025.
[38] Letter no.147/DLSA/K.D.-2025 dated May 31, 2025.
[39] Application no. HCALD/R/2025/60542 dated May 28, 2025.
[40] Letter no. 943/RTI/1012/2025/AHC dated May 30, 2025.

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the jurisdiction belongs to the Hon'ble Allahabad High Court itself.[41] The RTI was finally replied to by the UPSLSA, saying that the 2006 Rules do not apply to the UPSLSA and DLSAs. Secondly, the 2015 Rules would apply to the UPSLSA and DLSAs.[42]

Different modes of replying to the RTI

Out of 71 DLSAs, 11.3% (8/71) replied through email, while 64.7% (46/71) replied through registered post. Out of the 11 answered applications, 5 replied over email and 6 replied through registered post. Since 41 out of 71 DLSAs rejected the application, they informed the same in different ways. 3 informed the same through email, and 38 informed through writing an order and sending the same by post. Among the rejection orders received through the post, there were three categories: 8 sent only the order rejecting the application, 5 sent the order of rejection as well as the postal order, whereas 18 sent the rejection order as well as the RTI application, including the postal order.

Time taken to reply

A total of 54 responses were received; out of these responses, 94.4% (52/54) were received within 30 days, while 3.7% (2/54) replies were received within 40 days from the date the respective DLSA received the application.

Silence over RTI applications

23.9% (17/71) RTI applications were neither rejected nor returned to date. Rule 7 of the 2015 Rules provides for the right to appeal if a person does not receive a decision from a State PIO or is aggrieved by a decision of a State PIO. A similar right to appeal is also provided under section 19 of the RTI Act, 2005. In *State of Uttar Pradesh* v. *Raj Narain*,[43] the Supreme Court observed as under:

> "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their

[41] Letter no. 1135/CS/RTIA/2025 dated June 3, 2025.
[42] Letter no. 2156/SLSA-40/2015 (PS/RTI) dated 9th July 2025
[43] (1975) 4 SCC 428

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public functionaries. They are entitled to know the particulars of every public transaction in all its bearing."[44]

Rule 4 (6) of the 2015 Rules provides the procedure for the disposal of the RTI applications. It deals with three scenarios: firstly, when the PIO accepts the application, secondly, when the application requires payment of additional fees and thirdly, when the application is to be rejected. In the first case, the PIO is required to convey the information to the applicant. In the second case, the PIO is required to inform the applicant about the payment of additional fees and in the third case, he is required to convey rejection. Thus, in any case, the informant is to be informed. In the researcher's case, one issue is that since the RTI has been filed in the offline mode, there is not much proof for filing an appeal. For the purpose of appeal, a copy of the application is required. It is only the postal receipt which can prove the fact that a post was sent to the PIO.

Miscellaneous Issues

RTI replied by the Central PIO('CPIO') of the District Court instead of the PIO of DLSA

18.3% (13/71) applications were replied by the CPIO of the concerned district court. The CPIOs are designated by the High Court for the district courts. The DLSAs function within the premises of the district court. The PIOs of the DLSA are designated by the UPSLSA. According to rule 4(5) of the 2015 Rules, if the PIO finds that the request made for disclosure of information related to another PIO, then such PIO shall, within five days from the date of receipt of the request, transfer the request to the other PIO. In the case of the researcher, the RTI applications should have been transferred to the PIO/Secretary of the DLSA, but that didn't happen. Only one DLSA, of Ghazipur, transferred the RTI application from the CPIO to the SPIO or PIO.[45]

Refusal to accept RTI application

2.8% (2/71) of the RTI applications were not accepted, and they were returned sealed closed to the researcher by post. The reason stated on the envelope was that the officer refused to accept. In *CPIO, Supreme Court of India* v. *Subhash Chandra Agarwal*,[46] it was held that even the

[44] *Ibid.*
[45] Order dated May 30, 2025.
[46] (2020) 5 SCC 481.

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office of the Chief Justice of India comes within the purview of the RTI Act. DLSA, being a statutory body, is no exception and is bound to provide information.

Enquiry about the applicant

5.6% (4/71) of the DLSAs including the DLSAs of Barabanki, Gonda, Kasganj and Shravasti called the researcher, asking questions such as: What is the professional capacity of the researcher? And why is the researcher seeking such information? The researcher responded, stating that he is a research scholar and the information is sought for academic purposes. In *Surupsingh Hrya Naik* v. *State of Maharashtra*,[47] the Bombay High Court observed that a person seeking information is not required to give reasons. The court observed that "the test always in such matter is between private rights of a citizen and the right of third party to be informed. The third party need not give any reason for his information. considering that it can be said that the object of the Act, leans in favour of making available the records in the custody or control of the public authorities."[48]

Added the cost of filing an offline application

In the online application, Rs. 10 is to be paid as an application fee. In the online portal, an appeal can be filed easily, and no charge is required. But since the DLSAs are not part of the online portal, one has to incur postal and stationery charges to file an application. The researcher incurred a cost of around Rs. 45 on each application, including the postage and stationery charges, apart from the application fees of Rs. 10. So the total cost of each offline application was around Rs. 55-60, which is 5-6 times that of an online application.

V. Conclusions and Suggestions

Enforcement of the RTI Act has had hurdles since its inception.[49] Even after two decades, there is still scope for improvement. An applicant faces multiple problems while filing RTI applications to DLSAs. A survey in Nashik district in Maharashtra finds that most of the

[47] AIR 2007 Bom 121.

[48]

[49] Rajvir S. Dhaka, "Revisiting 11 years of RTI", 51 *Economic & Political Weekly* 52 (2016)

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government offices have not notified the PIOs, which is a statutory requirement of the RTI Act.[50] More RTI activism has also proved to be dangerous; evidence of murder is also seen in past.[51] The poor implementation is also attributed to a lack of PIOs to demand information from and a delay in replying to the applications.[52]

To address these challenges, solutions are required at the legislative and administrative levels. The end result of seeking information should not be defeated by mere technicalities. The opacity observed in DLSA responses not only undermines citizens' right to know but also erodes trust in institutions designed to serve the most vulnerable. If unaddressed, these procedural blocks risk rendering the RTI Act ineffective in one of the country's most critical access to justice institutions. This procedural rejection is not merely a technical lapse; it is a direct barrier preventing victims from accessing information about their entitled compensation, thereby undermining the core mission of the DLSA. The following measures are suggested for bringing about a robust change in the access to information from the DLSAs.

i. Inclusion on the Online portal: It is important to bring the UPSLSA and DLSAs on the online RTI portal of the UP government so that RTI applications can be filed conveniently and economically. The fact that the Delhi Legal Services Authority is included on the online portal, even if its district counterparts are not, demonstrates that integrating such bodies into the digital RTI framework is technologically feasible. Uttar Pradesh's failure to do so for either UPSLSA or its DLSAs points to a greater lag in digital governance.

ii. Harmonization of rules: The RTI rules of the State government and the Allahabad High Court must reflect uniformity in terms of the application fees. It is suggested that ordinarily the same fees should be charged, and for other cases, proportionate extra fees may be levied. The Allahabad High Court Rules 2006, rule 3 states that one RTI application can ask for one particular item of information only. Each application shall be accompanied by a fee of Rs. 500. These two rules appear to be excessive. In contrast, the

[50] Ashwini Kulkarni, "Governance and the Right to Information in Maharashtra', 43 *Economic & Political Weekly* 15 (2008).

[51] Christophe Jaffrelot et. al, 'The Struggle of RTI Activists in Gujarat', 53 *Economic & Political Weekly* 62 (2018)

[52] "Rooting out graft", *The Indian Express*, December 13, 2016. ---add author's name

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2015 Rules require only an application fee of Rs. 10 and allow an application of up to 500 words. Thus, the former must align with the format and fee structure of the 2015 Rules.

iii. Objection redressal window before rejection: A mechanism should be introduced where, instead of straight away rejecting the applications, an objection should be raised by the PIO, and a certain time frame should be provided to address the objection. This will also reduce the number of appeals.

iv. Encouraging digital replies: An RTI application should be replied to by electronic means wherever possible. Recently, the *Delhi High Court in Aditya Chauhan* v. *Union of India*,[53] observed that the information sought under the RTI Act has to be provided in all possible electronic means. The public interest litigation here raised the issue that the PIOs are not providing information in modern electronic forms such as emails and pen drives, though the same has been provided in the RTI Act, 2005. Section 2(j) of the 2005 Act defines "right to information" as including "information in the form of diskettes, floppies, tapes, video cassettes or in any other *electronic mode*". The petitioner highlighted that it is because of the lack of legislative framework in the Right to Information Rules, 2012, that the PIOs are reluctant to provide the information in electronic modes. The court directed putting in place an adequate framework for the purpose.

v. Separating the office of PIO and Secretary of DLSAs: Currently, the Secretaries of the DLSAs undertake the charge of PIOs of DLSAs. The Secretaries of DLSAs are Senior Division Judicial Officers. They have a profile of a judge and may confuse the function of DLSA with the court. It is possibly the reason why they cited the 2006 rules, assuming that the applications were made to the court. Thus, to bring clarity in the function, a separate office of PIO should be created in all DLSAs, comprising persons who are not judicial officers, so that they there is clarity in the application of the rules.

[53] 2025 DHC 5193 DB

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vi. Staff training: The secretaries and staff of the DLSAs must be apprised of the relevant rules applicable to the UPSLSA and DLSAs. They should be trained to provide information in the same manner as asked in the applications. In case of any confusion, clarification must be sought from the applicant instead of being rejected straight away.

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THE CONSTITUTIONAL CONTOURS OF COW PROTECTION: A LEGAL ANALYSIS OF RELIGIOUS RIGHTS IN INDIA

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ABSTRACT

The complex constitutional and legal issues surrounding cow protection in India are discussed in this research paper, with particular focus on the ways in which governmental regulations conflict with individual liberties, particularly the freedom of religion and the right to work. In order to show how these forces influenced Article 48 of the Constitution, which makes cow preservation a directive rather than a fundamental right, the study traces the historical development of bovine veneration from Vedic tradition to its politicisation throughout the colonial period. Article 48 and fundamental constitutional safeguards, such as Article 19(1)(g) (freedom of occupation), Article 21 (life and personal liberty), and Article 25 (freedom of religion), continue to clash, according to the research. This tension is highlighted by judicial pronouncements that prioritise animal welfare while simultaneously causing economic and social hardship for minority populations that depend on cattle-related trades, such as those that uphold complete prohibitions on cow slaughter. The paper also looks into the topic of cow vigilantism, in which extralegal enforcement exacerbates tensions within communities and threatens human rights and the rule of law. India presents particular difficulties in balancing secular administration with robust cultural traditions, as demonstrated by a comparative study with international frameworks for religious freedom and animal protection. The paper calls for a more comprehensive and multidisciplinary approach, concluding that effective cow protection policies must strike a balance between religious passion, economic realities, and animal welfare. To ensure both true justice and the rights of all individuals in a secular democracy, policy reforms should address the wider ethical, legal, and socioeconomic ramifications rather than depending solely on religiously driven bans.

I. Introduction

The conflict between the instructions to cow protection and the personal rights, especially religious and the right to work, constitutes the core of the existent legal and social controversy[1]. Such a complex connection requires a rigorous analysis of the interpretation and

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[1] Suryapratim Roy & Rahul Sambaraju, "Hindu Zion: the politics of constitutional accommodation" in Mark Tushnet and Dimitry Kochenov, *et.al.* (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar 2023) available <https://doi.org/10.4337/9781839101649.00046>.

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application of constitutional provisions, the aim of which is to however sustain both state policies and individual freedom in a case of cow slaughter. It is, hence, the critical analysis of the constitutional outlines of cow protection in this paper, which investigates how this controversial area has been established, through legislative acts and judicial decisions[2].

The paper will also examine the constitutional issues that arise out of these laws, i.e. how cow protection actions come to collide with the freedom of the Indian Constitution. It involves a close reflection of the protection of bovine species, specifically cows, as a legal concern despite various historical perceptions of the sacred status of bovines, as well as how such legal provisions, in a way, violate secular ideals and basic rights of different peoples[3]. Particularly, it will discuss how the cow protection statutes which are frequently motivated by religious feelings may come into contradiction with the secular principles laid down in the Indian Constitution particularly when they collide with the eating habits of some communities as well as their economic endeavors[4].

Most principles of justice, liberty, and equality are constituted in the Indian Constitution via its Preamble, establishing a secular system that requires giving equal consideration to such issues loaded with religious overtones[5]. Nonetheless, the reinforcement of Hindu majoritarian traditions in the form of cow protection laws undermines this secular construct by determining food habits as well as making the lives of religious minorities economically challenging[6]. This conflict highlights the critical importance of a close legal interpretation to come to terms with the state instructions on cow protection and the constitutional law protection of religious freedoms and rights to continue to work in any occupation, trade, or business[7]. In this reasoning, this paper will present the conflict between Article 48 of the Constitution, a Directive Principle of State Policy (DPSP), as a reference that requires cow slaughter to be prohibited, and such fundamental rights as those guaranteed in Article 19(g) and Article 25[8].

Furthermore, it will discuss how the right to life and personal liberty guaranteed by Article 21 and how the necessity to take proper care of the environment and to express

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2 Himika Batra, "An Analysis on the Prohibition of Cow Slaughter" 4 *Indian Journal of Law and Legal Research* 2582 (2022).

3 *Ibid*.

4 Priyanshu Kar, "The Bovine Quagmire: Analysing Perspectives of Right to Food and Slaughter of Cows for Consumption in India" SSRN Electronic Journal available <https://doi.org/10.2139/ssrn.3998124>.

5 Purnima Janghu & Pranjal, "Emerging Trend of Violent Cow Protection and the Right to Religion in India" 33 Supremo Amicus 2456 (2023).

6 *Supra* Note 2.

7 *Supra* note 5.

8 Kenneth R Valpey, Cow Care in Hindu Animal Ethics (springer, Cham, 2020) available at <http://library.oapen.org/handle/20.500.12657/22832>.

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compassion to living beings that Article 51A(g) adds to the legal situation and makes bovine protection even harder. Such intricate interaction of articles ultimately raises the question of whether the state seeking to protect cow is in tandem with its constitutional duty to maintain a secular and fair society to all its citizens or not.

II. Historical Background of Cow Protection in India

Although the cult of cows is a very old phenomenon, being integral to the life of the modern-day Hindu, there is a complex history of its evolution, which began with the ancient Vedic tradition and has been politicized during the modern centuries[9]. First, cows were venerated due to their economic value as a source of milk, dung, and labor, but this religious status increased over the centuries[10]. Cow protection movements were highly popular in the colonial era, and in many ways acted as a source of national circumstances and even opposition against the British rule[11]. These activisms emphasized the cow as an icon of Hindu identity, putting a pressure on creating laws to protect it and a precedent to its introduction into political speech.

This historical background had a significant effect on the writing of the Indian Constitution, especially the introduction of the cow protection in the Directive Principles of State Policy as opposed to the constitutive right, which used to represent the variety of opinions which were held when the country was established. This strategic positioning was a compromise between groups that were supporting the total ban on cow slaughter and those who promoted personal liberties and secular management. The controversies that existed in the inclusion of this issue when constituting the Constitution highlight a conflict between religious feelings and economic forms, especially regarding the different communities who subsisted on cattle[12]. As a result, the inclusion of Article 48 came, which encouraged the State to restructure agriculture and animal husbandry on modern and scientific principles and, in the first place, to take measures to preserve and improve the breeds and to forbid slaughter of cows and calves and other milch and draught cattle[13]. Though such an inclusion represented the domination of

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9 Ravindra Pratap, "*Cow Vigilantism and India's Evolving Human Rights Framework*" 17 Muslim World Journal of Human Rights 45 (2022) available at <https://doi.org/10.1515/mwhr-2019-0019>.

10 Mohammad Taha Yadi, "*Gandhian Philosophies & The rigorous Cow Protection laws"* 2 Jus Corpus Law Journal 161 (2022).

11 *Ibid.*

12 *Supra* Note 2.

13 Kriti Garg, "*Religious Crimes in Developing Countries: Indian Perspective*" 3 International Journal of Law Management & Humanities 673 (2020).

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Hindu feelings, it did not prescribe the outlawing of the cow murder but indicated the rule principle of the state policy[14].

This subtle constitutional stance was open to different interpretations and legislative decisions in different states, which resulted in patchy legislation, either strictly banning slaughter of cows or regulating it with some limitations[15]. This chronological trend demonstrates the process of cow protection, which had socio-economic and religious backgrounds, being transformed into a politicized one, as the dynamic between communal and secular thoughts[16]. To be more precise, the discussions of the Constituent Assembly related to Article 48 demonstrate a complicated bargaining between those who valued the economic and cultural value of the cow and those who protested against the establishment of religiously-driven restrictions upon the food consumption[17]. Such deliberations eventually saw the inherition of cow protection under the non-justiciable directives of the principle which pointed at a hopeful move towards a governmental desire and not a right that is immediately enforceable[18]. This was a trade-off to recognize the general cultural sentiments but yet not openly infringe upon the core rights of most communities including those involved in the cattle trade.

The further implementation of anti-slaughtering laws of cows in many Indian states, usually supported by the Supreme Court, according to Article 48, is another reflection of the power of these historical and constitutional discourses[19]. This result in a vituperative analysis of the manner in which this body of laws claiming to address the plight of animals, in fact, disproportionately affect certain communities, sparking communal hostility and raising the question of equality before law[20]. The emergence of cow protection movements in the colonial era led by the likes of Dayananda Saraswati and Mahatma Gandhi also cemented the symbolic role of cow in the independence movement, impacting its ultimate constitutional status[21].

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14 *Supra* note 9.

15 Shivangi Gangwar & Aishwarya Pagedar, "*Examining the living metaphor in the Indian Constitution*" 13 Jindal Global Law Review 347 (2022) available at <https://doi.org/10.1007/s41020-022-00183-8>; *Supra* note 8.

16 Nazima Parveen, "In the Name of Cow: Legal–Constitutional Discourse and the Contours of Contemporary Indian Politics" 8 Studies in Indian Politics 214 (2020) available at <https://doi.org/10.1177/2321023020963519>.

17 Sambaiah Gundimeda, "*Debating cow-slaughter: the making of Article 48 in the Constituent Assembly of India*" 22 India Review 1 (2023) available at https://doi.org/10.1080/14736489.2022.2142757>; *Supra* note 2.

18 *Supra* note 2.

19 *Supra* note 15.

20 *Supra* note 5.

21 *Supra* note 8.

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Gandhi explicitly linked the idea of cow reverence with the Hindu tradition but he also sought a solution to the issue with non-Hindus regarding cow care, realizing the multidimensional elements of the issue that he believed were inter-faith[22].

Nevertheless, B.R. Ambedkar, one of the designers of the Indian Constitution, critically analyzed the evidence of tradition and presented the argument against the existence of continuous cow veneration, pointing to the examples of meat consumption (beef) in ancient India and supporting the interests of the marginal groups of society, the livelihood of which was based on cattle. His historical study, based on sacred scriptures, questioned the common assumption that ancient brahmins were unaware of cow sacrifice and meat consumption, and there is a more complex historical truth[23].

III. Constitutional Provisions and Their Interplay

The Indian Constitution offers a complex legal environment in regard to cow protection with different articles in support and opposition to the enforcement of anti-slaughter laws. In particular, the Directive Principle of Article 48 leads to the promotion of the prohibition of cow slaughter on the grounds of animal husbandry, whereas Articles 19(g) and 21 safeguard the fundamental rights in the industry, business, and livelihood, which is in a direct contradiction with these prohibitions[24]. Such a collision course makes such a judicial balancing act mandatory, with the judicial system having judged in many cases to balance the State command to preserve cattle protection and individual liberties and liberty of the economy[25].

Moreover, Article 25 of the Constitution provides the freedom of conscience, freedom to profess, practice and spread religion, which becomes relevant to the issue of whether cow slaughter is a religious ceremony practiced by some communities and therefore involves encroaching upon their fundamental rights[26]. Article 51A(g), on the other hand, imposes a primary obligation on any citizen to preserve and enhance the natural environment, forests, lakes, rivers, and wildlife, and to care about living beings, serving as an additional constitutional justification of the animal protection efforts[27].

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22 *Supra* note 8.
23 *Supra* note 8.
24 *Supra* note 9.
25 *Supra* note 9.
26 *Supra* note 5.
27 Nanditha Krishna, "*Animal sentience in Indian culture: Colonial and post-colonial changes*" 31Animal Sentience 16 (2022) available <https://doi.org/10.51291/2377-7478.1751>; *Supra* note 9.

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It is this complex filter of constitutional clauses which, therefore, requires a jurisprudential approach which recognizes the aspirational objectives of the state policy as well as the need to protect the basic rights and freedoms of every citizen. This mutually complicated interplay frequently results in legal complications where the authority of the state to make laws in animal welfare is weighed with the constitutional rights of individuals to conduct business or religion. As an example, Article 48, which aims at safeguarding cattle by encouraging banning the slaughter practice, clashes with Article 19(g), which assures the right to carry on any profession, or pursue any occupation, trade or business and thus directly affects the livelihood of butchers and others in the cattle business[28]. Article 21, which asserts the right to life and individual freedom, often construed to imply the right to a livelihood, complicates this collision by placing the right to practice cattle-related trades under intense constitutional review[29]. Also, Article 25, which ensures freedom of religious affiliation, overlaps with these rights by creating the question of whether cow slaughter is a vital spiritual practice in some quarters, and therefore may be classified as a fundamental right.

These developments in jurisprudence of the Supreme Court, most notably its liberal approach to the interpretation of fundamental rights, imply the need to harmoniously interpret and understand these stipulations in such a way that enshrined freedoms are not delegated to state policies including those based on the Directive Principles[30]. In fact, the doctrine of reasonable restrictions on Fundamental Rights, as applied in cases such as those in *Maneka Gandhi*, would be important in achieving a balance between the competing interests and making sure that legislative action is fair and has a valid intention of the common good without excessive intrusion into individual liberties[31]. This difficulty emphasizes that it has remained a difficult task to balance the aspirational, but untestable, Directive Principles with the operative Fundamental Rights, which often result in lengthy legal battles over validity and applicability of cow protection laws.

Through these constitutional clauses, the jurisprudential journey has demonstrated an unending attempt to show where the limits of the state mandate are drawn in terms of religious and economic liberties, particularly the issues of the rules governing animal welfare. This involves the consideration of whether the employment of animal euthanasia in the case of

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28 *Supra* Note 2.

29 Prof. (Dr.) SK Bose, Tarini Kalra & Kanchan Bhadana, "Interplay of Articles 14, 19 And 21 with reference to Maneka Gandhi Case" 7 Indian Journal of Law and Legal Research 3907 (2025) available <https://doi.org/10.2139/ssrn.5312427>.

30 *Ibid.*

31 *Ibid.*

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terminally ill animals, must be allowed on the basis of passive euthanasia as in cases such as *Aruna Shanbaug*[32]. But, the Animal Welfare Board of India has repeatedly encouraged more restrictive interpretations of animal protection legislation, frequently criticizing practices that it regards not to be in conformity with the animal welfare principle. Also, the courts have used the interpretation of Article 51A, especially the compassionate attitude to living beings, to buttress the ban on cow slaughtering, implying that the protection of animals is to be seen not only in the welfare of living beings but in a further moral responsibility[33].

The growing trend in judicial decision making in regards to compassion towards Animals, taking the form of a constitutional requirement only further complicates the already difficult relationship between religious activities, property rights of the economy, and government stipulated animal protection[34]. Such a subtle intersection between different provisions of the constitution and how they are interpreted by the courts presents the larger problem of how to reconcile the multiple values and economic realities of society under a secularist system[35].

The Indian secularism model follows the formula of maintaining distance with religion and at the same time respects every religion and their respective workings, which further complicate their interpretations[36]. This strategy will be in order to tolerate various religious practices without favoring any of them and will cause peculiar problems when judging the cases when religious practices clash with the state laws concerning certain issues, such as cow protection[37].

Such subtle perception of secularism, therefore, requires a precarious balancing act, which would permit the sanctity of religious sentiments, yet at the same time safeguard the constitutional right to animal welfare and the economical rights of the citizens[38]. The distinctive

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[32] Hardik Daga & Latika Choudhary, "*Analysing the Animal Euthanasia Scenario in India in Light of the Constitutional Provisions*" 13 Christ University Law Journal 87 (2024) available at <https://doi.org/10.2139/ssrn.5164437>.

[33] *Supra* note 9.

[34] Uday Singh Cheema, "*The Legal Debate Surrounding Animal Sacrifices: Examining the Rights of Animals and Religious Freedom*" 6 International Journal of Law Management & Humanities 598 (2023); Sourav Mandal & Aishwarya Pagedar, "*A brief sketch and some open questions: Legal scholarly publishing on South Asia*" 15 Jindal Global Law Review 1 (2024) available < https://doi.org/10.1007/s41020-024-00230-6>.

[35] Deepa Das Acevedo, "On the Familiar Pleasures of Estrangement", in Tom Ginsburg & Benjamin Schonthal, et.al. (eds.), *Buddhism and Comparative Constitutional Law* 345 (Cambridge University Press, 2023); Parhi, S., & Biradar, S. (2023). The Role of Religious Value in Law Making.

[36] Kaushal Singh, "*Rethinking Secularism: An Inquiry into its Viability and Adaptation in the Indian Context*" (2024) SSRN Electronic Journal available <https://doi.org/10.2139/ssrn.4853411>.

[37] *Supra* Note 36.

[38] *Supra* Note 2.

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model of secularism in India versus the intense separation that prevails in Western countries allows the state to intervene in the religious matter to support social justice and equality, but with its own problems of communalism and political manipulation of religion[39].

IV. Judicial Pronouncements on Cow Slaughter Bans

The Supreme Court of India has been critical in setting the legal framework on or around the issue of cow protection, with some of their decisions giving light to the constitutionality and applicability of the legislative prohibitions against slaughter of cows. The decisions have been keen to find a balance of power of the state to impose such prohibition, which is mostly based on cultural and religious feelings, and the fundamental rights including freedom of trade and religion[40].

For instance, in the case *Mohd. Hanif Qureshi v. State of Bihar* also reviewed the constitutionality of cow slaughter ban by recognizing that the state has a legitimate interest in preserving wildlife, but the effect of such laws on the communities was also taken into consideration. The case also introduced a precedent as it made a distinction between slaughtering cows, calves, and young stock, which could be banned, and slaughtering aged or infirm cattle, which was considered useful and could be allowed to be slaughtered[41]. Afterwards, the *Haji Usmanbhai Hasanbhai Qureshi v. State of Gujarat* distinction was further narrowed down by the case which supported the prohibition of slaughtering of healthy cattle but did not prohibit the slaughtering of cattle that was not economically productive[42]. The most thorough decision was however in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,* a nine judge court unequivocally maintained the total ban on slaughter of any cattle, be it the bull or the bullock, regardless of age, basing on the economic value of their offspring and dung. This ruling greatly extended the range of acceptable restrictions on the right to trade, which focused the Directive Principle presented in Article 48 on a single economic freedom.

This decision was in contrast to previous predecessors, which shaped that a total ban on the slaughter of cows was constitutional, thus enhancing to strengthen the state authority to enact laws on animal welfare and animal farming preservation[43]. The logic that was followed

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[39] Rijul Agrawal, "*The fragile balance: Challenges to secularism in India. International Journal of Political Science and Governance*" 6 International Journal of Political Science and Governance 251 (2024) available <https://doi.org/10.33545/26646021.2024.v6.i2d.394>.

[40] *Supra* note 9.

[41] *Supra* Note 2.

[42] Archit Jangid, "*Secularism in India: A Part of the Basic Structure Constitution of India*" 3 Jus Corpus Law Journal (2023).

[43] *Supra* note 9.

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by the Court in Mirzapur highlighted the economic wealth of cattle in general, despite being past their productive years, which offers a substantial constitutional number of protections against farms. Nevertheless, the observation that the concept of a total ban is in the most advantageous economic interest has frequently faced criticisms and even legal interpretation, particularly in the economic cost of keeping unproductive animals[44].

The astute interaction between the constitutional mandates, economical fact, and the varying socio-cultural environment of India are the key issues in this continuing debate, especially with regards to the primary religious practice test which numerous legal disputes regularly attempt to produce[45]. The doctrine of essential practices, regularly applied when there is an issue of religious freedom, addresses the issue of whether the certain religious practice is central to a certain religious faith, thus affecting the extent of protection afforded under Article 25[46]. Such a legal test examines the question of whether the ban on cow slaughter directly violates a tradition or doctrine that the state believes to be part and parcel of the doctrine of a religious community, and thus challenges the extent to which the state should interfere with the religious doctrine. As an example, even the Allahabad High Court has ensured to pressure the Central Government to think about declaring cow a national animal and cow protection as a fundamental right of Hindus and show just how the religious sentiment is interwoven with legal speech[47]. Although not legally enforceable, the court's recommendation is typical of the continuing movement of placing even more weight on cow protection as a Directive Principle to a fundamental rights[48].

Moreover, this emphasizes the way legislative and judicial institutions are sometimes forced to revolve around the constitutional requirements of secular governance and the predominant socio-religious values of a large segment of the population[49]. The cow protection problem is also aggravated by the phenomenon of cow vigilantism where self-proclaimed cow protectors become violent and this creates serious human rights issues and challenges the rule of law. These self-administered justice acts frequently lead to infringement of basic rights, such as the right to life and personal freedom, of cow slaughterers or transporters, and structures constitutional protection[50]. This unlawful application of the enforcers of non-state authorities

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44 *Supra* note 9.
45 Rushil Batra, "*The Essential Religious Practice Test: A Sorry Tale of Judicial Misreading*" 11 Indian Journal of Constitutional Law 71 (2024).
46 *Supra* note 9.
47 *Supra* Note 2.
48 *Supra* Note 2.
49 *Supra* Note 2.
50 *Supra* note 10.

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makes enforcing constitutional ideals quite difficult because it undermines the distinction between legitimate authority of the state and unconstitutional vigilante justice[51]. This pattern highlights how weak constitutional secularism in India proves to be in the face of ingrained religious beliefs and politicized interpretations of cultural tradition[52]. This effect leads to the need to thoroughly reconsider the changed human rights structure in India and the strength of its rule of law protection to ensure the safety of the vulnerable groups[53].

The long held societal interest in cows, which has been driven by religious and cultural discourses, even gives the existence of may Gaushalas spread all over India the backing it deserves among the population[54]. Nevertheless, even with all these actions, the effectiveness of legal regulation itself as a single tool to deliver the holistic care and protection of bovines has its fair share of scepticism[55]. This skepticism is a reflection of the continuing issues with keeping non-productive cattle that are frequently neglected and abandoned, the ethical concerns one might have when viewing some Hindu animal ethics views[56]. These considerations of ethics can be applied to the larger discussion of the balance between religious feeling, economic feasibility and the practical difficulty of animal welfare in a highly populated country.

V. Religious Rights, Essential Practices, and Indian Secularism

The Indian secularism is however not the same as the approach used by the West, as it allows the state to intervene in religion issues to encourage social justice and equality instead of absolute segregation[57]. Such a delicate mode permits intervention to religious practices that are considered enemies of a good order or morality in society, but it also creates a dissonance when government action is seen to favor one religion over others, especially the cow protection laws[58]. The dynamic is usually subject to controversy on whether slaughtering cows can be classified as an obligatory religious practice evidenced within any community, and thus the constitutional boundaries of religious liberty under Article 25[59].

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[51] *Supra* note 5.
[52] *Supra* Note 2;
[53] *Supra* note 9.
[54] *Supra* note 8
[55] *Supra* note 8
[56] *Supra* note 8
[57] *Supra* note 39.
[58] Vijay Pereira, Daicy Vaz, Ashish Malik, Faiza Ali, "*Cui Bono? Cow Slaughter ban and its impact on business and society in India*". Organization (2024) available <https://doi.org/10.1177/13505084241247451>.
[59] *Supra* note 5.

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The courts have always struggled with the need to establish what constitutes the key religious practices usually falling back on historical and theological study and determination to whether or not a certain rite or even a certain dietary proscription is central to the religion. Such judicial review serves to curb the abuse of the freedom of religion claims as a way of avoiding the enforcement of laws or enforcing practices that are not at the heart of the main ideas of a religion[60]. This method, though, frequently becomes the target of criticism as the way that might compromise the freedom of religious organizations to establish their own standards and ideas[61]. This renders the meaning of Article 25 quite controversial, particularly following the conflicts between the religious moods and the state-obligatory secular values or the issue of animal rights. In fact, the legal debate that has been happening regularly takes a look at whether cow slaughter was a component of any religion, especially given that there are no clear religious texts that require such practices to be obligatory to practice the religion[62]. This legal question is commonly debated because some rituals regard the cow as sacred and its protection is tied to the religious obligation, and others, especially the Abrahamic traditions, can perceive some rituals connected to animals as a part of their culture or food traditions[63].

VI. Socio-Economic Implications of Cow Protection Laws

Although such laws are often proposed in a religious or cultural context, they have a penetrating impact on other economic industries, specifically those relying on animals, including the leather and meat industry[64]. Limits on cattle trade and slaughter harm marginalized groups who detestably rely on these markets, casting serious questions of economic fairness and human rights[65]. Specifically, the limitation of the cattle market and the practice of it tends to impose financial disenfranchisement on the community which has a long-standing tradition of such kinds of occupation, which in turn leads to the exacerbation of the socio-economic inequalities. Moreover, enactment of these laws can also lead to increase in the cost of rearings cattle particularly to the aged or unhealthy cattle therefore the burden to the farmers and also in most cases cattle can be discarded.

This interference effect illuminates how precarious is the connection between religious taboos, economic facts and animal welfare realities and brings the effectiveness and ethical rights of such policies into doubt. This economical impact has spilled in the dairy sector where

60 *Supra* Note 2.
61 *Supra* note 5.
62 *Supra* note 34.
63 *Supra* note 8.
64 *Supra* note 9.
65 *Supra* Note 13.

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restrictions on sale of unproductive cows can add a financial strain to farmers depending on cows clearance to make a living. This would largely result in a cattle overtake that results to strain in utilization of land resources hence, this has resulted in environmental degradation. Even more importantly, they can contribute to the habit of cattle trading and slaughter unintentionally because the monetary necessity is likely to prevail over the law, and the black market where illegal activities of people cannot be checked, and proper standards in the upbringing of animals are not observed is created[66]. In their turn, these informal actions undermine the rules of the health of people and worsen the issue of the spreading disease control, making certain additional threats to the human and animal lives.

These chain reactions serve as indicators of the multi-dimensionality of the act protecting religious or cultural values and demonstrate that even the policies that claim to safeguard them may have some significant and, at any rate, negative socio-economic and population health effects and demand the references to their overall efficiency and moral foundation. It implies that an in-depth study of the cow protection law should involve a rigorous, multi-layered study that transcends the religious decree on cow protection with its concrete human-economic, and more important ramifications on the people and the environmental sustainability.

VII. Comparative Perspectives on Animal Protection and Religious Freedom

As an example, the review of the laws in the countries that have high-quality animal protection laws, e.g., Germany or Switzerland, and those with high-quality religious freedoms protection, e.g., Israel, can provide important insights into how can be reconciled between these two commonly clashing priorities. This analysis tends to reveal a range between extreme prohibition of certain religious methods of slaughtering to moderations that aim to reduce animal pain without violating the religious dietary taboos.

This comparative prism also emphasizes the difficulties in recognising the nature of religious necessity in animal practices, in particular, as ethical considerations of animal sentience are gaining more and more legal and social importance. In fact, in India, animal protection, especially cows, have deep religiosity and cultural beliefs, and certain animals are traditionally worshipped as incarnations of gods and are viewed with great respect[67]. This

[66] *Supra* note 8.

[67] Nimita Aksa Pradeep & Noureen Siddique, "*Covid-19 and the Plight of Animals in India: Safety And Prevention Approaches*" 7 International Journal of Law and Social Sciences 1 (2021) available <https://doi.org/10.60143/ijls.v7.i1.2021.23>.

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deference usually affects the legal and social standards, which create special problems with the incorporation of contemporary animal welfare evaluations as a part of the regulation[68]. Nevertheless, such a conventional adoration usually stands in opposition to the realities of industrial farming and the rise of the dairy sector, where the welfare of each animal can be at odds with the economic needs[69]. Thus, the critical analysis of these laws should also take into consideration the changing idea of animal consciousness and what ethical conclusions can be made when the policy follows religious feelings instead of the proven pain of animals in modern settings[70].

This contradiction makes the slight legal and ethical discussion necessary, which attempts to resolve the old cultural values and the current scientific explanation of animal thoughts and pain[71]. It means balancing among the freedom of religion, animal welfare, and preserving order in the country, particularly in a multicultural state like India where other communities perceive the ethical treatment of animals and the significance of religious practices differently[72]. Judicial interpretations also add to the complexity, as, in most cases, attempting to find a compromise between these conflicting interests, e.g., in a number of cases related to animal sacrifice, and the essential religious practices test[73]. The theory of the essential practices of religion applies to the legal cases of animal sacrifice, in particular, particularly, when the courts aim to tell whether the given practice is central to the religion itself, or merely a part of a traditional tradition[74]. This judicial examination is oriented at establishing that religious freedom demands are not exercised to legalize otherwise contentious collection of customs that would not likewise sit effectively in the larger universal policy discourse like safeguarding animals[75]. It demands a very strong examination of historical and theological approaches to find what the actual essence of such practices in various religious traditions is[76].

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68 Shilpi Kerketta, Abhishek Kumar Singh, Chandan Kumar, Shailendra Kumar Rajak and Banani Mandal, "Integrating On-Farm Animal Welfare Assessments into Regulatory Frameworks: Challenges and Solutions for Improved Animal Care", in Jaco Bakker and Melissa A. de la Garza, et.al. (eds.), *From Zoo to Farm - The Quest for Animal Welfare*, available <https://doi.org/10.5772/intechopen.115032>.

69 *Supra* note 8.

70 *Supra* note 9.

71 *Supra* note 34.

72 Joe Wills, "*The Legal Regulation of Non-stun Slaughter: Balancing Religious Freedom, Non-discrimination and Animal Welfare*" 41 Liverpool Law Review 145 (2020) available <https://doi.org/10.1007/s10991-020-09247-y>.

73 *Supra* note 45.

74 *Supra* note 34.

75 *Supra* note 34.

76 *Supra* note 34.

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Moreover, animal welfare transformation is another necessary issue of the legal framework since it is increasingly accepted that animals are valuable in their own right, irrespective of their practicality to humans, and it is rather a challenge to anthropocentric ideas of religious freedom. These problems cause a reassessment of the legal paradigm that can justify the religious sensibility, as well as the evolving ethical beliefs regarding the sentience of animals[77]. The need to adopt a multi-disciplinary approach which includes legal, ethical, and scientific aspects to create a more balanced and sustainable structure of human and animal rights is proven by such diverse interaction[78]. The occupying complexity of this balance is further complicated when animal sacrifice, in some cases, being rooted in specific religious practices, is in conflict with animal protection laws, resulting in legal disputes about the limits of animal safety and a religious right to practice, which often result in some controversies[79].

The case of the jurisprudence of the "essential religious practices" test as interpreted by Indian courts since the *Shirur Math* case of 1954 has frequently been used to identify the legality of such practices[80]. The test allows distinguishing between the essential religious beliefs that should be provided federal protection and those that are simply traditional and, therefore, are subject to state control[81]. The objective of this judicial interpretation is to avoid the abuse of religious freedom arguments to support practices that might otherwise be seen as inhumane or not congruent with other more comprehensive policies, such as animal protection[82]. According to critics, however, judges, by taking a theological role in determining the core practices, can have uneven interpretations of the religious texts or even group practices, which can restrict constitutional protection of religious freedom[83]. This aspect has caused the Indian judiciary to struggle with its success in defining exactly what is meant by religion and religious denomination in the context of the Constitution, which only makes the legal interpretation of practices such as cow protection difficult[84]. This is compounded by the economic cost of cow protection, in which trade-offs between the livelihoods of the agricultural

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77 Paul Chaney, Ian Rees Jones & Ralph, "*Sentience and salience – exploring the party politicization of animal welfare in multi-level electoral systems: Analysis of manifesto discourse in UK meso elections 1998–2017*" 32 Regional & Federal Studies 115 (2020) available <https://doi.org/10.1080/13597566.2020.1853105>.

78 Walter Veit, "*Confidence Levels or Degrees of Sentience?"* 15 Asian Bioethics Review 93 (2022) available <https://doi.org/10.1007/s41649-022-00230-5>.

79 *Supra* note 34.

80 Subhashree Parhi & Shashwata Biradar, "*The Role of Religious Value in Law Making*" 5 Indian Journal of Law and Legal Research 1 (2023).

81 *Ibid*; *Supra* note 9

82 *Supra* Note 34.

83 Nabeela Siddiqui, "*On crossroads with Constitutional Morality: The (Un)tamed ERP* test" SSRN Electronic Journal (2020) available <https://doi.org/10.2139/ssrn.3674829>.

84 *Supra* note 9.

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sector and ethics appear to be a considerable policy challenge[85]. In addition, the constitutional requirement of secularism in India which, although it offers the importance of equal treatment of all religions, was sometimes applied in a sense that seems to support the religious sentiments in the majority[86].

VIII. Conclusion

The constitutional model of cow protection in India is, therefore, a muddled patchwork, and a conflict of different cultural, religious, and economic interests within a secular democratic state. The current judicial interpretations and legislative interventions with reference to cow protection explains how constitutional law in India is dynamic in its moves to constantly adjust to changes in society but in the quest of maintaining the core ingredients of justice and equality. The changing debate of cow protection is thus going on to push the limits of religious freedom, economic freedom, and the governmental need to stand by cultural emotions and stay faithful to secular values. This unending tension between the maintenance of ideas of religious sensibilities and the preservation of individual rights is an indication of a greater problem of retaining the exclusive brand of secularism of India. Moreover, even though legally, slaughter of bovines is forbidden, and even though cattle suffer widely before slaughtering, there is a great divergence between the nominal importance of the law and the actual reality, and they are often hidden by the figurative sacredness of cattle. This disparity underscores that the more subtle legal and policy-oriented gaze which considers animal welfare in its entirety, not merely the taboo on slaughter but thus the notion should also be applied to the ethical considerations during the phase of every animal. This would necessitate a sharp re-think of existing legal provisions and legal enforcement with respect to its effectiveness in providing both animal welfare and social fairness. Furthermore, another aspect that needs consideration to shape equitable and legally binding policies is the socio-economic consequences on the population which relies on cattle trade, which is normally skewed towards the minorities. Besides, the cow protection lawsuits also cause problems in enforcement because of cow vigilantism that is normally politically based, not necessitated by the logic of deeply rooted legal issues, but such based on violence and violations of human rights to marginalized groups of people. This demands the critical examination of the aspect of how such extra-legal actions are against the rule of law as well as the constitutional provisions of all citizens. With this complicated combination of law, religion, and socio-economic concerns,

[85] *Supra* Note 2.
[86] *Supra* Note 2; *Supra* note 80.

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it is clear why a more comprehensive and holistic approach to cow protection, beyond banning it, is necessary, but one that considers the well-being of animals and the rights of all citizens. These acts outside of the law are detrimental to the effectiveness of the existing laws and are founded primarily on the religious fervor about the sacredness of cows[87]. This is further complicated by the fact that secularism in the Indian context can be defined in a variety of ways, and the state has to walk a fine line between total disentanglement and independent respect of all religions. It is an endless debate to the Indian legal and political framework that must strike a balance between the religious freedom and secular ideals in the process of discussing animal welfare and safeguarding human rights. The criterion of cow protection which is tightly interrelated with the Hindu beliefs also encompasses the broader bhakti facet of Hindu religious thinking, which presupposes a sense of spiritual impulse that cannot be reduced to the legal traditional interpretation of the concept of dharma.

[87] *Supra* note 10.

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BREAKING BARRIERS: AN INTERSECTIONAL ANALYSIS OF LGBTQ+ EDUCATIONAL RIGHTS AND RESERVATION POLICIES IN INDIA THROUGH AMBEDKARITE LENS

Himanshu Vashistha[*]

ABSTRACT

This research investigates the complex intersection of gender identity, caste and access to education inside India's reservation system, especially focusing on the experiences of Dalit transgender persons. Employing Intersectionality theory and building upon Ambedkar's critique of caste hierarchy, the study analyzes how transgender individuals from Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBC) endure increased marginalization that is not sufficiently addressed by the existing legal and policy frameworks in place. The study shows that despite the legal recognition through NALSA v. Union of India (2014) and the Transgender Persons (Protection of Rights) Act 2019, implementation gaps continue, especially with relation to horizontal reservation policies that can address intersectional identities. Census data suggests that about 23% of transgender population in India belongs to historically under-represented caste and tribal backgrounds, yet their literacy rates remain far lower than the national average. This study critically evaluates the limited engagement of National Education Policy 2020's with transgender-specific concerns and argues for comprehensive policy reforms that acknowledge the multiplicity of identities in the transgender community. Following an Ambedkarite structure, the study reveals how the fight for the rights of transgender parallels anti-caste movements, both challenging systems that control identity and perpetuate exclusion. The research concludes that for true liberation there is need to go beyond politics of singular identity towards the transformative coalition-building that comprehensively addresses structural inequalities.

I. Introduction

Ambedkar constantly advocates social and political changes that can eliminate oppression and exclusion system. He believed that the righteous society must confirm the equal access to opportunities, social fairness and respect all persons of different gender, race or ethnic background. Ambedkar in his work "*Castes in India: Their Mechanism, Genesis, and Development*"[1] discusses the idea of surplus men and women. Surplus men can emerge when wives die before their husbands, surplus women can emerge when husband die before wives. Ambedkar argues that, these surplus bodies had the "potential to transgress" social and ritual

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[1] B.R. Ambedkar, *Castes in India: Their Mechanism, Genesis and Development* (Lecture 2 Collated Readings, Ambedkar King Study Circle USA, Apr. 2020), *available at:* https://akscusa.org/wp-content/uploads/2020/04/lecture-2-collated-readings.pdf (last visited July 9, 2025).

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constraints, by violating caste purity through intercaste marriages. However, the most alarming thing was the violent exercise of "disposing" these bodies in order to reinforce rigid gender roles and to maintain the caste structure by way of forced widowhood, widow burning, and enforced celibacy, among others.

Beyond the context of caste, Ambedkar's examination of how surplus bodies are managed can be applied to non-binary and transgender individuals, which equally disrupts traditional expectations around gender and reproductive roles. Specifically, Dalit transgender individuals are regularly pushed into silence and invisibility by systemic injustice and are labelled as "abject bodies". Analysis of Ambedkar gives a basic foundation to understand organized exclusion and violence - both physically and symbolically - which transgender people face, especially of the lower caste background. Ambedkar criticizes the hierarchy of the caste system, which assigns social position to people on the basis of their birth circumstances. The transgender community which seems to be homogeneous is also subject to this inequality and hierarchy as well. The caste background and gender diversity of the trans people especially from Dalit communities, often becomes the basis for their oppression. Due to their refusal to align with conventional gender norms and due to their caste identity they are also pushed to the shore of the margin.

The dominant LGBTQ+ rights discourse mainly shows the concerns of English-speaking, urban and upper-caste individuals and does not usually reflect the dual burden of caste and gender. Dalit trans individuals, especially those who are economically precarious, struggle with uneven access to resources and ability to live fearlessly. However, despite these obstacles, a new movement of Dalit transgender activism is emerging, demanding positive discrimination policies in view of both gender and gender identity.

Adopting the Ambedkarite philosophy by individuals from both transgender and oppressed castes, is about claiming their right to dignified life. The violence against Dalit transgender not merely subjugate but also expunge from being called out by this emergent wave of Dalit trans activism. Trans Ambedkarite politics not only critiques tokenism in elite queer circles but also emphasises on community-led leadership, and calls for operational modification in the reservations based upon caste, property and reproductive rights, educational access, and healthcare overhauls. This new trans activism is not only looking for incorporation within existing systems but aims to completely modify the systems. Ambedkar's advocacy for

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social justice and critique of caste leads to a commendable framework to recognize and backing the hardships of Dalit transgender individuals.[2]

A framework for affirmative actions that mainly addresses historical injustices faced by marginalised community namely Scheduled Castes (SC), Scheduled Tribes (ST), Other Backward Classes (OBC), and more recently, Economically Weaker Sections (EWS) is established by the Indian Constitution, through its various amendments and judicial pronouncements. However, the inclusion of sexual orientation and gender identity as grounds for educational reservations within the existing constitutional and legal framework presents both unprecedented opportunities and significant challenges. India's education system has been significantly changed by the reservation laws which intended to rectify past injustices experienced by marginalised communities. In India, the LGBTQ+ community has faced centuries of discrimination, marginalization, and social exclusion, which is often compounded by intersectional identities that include caste, class, and regional affiliations. For LGBTQ+ community the criminalization of homosexuality under Section 377 of the Indian Penal Code,1860 created additional obstacles to social participation and educational access until it remained in effect until 2018. A turning point in LGBTQ+ rights discourse which opened new possibilities for inclusive educational policies came when Hon'ble Supreme Court in *Navtej Singh Johar v. Union of India (2018)*[3], decriminalized consensual homosexual acts. However, there is still a dearth of research on the relationship between sexual/gender identity discrimination and caste-based marginalisation.

A particular kind of intersectional marginalisation that goes against the established inclusion policies and frameworks of social justice experienced by the students who identify themselves as LGBTQ+ and fall under one of the two reserved categories (SC/ST/OBC). Due to reservation policies historically underprivileged castes and communities now have greater access to education, but LGBTQ+ people in these communities continue to face additional forms of discrimination. The constitutional protections to LGBTQ+ individuals has been extended not by explicit constitutional amendments rather primarily through judicial interpretation. A constitutional foundation for LGBTQ+ rights has been created by the Hon'ble

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2 Swarupa Deb & Aniket Nandan, *How B.R. Ambedkar's Radical Critique of Caste Could Transform Transgender Activism in India*, Scroll (in deed in *Scroll.in*) (Apr. 14, 2025), *available at:* https://scroll.in/article/1081287/how-br-ambedkars-radical-critique-of-caste-could-transform-transgender-activism-in-india (last visited July 9, 2025).

3 *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1; AIR 2018 SC 4321 (India).

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Supreme Court's affirmation of gender identity and sexual orientation as basic component of human dignity under Article 21 of the Constitution of India[4]. However, it remains a matter of ongoing legal and policy development whether these rights specifically apply to reservation policies or not.

A conceptual gap is created in absence of a strong understanding and mechanism for oppressed communities, especially Dalit transgender individuals. To facilitate the better policy and social reform and to highlight the difficulty faced by them it becomes essential to address this gap. This research fills a significant knowledge vacuum about how students endure several marginalised identities in India's educational system. The research take note of lived experiences of LGBTQ+ students from reserved categories, as well as barriers faced by them in getting access to education and, the effectiveness of India's current institutional support systems and policy framework.

II. Theoretical Framework

The primary theoretical foundation for this research study is provided by Queer theory and Kimberlé Crenshaw's intersectionality theory.

Queer Theory

The origin of the Queer theory is in earlier theories and movements that questioned the traditional wisdom related to gender and sexuality. The feminist theory, notably the writing of academics such as Judith Butler laid the foundation for queer theory. The idea of gender performativity by Butler, which argues that gender is a collection of behaviours and performances rather than an intrinsic trait, served a pivotal role in the development of queer theoretical point of view.

Furthermore, during the AIDS health emergency in 1980s the activism of the LGBTQ+ movement brought to light the demand for a theoretical model that could handle the intricacies of LGBTQ+ lives. Teresa de Lauretis popularised the term "queer theory" during a lesbian and gay sexuality conference at the University of California, Santa Cruz in 1991. Since then, it has evolved in a large and varied field that covers various subjects and methodology, which are tied together by shared dedication to interrogate traditional wisdom related to gender and sexuality.

[4] Constitution of India, art. 21.

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Judith Butler popularised the term “Performativity” in her groundbreaking book "Gender Trouble," and it is core principle in queer theory. Butler argues that a person's gender is something they do rather than something they are. Gender performance is constituted by a set of socially controlled and reinforced actions, gestures, and behaviours. This performative aspect of gender which implies that identity is contingent and flexible called into question the idea of a consistent, stable identity.

This concept of performativity also applies to sexuality. Queer theory highlights that, sexual identities are created through repeated performances and social expectations rather than being fixed categories. Queer theory highlights the performative aspect of gender and sexuality, emphasising how alternative performances and expressions can subvert and resist normative identities.

Another important idea within queer theoretical framework is heteronormativity, which assumes that heterosexual constitute the normal sexual orientation. This ideology is based on the premise of gender and sexual binaries, which perpetuate the notion that only two genders (male and female) exist. Queer theory challenges heteronormativity by highlighting the ways in which heteronormativity stigmatises and marginalises queer identities and practices. Queer theory aims to upend the binary reasoning that supports heteronormativity by promoting a more diverse understanding of gender and sexuality. By contesting the supremacy of heterosexual norms, queer theory seeks to make room for a greater variety of identities and practices.

The idea of deconstructing binary categories like male/female and heterosexual/homosexual is central to queer theory. The complexity of human experiences are not sufficiently represented by these dichotomies, which are seen as oversimplified and reductive. Instead of reflecting any innate or natural divisions, queer theory asserts that these binaries are socially constructed and upheld through power dynamics.

Queer theory creates new avenues for understanding difference and identity by dismantling these dichotomies. It pushes us to think beyond strict classifications and to accept the flexibility and diversity of identities. It promotes a more complex and inclusive viewpoint by forcing us to reevaluate our presumptions about gender and sexuality. Ultimately aiming to dismantle oppressive structures by challenging rigid categories, queer theory calls for the recognition and validation of diverse identities and experiences.

Intersectionality Theory

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The term “intersectionality” was originated by a feminist legal scholar Kimberle Crenshaw. In her 1989 article *"Demarginalizing the Intersection of Race and Sex,"*[5] Crenshaw explain how a single categorical axis of oppression/discrimination (race) theoretically erased a Black women and how this erasure is imported into activism and legal reforms. Crenshaw's paper mostly addressed the oppression of Black women, who experience social inequality in two ways: first, because they are Black, and second, because they are female. She gave an example of a Black woman who felt she was being passed over for a job because of these two intertwining factors. The employer countered that since the company employed black people (black men), she could not have been subjected to racial discrimination. Additionally, they contended that since the company employed women (white women), she could not have been subjected to gender discrimination.

Crenshaw argues that the oppression of black women was frequently disregarded due to a lack of awareness in society about the interconnectedness of factors that can oppress individuals in different ways. As a legal scholar, Crenshaw analysed three court cases to support her claims. She described the issue with a doctrinal response to discrimination, which requires that the experiences of sexism and racism be matched with those of white women and Black men, respectively. Black women were therefore only protected to the degree that their experiences aligned with those of either of the two groups. The court in *DeGraffenreid v. General Motors*[6] rejected the idea that black female employees face compounded discrimination. Utilising white female employment records as the "historical base" for the conditions of female employment within the company, they examined the plaintiff's claims. White female employees' experiences did not illustrate the highly specific types of discrimination that Black female employees faced. A woman who claimed to have experienced discrimination because she was Black was denied access to the company's overall sex disparity statistics in *Moore v. Hughes Helicopter, Inc.*[7] Regardless of what the statistics suggested, a Black woman's experience of sexism was not regarded as sexism at all. The court ruled in *Payne v. Travenol*[8] that Black women could not speak for a whole Black community because of alleged class conflicts in situations where Black women were further disadvantaged by sex.

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5 Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, 1989 *U. Chi. Legal F.* 139.

6 *DeGraffenreid* v. *Gen. Motors Assem. Div*., 413 F. Supp. 142 (E.D. Mo. 1976).

7 *Moore* v. *Hughes Helicopters*, Inc., 708 F.2d 475 (9th Cir. 1983).

8 *Payne* v. *Travenol Labs*., Inc., 673 F.2d 798 (5th Cir. 1982).

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Therefore, Black men might not be able to participate in the remedy in the few instances where Black women are permitted to use overall statistics showing racially disparate treatment (Crenshaw 1989, 148).

What does this signify? Due to their Blackness or femininity, Black women's needs and viewpoints are still marginalised in the feminist and Black civil rights agendas. In terms of rights, theory, jurisprudence, and justice, the burden's singularity—one's race, sex, or class—becomes the defining characteristic.

The most vulnerable members of society are put in precarious positions by this type of rigid identity thinking, both from a policy and public opinion standpoint. As an activist or policymaker, will you consider the caste oppression of the villagers when you think of a poor village with a large Dalit population? Their extreme poverty? Their segregation in spite of India's ban on untouchability? The village's dearth of civil facilities and educational opportunities? Why not everything at once? There's a chance that you will have a better understanding of the situation if you see the problems as interconnected and intersecting. Based on your own preconceived notions, people will probably tell you that it is always a good idea to work with people rather than for them. That's precisely what Crenshaw promoted.

Intersectionality theory is a framework for comprehending how various social identities and oppressive systems interconnect to produce distinct pattern privilege and marginalisation. This approach of intersectionality serves as tool to study how cultural, sexual, racial, and religious differences intersect to form identity construction within campus and off campus. The theory helps explain why LGBTQ+ individuals from reserved categories may face different challenges than their upper-caste LGBTQ+ peers or their heterosexual caste peers.

The concept of intersectionality becomes particularly relevant when examining LGBTQ+ individuals who also belong to SC, ST, OBC, or EWS categories. The educational disadvantages of these individuals get compounded as they face multiple forms of discrimination and marginalization. For illustration, an LGBTQ+ person from a Scheduled Caste background, may face unique barriers to educational access and success because of discrimination based on both their sexual orientation or gender identity and their caste identity.

It is also important to see the economic dimensions of this intersectionality. Upon disclosure of their identity the LGBTQ+ individuals from economically weaker sections may face family rejection and loss of financial support, increasing the economic barriers they

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already face in accessing quality education. This intersection of economic vulnerability and LGBTQ+ identity creates a compelling case for specific affirmative action measures.

Indian educational institutions should consider the complex questions about how to address these intersectional identities within existing reservation frameworks. Should an LGBTQ+ individual from an SC background be eligible for both SC reservation and potential LGBTQ+ reservation? How should institutions balance competing claims for limited reserved seats? These questions require a policy response that recognizes the complexity of intersectional identities while maintaining the integrity of existing reservation systems.

III. National Framework On LGBTQ+ Rights on Education: Legal and Policy Analysis

Census Data Analysis: Transgender Population Demographics and Educational Marginalization

In 2011 census of India total 4,87,803 transgenders were plotted across all states and Union Territories. The statistics reveals only Uttar Pradesh accounting for 1,37,465 transgenders, which is 28% of the nation's transgender population. This is followed by Andhra Pradesh 43,769 (9%) of transgenders and then Maharashtra having 40,891 (8%). Only two transgender people belongs to Lakshadweep caught last position. As per data related to the literacy rate among transgenders in India, overall literacy rate scores to only 56.07%. Among states Mizoram tops list with the highest of 87.14% of the literate transgender; followed by Kerala 84.61% and Daman & Diu have 75.51% respectively; Tamil Nadu recorded only 57.78% of literacy rate and placed 22nd position among 35; Bihar scores the least 44.35% of the transgender having literateness.[9]

The data reveals a concerning picture of educational marginalization among transgender persons from SC/ST backgrounds. With an overall transgender literacy rate of 56.07% - already below the national average 74.04% - the situation becomes more complex when examining the intersectional disadvantages faced by those from scheduled castes and tribes. Out of 487,803 transgender individuals counted, 78,811 (16.2%) belong to SC communities and 33,293 (6.8%) to ST communities. This means nearly 23% of India's

9 "Transgender in India," *Census 2011 India*, *available at:* https://www.census2011.co.in/transgender.php (last visited July 9, 2025).

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transgender population comes from historically marginalized caste and tribal backgrounds, suggesting multiple layers of social exclusion.

#	State	Transgenders	Child(0-6)	SC	ST	Literacy
-	India	487,803	54,854	78,811	33,293	56.07%
1	Uttar Pradesh	137,465	18,734	26,404	639	55.80%
2	Andhra Pradesh	43,769	4,082	6,226	3,225	53.33%
3	Maharashtra	40,891	4,101	4,691	3,529	67.57%
4	Bihar	40,827	5,971	6,295	506	44.35%
5	West Bengal	30,349	2,376	6,474	1,474	58.83%
6	Madhya Pradesh	29,597	3,409	4,361	5,260	53.01%
7	Tamil Nadu	22,364	1,289	4,203	180	57.78%
8	Orissa	20,332	2,125	3,236	4,553	54.35%
9	Karnataka	20,266	1,771	3,275	1,324	58.82%
10	Rajasthan	16,517	2,012	2,961	1,805	48.34%
11	Jharkhand	13,463	1,593	1,499	3,735	47.58%
12	Gujarat	11,544	1,028	664	1,238	62.82%
13	Assam	11,374	1,348	774	1,223	53.69%
14	Punjab	10,243	813	3,055	0	59.75%
15	Haryana	8,422	1,107	1,456	0	62.11%
16	Chhattisgarh	6,591	706	742	1,963	51.35%
17	Uttarakhand	4,555	512	731	95	62.65%
18	Delhi	4,213	311	490	0	62.99%
19	Jammu and Kashmir	4,137	487	207	385	49.29%
20	Kerala	3,902	295	337	51	84.61%
21	Himachal Pradesh	2,051	154	433	118	62.10%
22	Manipur	1,343	177	40	378	67.50%

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#	State	Transgenders	Child(0-6)	SC	ST	Literacy
-	India	487,803	54,854	78,811	33,293	56.07%
23	Tripura	833	66	172	181	71.19%
24	Meghalaya	627	134	3	540	57.40%
25	Arunachal Pradesh	495	64	0	311	52.20%
26	Goa	398	34	9	33	73.90%
27	Nagaland	398	63	0	335	70.75%
28	Puducherry	252	16	40	0	60.59%
29	Mizoram	166	26	1	146	87.14%
30	Chandigarh	142	16	22	0	72.22%
31	Sikkim	126	14	9	37	65.18%
32	Daman and Diu	59	10	1	2	75.51%
33	Andaman and Nicobar Islands	47	5	0	3	73.81%
34	Dadra and Nagar Haveli	43	5	0	22	73.68%
35	Lakshadweep	2	0	0	2	50.00%

Figure[10]

The state-wise analysis reveals stark inequalities. While states like Mizoram (87.14%) and Kerala (84.61%) show exceptional literacy rates among transgender persons, states with large SC/ST transgender populations like Uttar Pradesh (55.80%) and Bihar (44.35%) lag significantly behind. This pattern suggests that regions with higher SC/ST populations may have compounded barriers to education. The educational challenges faced by transgender persons from SC/ST communities represent a clear case of intersectional discrimination. They face barriers not just due to their gender identity, but also due to caste-based discrimination and, in the case of tribal communities, geographical isolation and cultural barriers. The census data doesn't provide literacy rates specifically for SC/ST transgender individuals, making it

[10] *Ibid.*

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impossible to directly assess how caste and tribal identity compound educational disadvantages within the transgender community.

NALSA v. *Union of India* and Implementation Challenges

In year 2014 in its landmark verdict in *NALSA v. Union of India*[11] Supreme Court not only granted transgender individual the right to self-identify their gender but also recognized them as a socially and economically backward class (SEBC) and extend all kinds of reservation in education and employment as available to members of Other Backward Classes (hereinafter OBCs) category. While the recommended affirmative action provisions are yet to be implemented (Amin, 2023[12]; Sasikumar, 2023[13]).

Evolving jurisprudence on LGBTQ+ rights provides important legal foundations for potential reservation policies. The Court's recognition of dignity, equality, and non-discrimination as fundamental rights applicable to LGBTQ+ individuals creates a constitutional basis for affirmative action measures. However, the Court has also maintained tht reservations must be based on identifiable criteria of social and educational backwardness, which requires careful documentation and evidence-gathering regarding the specific disadvantages faced by LGBTQ+ communities.

Another important legal challenge is presented by the process of identification and verification. LGBTQ+ identity verification process includes questions relating to privacy, self-identification, unlike caste-based reservations, which rely on established documentation systems, and thus there exist high potential for misuse. By respecting individual privacy and dignity legal frameworks must balance the need for verification.

The scope of Article 15 of the Constitution of India and the question whether sexual orientation and gender identity can be considered as grounds for special provisions put a significant constitutional challenges to LGBTQ+ reservations. Another important question which Indian legal system will need to navigate is whether LGBTQ+ status constitutes a form of social and educational backwardness that justifies affirmative action measures.

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11 *National Legal Service Authority.* v. *Union of India*, (2014) 5 S.C.C. 438 (India).

12 Aisiri Amin, *The Long Fight for Horizontal Reservation for Transgender People*, *Mint Lounge* (Apr. 18, 2023), *available at:* https://lifestyle.livemint.com/news/talking-point/the-long-fight-for-horizontal-reservation-for-transgender-people-111681814106470.html (last visited July 9, 2025).

13 M. Sasikumar, *Explained: Why Trans People Are Demanding Horizontal Reservation Across Castes*, *The Quint* (Apr. 20, 2023), *available at:* https://www.thequint.com/explainers/trans-people-fight-for-horizontal-reservations-across-castes (last visited July 9, 2025).

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Several pioneering steps to create more inclusive educational environments are being taken in recent past by many state governments and educational institutions. State like Kerala, Tamil Nadu, and several others have begun to address the specific needs of LGBTQ+ students and have implemented anti-discrimination policies in educational institutions. Though initiatives relating to gender-neutral facilities, inclusive admission policies, support systems for LGBTQ+ students, remain scattered and inconsistent across the country but some universities have taken welcoming steps to address the same.

University Grants Commission (UGC) has issued guidelines for higher education institutions to eliminate discrimination based on gender identity and sexual orientation. However, these guidelines primarily focus on anti-discrimination measures rather than affirmative action or reservation policies. The gap between anti-discrimination measures and positive affirmation through reservations represents a significant area for policy development.

During special discourse on '*Affirmative Action and Constitution of India'* hosted by the India International University of Legal Education and Research (IIULER) when Ex-Chief Justice Hon'ble Justice U.U. Lalit was asked about potential inclusion of LGBTQ+ community within the ambit of constitutional affirmative action/reservation, he was of view, *"Theoretically yes, but if I give the counter argument, not to belittle the idea, but to see that my birth in a community like SC, ST or OBC is something beyond my capacity while sexual orientation is my choice." "It is not thrust upon me as an accident of birth. So it is not through my sexual orientation that I am deprived of anything. Someone who is born as a third gender is a matter of accident of birth and there the affirmative action is a yes. But for most of the LGBTQ community the orientation is their own choice."*[14]

He further differentiated between vertical and horizontal reservation by stating that the Constitution has recognized "vertical reservation" for SCs, STs, OBCs which means an SC cannot be an ST or OBC and vice versa. This kind of reservation is for vertically separate compartments. For physically disabled and women there are horizontal reservations which means one will be taking a slice out of the individual vertical column without increasing the total reservation quota size. Thus, similarly the LGBTQ can be a horizontal reservation category.

[14] No 'Vertical' Reservation on Lines of SC, ST, OBC for LGBTQ Members, Says Former CJI Lalit, *The Print* (Jan. 11, 2024), *available at:* https://www.theprint.in/india/no-vertical-reservation-on-lines-of-sc-st-obc-for-lgbtq-members-says-former-cji-lalit/1920355/ (last visited July 9, 2025).

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IV. Analysis of The Transgender Persons (Protection of Rights) Act, 2019

International human rights law provides additional legal support for LGBTQ+ educational rights. India's commitments under various international human rights instruments, including the "*International Covenant on Civil and Political Rights"* and the *"International Covenant on Economic, Social and Cultural Rights"*, create obligations to ensure non-discrimination and equal access to education for all individuals, including LGBTQ+ persons.

The Transgender Persons (Protection of Rights) Act of 2019 was then passed with objective of preventing discrimination against the transgender community, and explicitly addressing discrimination in educational institutions. The objective of this legislation is to ensure the inclusion of transgender individuals within educational system and to protect the rights of transgender individual. Further, the Act clearly defines who is considered a transgender. "Transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta (Government of India, 2019[15], p. 2).

This oversimplified definition of transgender overlooks another important aspect of transgender people's identity, which is the caste and class in the Indian context. Naik et al. (2023[16]) highlight that many transgender people come from scheduled castes and scheduled tribes, usually from economically weaker sections, and the fluid nature of their gender can be due to their sociocultural context. While the transgender identity in India includes various dimensions depending on culture, region, religion, caste, class, and many more, the definition in the Act fails to give space to all these intersectionalities in the conceptualisation, leading to various issues such as the case of reservation for transgender people in education and job opportunities. The debate between vertical reservations (treating transgender as a single category) and horizontal reservations (recognising intersectional identities) emerged directly from the Act's limited conceptualisation of transgender identity. The transgender people belonging to the SC community support the horizontal reservation due to experiencing double

[15] The Transgender (Protection of Rights) Act, 2019, No. 40 of 2019, Acts of Parliament, 2019 (India), *available at:* https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf (last visited Sept. 15, 2023).

[16] N.M. Naik, S. Gharge & S. Unisa, *A Snapshot of Transgender Community in India*, 52(2) Demography India 60 (2023), *available at:* https://iasp.ac.in/uploads/journal/005-1708491768.pdf.

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marginalisation in contrast to transgender people, who consider transgender as a single identity and need to be seen separately.

These neglects of complexities and intersectionality of transgender identity within legal conceptualisation reflect what Spivak (1988[17]) terms the "paradox of representation," where attempts to give voice to marginalised groups often reinforce their silence. The law's development was shaped predominantly by globally connected elite transgender activists highlighted by Dutt and Roy (2014[18]), who have the economic and cultural capital to make their voice as "the voice" for the entire transgender community. These activists, equipped with the linguistic competence to engage with legal discourse, international networks, and economic resources, become what Bourdieu (1991[19]) calls "authorised speech". This creates a framework that privileges certain articulations of transgender identity while rendering others illegible to the state. The subaltern transgender communities, particularly those from lower castes and economically marginalised backgrounds, find themselves in what Spivak describes as a "double blind" – needing legal recognition but having that recognition filtered through elite interpretations of their identity that fundamentally mis-recognise their lived experiences and ways of being.

Recent scholarship (Chatterjee, 2018[20]; Rath, 2019[21]) underscores the need to decolonise trans studies in India by integrating regional histories, caste politics, and socio-economic disparities into the conversation. The Transgender Persons (Protection of Rights) Act, 2019, has been criticised for failing to adequately engage with these complexities, as it imposes a medicalised and bureaucratic framework onto communities that historically functioned with a more fluid gender system (Gupta, 2022[22]). Furthermore, Mishra (2023[23])

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17 Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *Marxism and the Interpretation of Culture* 271 (Cary Nelson & Lawrence Grossberg eds., Macmillan 1988).

18 A. Dutta & R. Roy, "Decolonizing Transgender in India", *1 TSQ: Transgender Stud. Q.* 320 (2014), *available at:* https://doi.org/10.1215/23289252-2685615.

19 Pierre Bourdieu, *Language and Symbolic Power* (Harvard Univ. Press 1991).

20 S. Chatterjee, "Transgender Shifts," 5 *TSQ: Transgender Stud. Q.* 311 (2018), *available at:* https://doi.org/10.1215/23289252-6900696.

21 V.V. Chaudhry, "Centering the "Evil Twin": Rethinking Transgender in Queer Theory", *25 GLQ: J. Lesbian & Gay Stud.* 45 (2019), *available at:* https://doi.org/10.1215/10642684-7275278.

22 N.K. Gupta, "Ruptures and Resurgences: Marking the Spatiality of Transgender Identity in India Since the Enactment of Transgender Persons Act 2019", 4 *Front. Pol. Sci. Art.* 963033 (2022), *available at:* https://doi.org/10.3389/fpos.2022.963033.

23 V. Mishra, *Transgenders in India: An Introduction* (Taylor & Francis 2023).

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highlights how educational access remains deeply tied to socio-economic status, reinforcing disparities even within trans-inclusive policy frameworks.

V. National education Policy 2020 and Transgender Rights

Moving to NEP (2020), India first enacted the Right to Education (RTE) Act in 2009[24] to achieve universal elementary education. Under RTE, initially transgender children did not get any space in the Act. Transgender children are classified as part of the "disadvantaged section" with 25% reservation under the RTE Act in 2014. However, this inclusion remains largely superficial, with continued barriers to full participation (Biwas & Soora, 2021[25]). NEP 2020 built upon RTE 2009, focusing on sustainable development goal 4 of equitable education. It provides a limited roadmap for transgender people's inclusion in mainstream education. In the NEP (2020[26]) 65-page document, the term "transgender" is mentioned only four times under subtheme 6 "Equitable and Inclusive Education: Learning for All" (p. 24). Even though including the term in the sixth subtheme is a step forward, a closer look shows major problems that are caused by larger systemic injustices. The minimal space allocated to transgender rights within this document exemplifies what Bourdieu (2018[27]) terms "symbolic violence" – the "subtle ways in which power structures maintain social hierarchies through seemingly neutral bureaucratic processes." Despite being one of the most marginalised groups, facing systematic abuse leading to high dropout rates, reliance on precarious means of survival, such as begging and sex work, etc. (Virupaksha & Muralidhar, 2018[28]), transgender people receive no specific section in NEP (2020) on educational provisioning, which reflects a tokenistic inclusion rather than meaningful policy intervention.

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[24] Right of Children to Free and Compulsory Education Act, No. 35 of 2009, India Code (2009), *available at:* https://www.indiacode.nic.in/bitstream/123456789/2079/1/A2009-35.pdf (last visited July 3, 2025).

[25] A. Biswas & S. Nandini, *Education of Transgenders in India: Status & Challenges*, 4(5) Int'l J. L. Mgmt. & Human. 415 (2021), *available at:* https://doi.org/10.10000/IJLMH.111902.

[26] Ministry of Human Resource Development, *National Education Policy 2020* (2020), *available at:* https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf (last visited Sept. 15, 2023).

[27] Pierre Bourdieu, *The Forms of Capital*, in *The Sociology of Economic Life* 78 (Mark Granovetter & Richard Swedberg eds., 3d ed. 2018).

[28] H.G. Virupaksha & D. Muralidhar, *Resilience Among Transgender Persons: Indian Perspective*, 34 Indian J. Soc. Psychiatry 111 (2018), *available at:* https://doi.org/10.4103/ijsp.ijsp_25_17.

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The NEP introduced the new terminology in nomenclature that is "Socio-Economically Disadvantaged Groups (SEDGs)". NEP (2020[29]) defines:

the Socio-Economically Disadvantaged Groups (SEDGs) can be broadly categorised based on gender identities (particularly female and transgender individuals), sociocultural identities (such as Scheduled Castes, Scheduled Tribes, OBCs, and minorities), geographical identities (such as students from villages, small towns, and aspirational districts), disabilities (including learning disabilities), and socioeconomic conditions (such as migrant communities, low- income households, children in vulnerable situations, victims of or children of victims of trafficking, orphans including child beggars in urban areas, and the urban poor). (p. 24)

This broader definition provides the scope of understanding the intersectionality of different marginalised groups in India. However, this conceptualisation is Foucault's concept of governmentality (Foucault, 1991[30]), revealing how administrative simplification can perpetuate more marginalisation of these communities. Subsequently, this oversimplified approach fundamentally undermines the unique challenges and needs of more vulnerable subgroups, particularly the transgender community who comes from Schedule caste, Schedule tribe and Other Backward Classes in India. Such blanket categorisation often allows more politically organised and socially visible marginalised groups to monopolise resources, attention, and advocacy platforms, effectively drowning out transgender voices. This administrative convenience perpetuates a dangerous hierarchy within marginalised communities, where transgender individuals from SC, ST and OBC, who face distinct forms of discrimination in healthcare, employment, education, and social acceptance, find their specific concerns diluted or ignored in favour of broader, more politically established issues.

While the policy explicitly on page number 25 mentions the educational marginalisation of tribal children, children from scheduled castes, children from other backward castes, and children with disabilities, Namaste (2000[31]) describes the absence of transgender-specific concerns as a reflection of "erasure" – the way institutional policies and practices render the struggles of transgender people invisible. The infrastructure provisions

[29] Ministry of Human Resource Development, *National Education Policy 2020* (2020), *available at:* https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf

[30] Michel Foucault, *The Foucault Effect: Studies in Governmentality* (Univ. of Chi. Press 1991).

[31] Viviane Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Univ. of Chi. Press 2000).

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have been mentioned in various sections, ranging from promoting early childhood education to effective governance through the school complexes/clusters section. The absence of specific guidelines for gender-neutral facilities and safe spaces reflects a deeper policy blindness to the embodied experiences of trans gender students in educational settings.

Professional Development (CPD) section, page number 21 of the policy, shows another critical weakness. There are no concrete requirements or guidelines for training educators and staff in transgender-specific sensitivity and support. This gap in professional preparation leaves educational professionals ill-equipped to address the unique challenges and needs of transgender students, potentially leading to inadvertent discrimination or inadequate support.

The administrative framework of NEP 2020, particularly its Gender-Inclusion Fund on page 26, provides minimal guidance on how this resource should be used to support transgender students specifically. Critical administrative issues such as name changes, gender marker updates, admission processes, and anti-discrimination policies remain unaddressed. Perhaps most importantly, the policy lacks implementation and monitoring strategies for transgender inclusion initiatives. Overall, these half-baked provisions reflect the broader issue of adapting inclusive provisioning without engaging with it at ground level.[32]

India should add specific implementation guidelines to NEP 2020 to go along with the general language about inclusion that comes from Malta's Gender Identity, Gender Expression, and Sex Characteristics Act (GIGESC Act) of 2015. Malta's legislation, considered among the most comprehensive globally, includes detailed educational protocols that India could adapt. The current broad categorisation of transgender students within SEDGs fails to address their unique educational needs. Malta's model provides clear guidance for school policies, educator training, and curricular integration that would give Indian educational institutions clear direction. Also, transgender-inclusive curriculum standards like the ones made for Malta's school system would help people understand and accept transgender people better, fixing the careless way that inclusion is handled now that we found in our analysis.

VI. The Role of Universities in LGBTQ+ Inclusion

In terms of LGBTQ+ inclusion and awareness, the higher education industry has advanced significantly. It was not unusual for pupils to who were "caught" engaging in same-

[32] Nabeela Ata, Suman Chaudhary & Tanmay Kulshrestha, "A policy discourse analysis of educational provisions for the transgender community in India," 77(5) *Educational Review* 1564-1584 (2025). DOI: 10.1080/00131911.2025.2505677

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sex activities on campus to be silently expelled for a significant portion of the 20th century (Renn, 2010[33]), implying that these were awkward circumstances for colleges to handle and would rather not be brought to light. Higher education institutions only began to realise the importance of actively ensuring that students from sexual minorities feel safer on campus as the century drew to a close (Renn, 2010). But as was already mentioned, there are still horrendous rates of violence and harassment against LGBTQI+ students on campus (Ellis, 2009[34]; National Union of Students, 2014). Evidence from the US showed that LGBT university students are more likely to experience sexual assault than their heterosexual and cisgender peers (Coulter & Rankin, 2020[35]), while research from the UK shows that 7% of trans students have experienced physical attacks by other students or staff because of their gender identity (Stonewall, 2018[36]). This indicates that there is still more work to be done to address these problems at the institutional level. For example, Grimwood (2017)[37] noted the need to combat homophobia, biphobia, and transphobia in higher education as well as to create the conditions necessary to lessen the effects of discriminatory practices on campus, based on data gathered from a large survey of LGBT university students in the UK.

By planning events like inviting outside speakers to discuss sexual minority issues, offering "safe zone" training, and hosting other focused extracurricular activities, some universities aim to foster more inclusive environments. Even though these initiatives are good, they might end up drawing in people who are already conscious of and sensitive to these problems, which would have the effect of "preaching to the converted" without really addressing the more serious problems of prejudice and discrimination in higher education. To solve these problems, more strategic and systemic measures must be implemented.

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33 Kristen A. Renn, "LGBT and Queer Research in Higher Education: The State and Status of the Field," *39 Educ. Researcher* 132 (2010).

34 S.J. Ellis, "Diversity and Inclusivity at University: A Survey of the Experiences of Lesbian, Gay, Bisexual and Trans (LGBT) Students in the UK," 57 *Higher Educ*. 723 (2009).

35 R.W. Coulter & S.R. Rankin, "College Sexual Assault and Campus Climate for Sexual- and Gender-Minority Undergraduate Students," 35(5–6*) J. Interpersonal Violence* 1351 (2020).

36 Stonewall, *LGBT in Britain: University Report* (2018), *available at:* https://www.stonewall.org.uk/resources/lgbt-britain-university-report-2018 (last visited July 3, 2025).

37 M.E. Grimwood, "What Do LGBTQ Students Say About Their Experience of University in the UK?", 21(4) *Persps.: Pol'y & Prac. in Higher Educ*.140 (2017).

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Ellis (2009)[38] offered some suggestions on how colleges can deal with persistent problems of harassment and discrimination on campus in order to create a zero-tolerance policy regarding these problems. These suggestions were to:

i. Include LGBT issues in the curriculum;
ii. Put policy and monitoring procedures into place;
iii. Establish penalties for discriminatory behaviour; and
iv. Include LGBT issues in the broader inclusivity practices

Curriculum as a window and a mirror

Style (1996[39]) offers a helpful metaphor for thinking about the necessity of LGBTQ+ representation in education: "curriculum as window and as mirror". The author claims that one of the curriculum's key purposes is to introduce students to new perspectives on the world. This is achieved by exposing students to a variety of academic fields as well as by offering them multiple identity windows and mirrors (such as multicultural staff), allowing them to feel accepted in the context of higher education and gain insight into the realities of those who are different from them. This fulfils the crucial function of helping to acknowledge people with disabilities and other groups that are often overlooked in conventional and mainstream higher education.

Even though Style (1996) addresses this in relation to gender and ethnicity, it is easily applicable to gay, lesbian, bisexual, trans, and queer students, who are frequently faced with a large number of heterosexual and cisgender representations in higher education and a relatively small number of individuals with whom they may identify. Students who identify as heterosexual or cisgender must also be given access to windows into the identities and realities of others.

Including sexual minorities in the curriculum may also serve to balance out the "discursive violence" that in daily life, LGBTQ+ individuals are exposed to “words, tone, gestures, and images that are used to differentially treat, degrade, pathologise, and represent lesbian and gay and bisexual, trans, queer, and other experiences” (Yep, 2002, p.170)[40]. The lecturer should strive to offer open windows and identity mirrors in two key ways. One of them

38 *Supra* note 34.

39 Emily Style, “Curriculum as Window and Mirror”, *Social Sci. Rec*. 35, Fall 1996.

40 G.A. Yep, “From Homophobia and Heterosexism to Heteronormativity: Toward the Development of a Model of Queer Interventions in the University Classroom,” 6 *J. Lesbian Stud*. 163 (2002).

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is aesthetically through using pictures of a variety of people to depict lecture presentations and handouts. He should made a conscious effort to find pictures that might depict a range of identities in terms of sexual orientation, gender, age, and ethnicity. Incorporating writers from sexual minorities and research and theory focused on LGBTQ+ individuals and issues into lessons is another way to go about this. Additionally, including representation of sexual minorities in the curriculum will give students a sense of the background and progression of the ongoing struggle for LGBTQ+ rights, which began decades ago with trailblazers like Hirschfeld (Ellis et al., 2019)[41]. By introducing differences in the form of representations that non-LGBTQ+ students are less accustomed to encountering in academic settings, exposure to these concepts, historical contexts, and influential individuals may help open windows and bring in "fresh air" for them. Knowing that some important figures in their field have been identified as LGBTQ+ may also upset a potential sense of "ownership" of the academic field of their choice. Therefore, these challenges to heteronormativity might make them more conscious of their advantages and show them how sexual hierarchies negatively impact things like individual freedom, creativity, and expression (Yep, 2002).

Coming out at university: Opportunities and challenges

The topic of LGBTQ+ representations in education brings up issues regarding how staff members who identify as sexual minorities can contribute to the diversity and inclusivity of higher education environments for students. Many young mind will first encounter (positive) role models of LGBTQ+ professionals at university because of the general acceptance of sexual diversity among university staff. For LGBTQ+ academics who want to increase LGBTQ+ visibility within their institution face complex challenges as whether, when, how, and to whom they should disclose their gender identity or sexual orientation. Generally non-LGBTQ+ university employees don't need to worry about these issues, which already seem like fairly significant and difficult ones to consider and ultimately take action on. Ellis (2009).[42]

VII. Conclusion: A Shared Struggle, A Shared Future

This research reveals that the fight for recognition of transgender rights in India cannot be divorced from the broader anti-caste movement, as both challenge systems that control

[41] S.J. Ellis, D.W. Riggs & E. Peel, *Lesbian, Gay, Bisexual, Trans, Intersex, and Queer Psychology: An Introduction* (Cambridge Univ. Press 2019).

[42] Nuno Nodin, "Queering the Curriculum. Reflections on LGBT+ inclusivity in Higher Education", 28 *Psychology Teaching Review* (2022).

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identity and perpetuate exclusion. The study demonstrates that Dalit transgender individuals face a unique form of intersectional marginalization that existing legal and policy frameworks inadequately address.

The analysis of current policies starting from the Transgender Persons (Protection of Rights) Act, 2019 till the National Education Policy, 2020 effectively reveals significant gaps in understanding and addressing the complex realities of caste-based discrimination within the transgender community. The dominant narrative of transgender rights, shaped by elite activists with greater cultural and economic capital, often renders invisible the experiences of those at the intersection of caste and gender marginalization.

Ambedkar true approach to transgender liberation, requires transcending identity based politics to embrace transformative politics. This requires collective empowerment through coalition with other marginalised community such as indigenous people, disabled people and sex workers. Such approach reflects Ambedkar philosophy that identity and social norms are neither fixed nor inherent but dynamic, and are shaped by socio-cultural forces and institutional practices.

It is the strong attempt to erase the concerns of the transgender individuals by concreate vision of uniform and casteless transgender community, because dealing with the uninformity may affect the state's response and welfare programs which was already introduced. The analogy of Ambedkar in caste reservation may help the Dalit transgenders in policies related to academic, legal and work engagements.

Concerns of Dalit transgender individuals are erased by the strong vision as a uniform and castless of transgender communities as it affects the state's response and welfare programs towards them. Ambedcarite perspective can help the Dalit Trans Activation Academic, Legal and Worker's Engagement Proceeding Policy.

The implementation of horizontal reservation can be prove a historical step for transgender individuals from Dalit community. As compare to the vertical reservations where benefits cut across. This will lead to a transgender from Dalit community to receive benefits from the Scheduled Caste category (vertical reservation) and as a transgender individual (horizontal reservation).

Moreover, Promoting Dalit Trans leadership within the widespread queer activism movement to include Dalits and Trans stories and improving the academic course may increase over time. The coated historical injustices and marginalisation of transgender individuals

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belonging to the Dalit community in society should be given adequate attention while drafting and amending policies and guidelines.

The critique given by Ambedkar on the caste was a critical evaluation of the institutionalized inequality legitimized through traditionalist discourse. Although his insights were rooted in caste but the ethos can be stretched to marginalisation of transgender community. Transgender rights movement and anti-caste movements are not separate struggles. They are parallel conflict against the ruling systems that dominate "*who we are allowed to be*". Only through this intersectional understanding can India move toward the inclusive society that Ambedkar intended to ensure dignity for all, social justice, equal opportunities and , regardless of gender, caste, or identity.

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THE RIGHT TO REPAIR IN INDIA: UNLOCKING INNOVATION, SUSTAINABILITY, AND CONSUMER AUTONOMY

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ABSTRACT

The right to repair has emerged as a counterforce to the paradox of modern consumerism, where individuals enjoy the freedom to purchase but are seldom free to repair. The right challenges the status quo based on 'planned obsolescence'— the practice by corporations and manufacturers to deliberately design products in such a way that they become frequently replaceable. This practice operates by way of restricted access to spare parts, proprietary software locks, warranty void clauses and other design choices that discourage repairs. The right to repair, in contrast, advocates for customers as well as independent repairers to be granted access to tools and technical know-how required for product restoration. Such practices not only adversely affect consumer autonomy but also fuel the ongoing environmental crisis, considering e-waste generation is rising in India. In this light, the paper thus explores how giving a formal recognition to the right to repair can significantly aid in sustainable governance. It will not only protect consumer interests but also enable an effective capacity-building of the citizens for them to meaningfully avail of their fundamental right against climate change, which has recently been granted judicial recognition as an inherent facet of the right to life under Article 21 of the Indian Constitution. It also puts forth that the often-cited IPR concerns justifying repair restrictions, can indeed be balanced with the right to repair, by offering a normative framework that reconciles the IPR concerns with this right. An approach based on a fine balance can safeguard innovation without undermining consumer rights and sustainability. Ultimately, the paper makes a case for the right to repair as a conscious policy decision necessitating a shift in how we conceive ownership and justice in an era of disposability, thus aligning it with the constitutional values of sustainability, access, and fairness.

I. Introduction

There were times when repair was second nature—frequent visits to automobiles, household appliances, and electronic devices repair shops, were a way of life. In the post-liberalization era, with the advancement of technology, the markets opened globally and were now flooded with newer and much more innovative products. However, instead of solidifying the repair practices, the products were rendered disposable and easily replaceable, owing to cost-effectiveness and advancements made in the manufacturing processes. Eventually, this shift led the manufacturers to focus more on mass-producing newer models on a frequent basis, rather than creating durable, repair-friendly designs. Consequently, in a consumption-oriented

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market, even the consumers started prioritizing convenience and affordability over sustainability and longevity. Such a consumption-oriented approach, *inter alia*, manifested in the form of proprietary designs restricting third-party repairs, digital locks and software restrictions requiring manufacturer authorization, warranty clauses that nullify repair rights upon repair attempts by non-authorized repairers, and limited availability of spare tools or the relevant know-how manuals. Therefore, what was once a natural consumer right, reduced to a corporate privilege, particularly in the automobile and electronics industry. This, in turn, fuelled the practice of 'planned obsolesce'[1]—a term that owes its origin to the times of the American Great Depression. During this period, the American businesses adopted the concept of "creative waste"[2] to fight their bear economy. The idea was premised upon deliberate discarding of products to buy new ones, and push for a strong economy. Even though the newer products and appliances were hardly discernibly different from the older ones in design and utility, it was the "visual trappings of progress desired by consumers"[3] that promoted continuous sales. Thus, the approach that shaped the aspirations of post-world war Americans, gradually permeated other developed and developing economies alike, in a globalized world.

It is trite to say that, with the passage of time, a consumerist approach once thought to be innovative and economy-friendly, took a toll not only on the consumers and market, but also the environment. The new set of challenges range from hindrance of free-flow trade between Original Equipment Manufacturers (for brevity, "OEMs") and, the third-party buyers and sellers; to hampering an effective e-waste management. Moreover, the real financial burden, borne out of a culture of over-consumption, falls upon the consumers who are forced to replace the products that can feasibly be repaired. Even the companies, without any hesitation, compromise on the product quality and durability, to ensure that the products are easily rendered outdated. It is ironic that ease to manufacture newer products, in reality, stifles true innovation, by allowing the companies to focus on disposability, rather than longevity and sustainability. Further, at times, 'planned obsolesce' can be viewed as a deceptive unfair trade practice. The 'Right to Repair' (for brevity, "R2R") movement emerged in response to these multi-fold issues, in the same country where the practice of 'Planned Obsolescence' had once emanated from—in the early 2000s, the first push came from the automobile sector in America, when the independent repairers found themselves incapable of accessing the vehicle diagnostic

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1 Bernard London, *Ending the Depression Through Planned Obsolescence* (Glasgow, 1932).

2 *Ibid.*

3 Nigel Whiteley, *Toward a Throw-Away Culture: Consumerism, 'Style Obsolescence' and Cultural Theory in the 1950s and 1960s*, 10 *Oxford Art Journal* 3–27 (1987).

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data and repair manuals, strictly controlled by the OEMs. This gave way to the first active legislative intervention, in the form of Massachusetts Right to Repair Law, 2012[4], permitting the third-party and independent automobile repairers to have the same kind of access to repair know-how and tools as the authorized dealerships and repair shops. This legislation also stirred a fruitful dialogue between consumer advocacy groups and the automobile OEMs, which translated into a nationwide Memorandum of Understanding in 2014[5]. The automobile OEMs agreed to ensure an easy access to repair data and tools. However, with the advent of digital technology, the OEMs, apart from creating structurally weak products, resorted to introducing new software-based restrictions, leading to renewed legal battles.

The right to repair gained momentum globally, particularly posed by digital technology. It empowers the customer to modify the products they own without manufacturer- imposed restrictions, thus promoting consumer autonomy, sustainability, and anti-competitive business practices. Various jurisdictions, namely the United States, European Union, and Australia. have taken significant legislative measures for enforcement of this right. US, being the flagbearer of this movement, has right-to-repair legislations in place in several states.[6] The European Union's Ecodesign Directive[7], which came into force recently in 2024, mandates that spare parts remain accessible to the end-consumers and independent repairers for up to 10 years. In a similar vein, Australia's Productivity Commission Report (2021)[8] recommended legislative intervention to curb unfair repair restrictions and promote a sustainability-based consumer autonomy. However, the global formal recognition of the right to repair has not yet translated to a concrete law in India. The Indian legal landscape remains fragmented when it comes to ensuring repair rights. Since India does not have a comprehensive legislative framework for codifying this right, its nuances must be understood by an intersection of certain legal provisions under consumer protection, competition law, and intellectual property law.[9] Though the Department of Consumer Affairs has launched a R2R portal recently in 2022, it still lacks

4 Massachusetts Right to Repair Law, 2012

5 Memorandum of Understanding, https://www.njgca.org/wp-content/uploads/Right-to-Repair-national-MOU-01-23-14.pdf (last visited on March 24, 2025).

6 Fair Repair Act, s.3830 https://www.congress.gov/bill/117th-congress/senate-bill/3830 (last visited on March 24, 2025)

7 Ecodesign for Sustainable Products Regulation, available at: https://commission.europa.eu/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/ecodesign-sustainable-products-regulation_en (last visited on March 24, 2025).

8 Australian Government Productivity Commission, *Annual Report 2021–22* (September 2022) https://www.pc.gov.au/about/governance/annual-reports/2021-22 (last visited on March 24, 2025)

9 Gaurav Pathak and Gaurangi Kapoor, "Suggested Framework for the Right to Repair in India," in Ashok R. Patil (ed.), *Consumer Law and Practice: Contemporary Issues and the Way Forward* (NLSIU 2022).

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a legislative backing. Thus, to foster a repair economy, it becomes crucial to explore how these laws interact amongst themselves, and to examine their interaction through the lens of sustainability, considering that India now stands as the third largest e-waste generator globally, after China and the US.[10] Though the small-scale repair shops and traditional technicians contribute significantly to bolster the informal economy in India, by promoting repair practices and reducing waste, they continue to face systemic challenges such as financial constraints, affecting their capacity to invest in advanced tools and training, and shortage of skilled labour, preventing expansion of operations.[11] This calls for integrating the circular and approach, and repair-friendly model, adopted by the informal sector small-scale repair shops into the operations of the big enterprises, to ensure meaningful sustainable growth.

II. Contours Of the Right to Repair in India

Socio-Cultural Perspectives

India has been home to suitability, frugality, and resourcefulness long before the emergence of sustainable movements in response to global consumerist approaches. The idea of restoration and repurposing of goods find place even in the Ancient Indian texts, including the Vedas and the Upanishads, in the form of the concept of '*Aparigraha*'[12] i.e., non-possessiveness, which deters over-consumption. The Gandhian teachings, shaped by the principles of self-sufficiency and minimalism, also reflect this approach—his *charkha*, symbolizing self- reliance instead of relying of foreign goods[13], was also a way of promoting repair culture. A culture of repair manifests not merely in texts and teachings but in the daily-life traditional Indian values, in the rural and urban spaces alike. The colloquial term '*jugaad',* meaning innovative improvisation, permeates the daily routine and language in India, symbolizing the ability to seek practical solutions for repurposing or reusing items, instead of quickly discarding them. A culture of repair ranges from common people repurposing old *sarees* and *dhotis* into quilts, to the persistence of professional second-hand and refurbished goods markets like Nehru Place in Delhi. These markets specialize in refurbished electronics,

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[10] *India's e-waste offers $6 billion economic opportunity*, The Economic Times, *available at:* https://cfo.economictimes.indiatimes.com/news/indias-e-waste-offers-6-billion-economic-opportunity-report/118235677 (last visited on Mar. 25, 2025).

[11] Sudeep Singh and A. M. Mohanty, "Issues with Indian SMEs: A Sustainability-Oriented Approach for Finding Potential Barriers", in *Innovative Product Design and Intelligent Manufacturing Systems* 159–166 (Deepak Gupta ed., Springer Nature Singapore Pte Ltd., 2020).

[12] S. Radhakrishnan, *The Principal Upanishads* (Harper & Brothers, 1953).

[13] David Hardiman, *Gandhi in His Time and Ours: The Global Legacy of His Ideas* (Columbia University Press, 2004).

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auto and appliance parts etc, thus thriving on reuse and repair, aiding significantly in curbing e-waste generation.

The shift in Indian approach from repair to replacement, *inter alia*, was on account of the entry of multinational corporations to India in the post-liberalization period., and the consequent increased availability of consumer goods.[14] Gradually, this led to the decline of traditional small-scale repair shops, due to readily available mass-produced goods at cheaper costs. The demand for repair also saw a steep decline, owing to the prevalence of disposable fast-fashion products and electronic goods. Though India held onto the materialist "use and throw" culture for several decades, it is interesting to note that the new-age startups, and urban repair Repair cafés and workshops promoting sustainable products and practices, is but a revivalist practice premised on bringing back a culture of repair and re-purposefulness to India. It is, therefore, unsurprising that the companies as well as small businesses specializing in mobile phone repairs, laptop refurbishing and appliance fixing are gaining traction in India.[15] The role of repair in India's informal economy is also not unnoticed—the informal sector is indeed the backbone of Indian economy, which involves the contributions of local craftsmen as well as small-scale technicians, cobblers, blacksmiths etc. India's longstanding traditional repair practices align with the principles of a circular economy.[16]

Legal Perspectives

Presently, the uncodified legal framework for the R2R in India primarily revolves around competition law concerns and consumer protection, particularly the monopolistic restrictions imposed by the OEMs on repair markets. The Competition Commission of India (for brevity, "CCI"), in *Shamsher Kataria* ruling [17], invoking sections 4(2)(b) and 4(2)(e)[18] of the Competition Act, 2002, affirmed the OEMs acting as a dominant enterprise and establishing dominance in repair markets, to be an abuse of dominance, which not only adversely impacts independent repairers but also hampers consumer welfare. Even the Consumer Protection Act, 2019[19] or the proposed Digital India Act, 2023[20] focus on the discussions relating to consumer

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14 *Supra* note 11

15 *NITI Aayog*, *Innovation for Sustainable Development: The Role of Startups in India's Green Economy* (2021).

16 *The Circular Economy: Lessons from India's Thriving Repair and Reuse Culture*, available at: https://thecsrjournal.in/the-circular-economy-lessons-from-indias-thriving-repair-and-reuse-culture/ (last visited on Mar. 25, 2025).

17 *Shamsher Kataria v. Honda Siel Cars India Ltd.*, 2014 SCC OnLine CCI 95.

18 *The Competition Act, 2002*, No. 12 of 2003, s. 4.

19 *Consumer Protection Act, 2019*, No. 35 of 2019.

20 *Digital Personal Data Protection Act, 2023*, No. 22 of 2023

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rights and fair market access. For instance, the Apex Court in *Jaswant Rai*[21] ruling allowed unavailability or inaccessibility of spare parts to be treated as a physical defect in the product, if it could be shown that a "reasonable purchaser" would not have entered into a contract with the manufacturer in the first place, had he been aware of the true quality of the said product. Additionally, in the *Sanjeev Nirwani v. HCL*[22] ruling, the Apex Court acknowledged and affirmed the manufacturers' duty to produce and provide, spare and consumable parts specific to a product, even after the warranty periods, undoubtedly at reasonable costs.

The above-stated rulings show that the right to repair in India is predominantly treated as a remedial measure, and not as an inherent 'right,' as the nomenclature suggests. This approach stems not from want of legislative or judicial efforts, but from a discourse majorly centred around IPR issues, and competition concerns. As a result, this approach overlooks the potential of a strengthened right to repair, in promoting sustainable development. The interplay among these allied fields thus serves both as a remedy, and a barrier, hindering the full realization of this right. The law as a barrier is a flip side of law as a remedy—the manufacturers usually raise copyright and patent concerns in favour of repair restrictions. The Copyright Act permits the OEMs to implement software controls such as Digital Rights Management, and to bar third-party modifications by way of end-user agreements. Specifically, Copyright Act, 1957 secs. 65A and 65B[23] of the Act criminalize bypassing digital security measures, or tampering with rights management information. In certain cases, the manufacturers also invoke 'package licensing' under the Patents Act, 1970, to extend protection over the repair process itself., in addition to opposing mere repairs. Though Patents Act, 1970, sec. 140[24] The Act prevents patent holders (here, OEMs) from imposing unfair conditions on buyers or licensees, the OEMs often bypass this protection by way of strategic licensing agreements requiring proprietary tools and diagnostics. Thus, in the absence of explicit legislative recognition, the legal landscape regarding the right to repair remains unsettled in India, as the courts address issues related to anti-competitive practices on a case-by-case basis, often focusing on consumer and competition concerns, with a negligible emphasis on environmental considerations and the sustainability aspect related to the right to repair. Consequently, the narrow focus undermines the full potential of right to repair framework, as an instrument of promoting sustainable development and aiding substantially in waste reduction, economic resilience, and climate

[21] *Jaswant Rai v. Abnash Kaur*, Suit No. 67 of 1966.
[22] *Sanjeev Nirwani v. HCL* CC/618/2014
[23] *Copyright Act, 1957*, No. 14 of 1957, ss. 65A, 65B.
[24] *The Patents Act, 1970* (Act No. 39 of 1970), s. 140.

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responsibility. Consequently, despite there being no express legislation, The Right to Repair Portal India serves as a major initiative of the Department of Consumer Affairs (DoCA) within the Ministry of Consumer Affairs Food and Public Distribution which aims to give consumers power through repair manual and authorized service center access as well as additional resources. Currently four sectors participate in the Right to Repair Portal voluntary scheme including agricultural equipment and mobile phones and electronics along with consumer durables and automobiles. Major firms operating within these sectors have initiated the practice of disclosing repair manuals as well as spare components details. Agricultural machinery falls into a category with strong participation levels because farmers require extended use from their farm equipment. A number of consumer electronic producers including smartphone companies have launched repair documentation to their customers. The repair tools and spare parts access varies depending on the industry because numerous manufacturers avoid granting complete access because of intellectual property concerns alongside safety concerns. User safety stands as a major concern in automobile and high-end electronic devices and medical equipment because wrong repairs may lead to severe consequences. The belief that manufacturers use safety concerns to monopolize repair markets faces criticism as a repair monopoly justification technique.

III. Sustainability Through the Right to Repair

Right to Repair as a Capacity-Building Measure

Today, it becomes more important than ever to explore the potential of right to repair in India as an instrument of sustainable development, considering that the Apex Court has recently, in the *MK Ranjitsinh*[25] ruling has recognized the right against the adverse effects of climate change, as a distinct fundamental right under Articles 14 and 21 of the Constitution. While the ruling does not expressly discuss the relevance of the right to repair in India, it does emphasize the need for a holistic approach towards understanding the concept of sustainable development in India. The ruling highlights how the agenda of sustainability in India "reflects the complex interplay between environmental conservation, social equity, economic prosperity and climate change"[26], and therefore calls for moving "beyond mere adherence to international agreements"[27]. This approach heavily resonates with the right to repair movement, which holds

[25] *M.K. Ranjitsinh v. Union of India*, (2024) InSC 280.
[26] *Supra note 26, Para 59*
[27] *Ibid.*

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potential to bring about a real and meaningful change. Such an approach can analogously be applied to balance the IPR concerns with environmental sustainability, emphasizing that neither should be subservient to the other, but rather that they should complement and reinforce each other. Here, it goes without saying that the Court has advanced a 'Human Rights-based Approach ("HBRA")[28] regarding the adverse impact of climate change upon standard and quality of life, but it is pertinent to note that simply granting or declaring a right without the corresponding capacity-building by the duty-bearer (here, the state), risks the right being reduced to a mere paper parchment.[29] For a right to translate into a meaningful right, capacity-building becomes central to HBRA.

It is , therefore, imperative for the state to undertake active capacity-building measures, that not only involve government initiatives, but also an active engagement of non-state actors, to ensure that all individuals (in this case, citizens and non-citizens alike) can effectively avail of and exercise this right—a strengthened right to repair can be a pivotal component of such capacity-building, as it can not only empower the consumers to extend the lifespan of their products but also contribute to environmental sustainability. For instance, capacity building, within this context, can entail sensitisation of citizens, solidifying institutional frameworks, and engaging non-state actors including businesses and civil society, that can enable a meaningful realization of the concerned right. A study related to consumer perspectives on the right to repair revealed that the intention to repair is, inter alia, influenced by factors such as environmental awareness, perceived ease of repair, and beliefs about legislation[30]. This underscores the need for capacity-building measures that effectively address these areas to promote repair practices. However, building a legal capacity does not necessarily require legislative intervention. Instead, strategic policy decisions employing effective utilization of existing legal frameworks can significantly strengthen this right. The existing scholarship largely advocates for enacting a separate R2R legislation, but falls short of exploring the potential of leveraging current regulations, such as the E-Waste (Management) Rules[31], and of integrating principles from IPR and Competition Law, to promote sustainability. For instance,

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[28] Principle One: Human Rights-Based Approach, available at: https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach#:~:text=The%20human (last visited on March 26, 2025)

[29] M. Broberg and H.-O. Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences,' 22(5) *The International Journal of Human Rights* 664–680 (2018).

[30] D. Marikyan and S. Papagiannidis, "Exercising the 'Right to Repair': A Customer's Perspective", (2024) 193 *Journal of Business Ethics* 35–61.

[31] Central Pollution Control Board, *E-Waste (Management) Rules* (2022).

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the said Rules include the key provision of Extended Producer Responsibility (EPR)[32], holding the OEMs accountable for the entire lifecycle of their products (including take-back, recycling, and disposal). While this provision focuses primarily on end-of-life management, it can be extended to encourage the manufacturers for designing easy-to-repair durable products. The EPR guidelines can be amended to incentivize the manufacturers for producing repairable and upgradable products, thereby strengthening the right to repair framework and reducing e-waste generation without any additional legislation for the time being.

Theoretical Models Supporting Sustainable Capacity-Building in R2R

The right to repair framework is generally debated within the confines of IPR concerns[33]and competition concerns[34], leading to the assumption that their interaction inherently obstructs sustainability. However, contrary to the conventional examination, a closer examination reveals that, when applied correctly, they can actively support a sustainability-driven repair economy. In fact, leveraging current laws, as an alternative to bringing an express legislation, can prove to be a more pragmatic approach for creating a robust and sustainable repair ecosystem, when supported by a well-established theoretical foundation. This involves situating the legal framework within a broader theoretical perspective, to bring more coherence to the interaction of theories from different allied fields.

At the core of the IPR justifications for repair restrictions, lies the Benthamite Utilitarian Theory[35], which maintains that exclusive IP rights should only be granted if they maximize overall societal welfare, suggesting that patents and copyrights promote innovation by granting monopolies.[36] However, excessive protection can not only adversely impact the market efficiency (free flow of ideas as well as trade)[37] but also cause environmental harm. Furthermore, as highlighted by Prof. Bernstein, social progress encompasses not only innovation but also "adoption process"[38], meaning thereby that progress can be attained only if the people get a real opportunity to avail of new technology. Thus, even the traditional IP justifications align with viewing the right to repair as a measure for ensuring consumers'

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32 *Ibid.*

33 Leah Chan Grinvald and Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 *Fordham L. Rev.* 104 (2019).

34 Miriam Imarhiagbe, The Right to Repair in EU Competition Law, 5(1) Nordic J. Eur. L. 169 (2022).

35 Jeremy Bentham, *The Stanford Encyclopedia of Philosophy* (Mar. 17, 2015).

36 Stephen R. Munzer, *New Essays in the Legal and Political Theory of Property* (Cambridge Univ. Press, 2001).

37 Michele Boldrin and David K. Levine, *The Economics of Ideas and Intellectual Property*, 102(4) *Proc. Natl. Acad. Sci. USA* 1252–1256 (2005).

38 Gaia Bernstein, *In the Shadow of Innovation*, 31 *Cardozo L. Rev.* 2257, 2275 (2010).

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capacity to get the innovative benefits of technological advanced products. A robust right to repair framework will not only positively impact environment, but also enable the consumers to derive more utility from the innovative goods, thereby serving the overarching utilitarian goal of enhancing overall societal well-being.

Similarly, Lockean Labour Theory justifies property rights based on labour input, but is qualified, majorly, by two factors—there is enough good left for others, and the labourer does not take more than what he needs. In the similar vein, Gordon has put forth, based on natural-rights perspective, that the IP rights are concerned with both public rights, and with those whose "intellectual labour" goes into creation.[39] This perspective supports the right to repair as a moral entitlement of the consumer, since consumers also mix their labour with the goods they own.[40] This can be instantiated by considering gamers who upgrade their PCs, or tweak software to optimize its performance; another example can be farmers applying physical labour and technical expertise to upgrade their tools and machinery, outside of manufacture-controlled repair services. This perspective also challenges the traditional view that ownership stops at purchase, rather the consumers invest their own labour into maintaining and modifying a product. Concomitantly with benefitting consumers and independent repairers, a RTR legal regime can potentially push innovation in repair markets as it allows the consumers and independent repairers in carving out newer repair methods, improving repair tools, or developing innovative repair kits.

A holistic understanding, therefore, requires transcending mere price and profit considerations, as has been done by the Post-Chicago school of antitrust law. The Post-Chicago School has expanded the analytical framework beyond the narrow focus of Chicago School on price effects, incorporating a broader examination of non-price harms (such as planned obsolescence). This shift acknowledges that non-price factors can also constitute anti-competitive behaviours, capable of substantially shaping market dynamics and consumer welfare.[41] The Post-Chicago school, as a scholar has noted, has thus recognized anti-competitive practices can indeed cause market failures by creating externalities not apparent in

[39] Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *Yale L.J.* 1533 (1993).

[40] John Locke, *Two Treatises of Government*, available at: https://www.britannica.com/topic/Two-Treatises-of-Government (last visited on Mar. 27, 2025).

[41] Mark Glick and Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who is Right in Light of Modern Economics?* 30(4) *Geo. Mason L. Rev.* 935 (2023)

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the pricing structures.[42] This perspective provides a framework for strengthening the right to repair, as giving the due weightage to non-price factors in IPR, consumer and competition matters, can serve as a proactive tool to foster a viable repair economy. These theories, often understood as incompatible with the right to repair, indeed translate into "internal justifications"[43] for solidifying the right to repair in a manner complementary to the IPR front. A case for right to repair can thus justifiably be grounded in the very rationales that have traditionally been used to justify IP rights.

Most importantly, a right to repair framework accounting for the said IPR concerns and theories makes way for a much more inclusive understanding of the right to repair in India Apart from an individual's personal right to repair and modify their products, it can also be understood to mean, by extension, sharing repair information publicly, advertising repair businesses, small-scale repair businesses manufacturing, importing and selling spare parts in competition with the OEMs, and mandating the OEMs to disclose repair know-how and supply spare parts. Such an approach "visualizes the notion of a right to repair as concentric circles"[44], with personal repair rights at its core and gradually moving towards the rights, that are more public in nature.

IV. LEGAL POSITION OF "RIGHT TO REPAIR" AROUND THE GLOBE

United States of America

The United States Right to Repair movement conducts several state-level initiatives to allow consumers and independent repair shops full access to electronic device tools while also enabling vehicle maintenance through authorized parts and comprehensive device information. Multiple state-level legislation has been passed during March 2025.[45]

The New York Digital Fair Repair Act (2022) became law on December 28th 2022 to establish an obligation for original equipment manufacturers to give consumers and independent repairer's access to repair information required for consumer electronic devices.

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[42] Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, *All Faculty Scholarship* (2020), *available at:* https://scholarship.law.upenn.edu/faculty_scholarship/2212 (last visited on Aug. 3, 2025)

[43] *Sup*ra note 33

[44] *Supra note 44, page 70*

[45] *The State of Right to Repair*, available at: https://pirg.org/connecticut/edfund/resources/the-state-of-right-to-repair/ (last visited on Mar. 27, 2025).

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Under this law manufacturers do not need to give access to motor vehicles alongside home appliances and medical devices. This legislation becomes applicable to all electronic devices that become first used or purchased within New York State starting from July 1, 2023 onwards. [46]

The state of Colorado leads the way when it comes to Right to Repair legislative action within multiple industrial sectors, through its 2022 regulation the medical device industry enables wheelchair users to possess essential components together with maintenance equipment and code software they need for motorized chair fix.[47] Agricultural Equipment (2023) creates mandatory requirements for farming equipment manufacturers to deliver maintenance materials to their users.[48] Broad Electronics (2024): Encompasses personal electronics, printers, appliances, HVAC systems, and more. Colorado will become one of the leading states in the nation after January 1, 2026 when its restrictive "parts pairing" rules come into effect under this law.[49]

Under the Minnesota Digital Fair Repair Act (2023) starting July 1 2024 manufacturers must follow the law for their post-July 1 2021 manufactured products. Under this legislation different digital electronic products such as personal electronics and appliances as well as servers and industrial equipment receive coverage. Under exceptions for this disclosure law off-road and recreational vehicles together with video game consoles and medical devices and agricultural equipment maintain immunity.[50]

The California Right to Repair Act (2023) commences operation on July 1st 2024 to mandate that manufacturers provide repair materials along with maintenance instructions and repair tools for all consumer appliances up to the category of personal electronics. According to the law manufacturers need to offer repair materials for three years starting from production for devices that cost between $50-$100 or they need to maintain access to repair materials for seven years from production for products worth more than $100. Home alarm systems and fire suppression systems as well as video games consoles together with selected agricultural and construction equipment have exemptions under this legislation. [51]

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[46] *The Digital Fair Repair Act, 2021* , s4104-A/A7006-B

[47] Consumer Right to Repair Powered Wheelchairs, *available at:* https://leg.colorado.gov/bills/hb22-1031 (last visited on Mar. 27, 2025).

[48] *Ibid.*

[49] The Minnesota Digital Fair Repair Act, 2023

[50] The Minnesota Digital Fair Repair Act,s. 325E.72

[51] The Right to Repair Motor Vehicle Data Law (Senate Bill No. 244).

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Under Massachusetts Automotive Right to Repair Law (2012 updated to 2020) vehicle owners alongside independent repair shops maintain full privileges to essential diagnostic and repair information. The 2020 update of the Massachusetts law added wireless telematics systems into the coverage which granted immediate vehicle data access for repair purposes.

More and more states now understand RTR's significance since their initiatives were created to address customer rights and environmental preservation while fostering competitive markets. The nation lacks uniform federal RTR regulations which creates different legal standards between states throughout the country. An increasing number of states have implemented Repair Right To Replace legislation across the country in March of 2025 because of expanding support for standardized repair rights.[52] The enforcement of RTR matters is advancing through the actions of government agencies at both federal and state levels. The U.S. Copyright Office through its October 2024 DMCA exemption granted repair access to ice cream machines and other equipment to McDonald's franchisees and third parties. Commercial and industrial equipment maintenance professionals can now use this DMCA amendment to bypass digital security barriers during their repairs because of significant RTR movement success.[53] The Federal Trade Commission (FTC) is currently investigating companies such as Deere & Co. because they assert the company monopolizes repair markets by blocking essential repair software and necessary tools from being accessible to the public.

European Union

The Right to Repair movement within the European Union has developed into a wide-ranging legal system that works to support sustainable buying habits while dealing with waste reduction. The initiative supports EU-wide environmental and resource efficiency goals under the European Green Deal and Circular Economy Action Plan to create a sustainable economy.[54] On April 23rd the European Parliament enacted significant reform with the Right to Repair Directive. The directive compels producers to establish repair service programs which should be both affordable and speedy while consumers must obtain detailed information regarding

[52] 'Already, 20 States Have Active Right to Repair Legislation in 2025', https://pirg.org/articles/already-20-states-have-active-right-to-repair-legislation-in-2025/ (last visited on Mar. 27, 2025).

[53] 'McDonald's Ice Cream Machines Get Help from the Feds', https://www.axios.com/local/chicago/2024/11/13/mcdonalds-ice-cream-copyright-law (last visited on Mar. 27, 2025).

[54] 'Right to Repair Directive – What Will This New Legislation Mean for Your Business?', https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/right-repair-directive-what-will-new-legislation-mean-your-business? (last visited on Mar. 27, 2025).

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their rights to maintenance. The legal guarantee extends by one year for all products repaired under warranty terms which encourages customers to select repairs instead of new purchases.[55]

As part of the directive amendments to the Sale of Goods Directive (EU) 2019/771 manufacturers now provide legal guarantees of an additional year to consumers making repair selection. The EU demonstrates its dedication to product extension cycles through this amendment while working to decrease waste amounts.[56] The EU directive mandates producers to provide technical maintenance services for products which can be fixed under current EU product laws including home appliances and televisions. The established right to repairs creates a dependable solution for customers which pushes manufacturers toward more environment-friendly business operations. A combination of scholarly research has evaluated how well the directive accomplishes its goals. The directive makes substantial improvements but academic scholars mention it falls short of solving problems with planned product deterioration while not providing adequate access to repair details. Manufacturers need stronger requirements which make them design products for both durability and repair accessibility.[57]

The RTR promotion work of the European Economic and Social Committee (EESC) includes running events and awareness campaigns to help establish repair practices in EU consumer communities. These initiatives strive to give power to customers as well as establish sustainable behaviors throughout Europe.[58]

China

Chinese Right to Repair (RTR) movement functions under the Law of the People's Republic of China on the Protection of Consumer Rights and Interests which people know as the Consumer Protection Law. Consumer rights and business obligations come from the Consumer Protection Law which China adopted in 1993 with subsequent amendments in 2009 and 2013. Article 23 of the Consumer Protection Law contains an essential provision related

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55 'Right to Repair: Making Repair Easier and More Appealing to Consumers', https://www.europarl.europa.eu/news/en/press-room/20240419IPR20590/right-to-repair-making-repair-easier-and-more-appealing-to-consumers (last visited on Mar. 27, 2025).

56 EUROPEAN COMMISSION, *Directive on Repair of Goods* (June 2024).

57 'A Critical Assessment of the European Directive Proposal on the Common Rules Promoting the Repair of Goods', *available at:* https://www.sciencedirect.com/science/article/pii/S0921344924005871 (last visited on Mar. 27, 2025).

58 Emilie Prouzet, 'Placing the Right to Repair at the Core of the EU's Consumer Protection Policy', *European Economic and Social Committee*, *available at:* https://www.eesc.europa.eu/en/news-media/articles/placing-right-repair-core-eus-consumer-protection-policy (last visited on Mar. 28, 2025).

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to Right to Repair. The article requires businesses which offer repair replacement or return services to fulfill them immediately and without unfair denial when these undertakings result from state regulations or consumer agreements. Under Article 23 of the Consumer Protection Law businesses must deliver promised repair services to consumers which establishes their rights during product failure or defects.[59] The Consumer Protection Law of China received support from government enforcement through the Implementing Rules of the Law on Protection of the Rights and Interests of Consumers on July 1, 2024. The rules established by the Implementing Rules for the Law on Protection of the Rights and Interests of Consumers specify different norms for consumer rights especially regarding defective product recalls. Under the Consumer Protection Law companies involved in manufacturing and importing must create recall plans while both releasing information and paying expenses related to product recall and notifying consumers of their rights. All entities participating in product sales or lease functions and component repair making or supply must help and collaborate with product recalls. According to the Implementing Rules businesses need to deliver honest and detailed product information and service explanations to their customers. The need for business clarity helps customers obtain essential knowledge to choose products wisely and use their rights confidently.[60] Under the Product Quality Law of the People's Republic of China consumers must obtain products both free of unreasonable dangers and capable of meeting advertised properties and functions. The legislation operates as an industry defense system which protects consumers from hazardous merchandise therefore lowering repair needs and boosting their security.[61] An evolving pattern of RTR in China remains evident after legislative changes according to scholarly studies. Consumer rights exist under current laws but additional explicit RTR provisions need to be introduced because modern electronic technology presents new repair-related challenges.[62]

Japan

Japan combines legal systems with cultural traditions to determine policies related to the Right to Repair (RTR). The automotive sector in Japan benefits from existing laws that form the base of repair activities although the nation has yet to enact dedicated Right to Repair

[59] Law of the People's Republic of China on Protecting Consumers' Rights and Interests, 1993.

[60] 'Implementing Rules of Consumer Protection Law Released', *available at:* https://www.roedl.com/insights/newsletter-china/2024-04/implementing-rules-consumer-protection-law-released? (last visited on Mar. 28, 2025).

[61] Product Quality Law of the People's Republic of China, 2000.

[62] Yanmin Quan, Xiaohao Zhang, 'Outlook on the right to repair: how will it find its way into China's Copyright Law?' 18 *Journal of Intellectual Property Law & Practice* 382–385 (May 2023)

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(RTR) legislation like those in the European Union or selected U.S. states. The Road Vehicles Act contains Article 64 as an essential regulation for "disassembling repairs" of automobiles. The Ministry of Transport (MOT) needs to inspect vehicle systems undergoing disassembly if such repairs are not conducted at certified or designated garages according to article 64. Significant vehicle repair work needs approval from the Ministry of Transport to maintain safety standards but limits which facilities can provide these types of repairs. Japanese government authorities have established clearer definitions for "disassembling repairs" along with simplified examination procedures for repair facilities. [63] Japanese cultural traditions embrace the concepts of repair and maintenance that are fully embodied in the practice of "kintsugi" – the art of fixing broken pottery with mixture of lacquer and powdered gold. Japan's cultural understanding of repairing products continues into contemporary grassroots movements which support both fixing and recycling of items thereby generating a social pattern focused on sustainable product durability.[64] Evidence gathered from scholarly research shows Japan's RTR framework is currently in a state of development. Existing laws serve as the foundation for consumer repair rights yet more specific regulations are needed for RTR matters specifically in modern electronic products dealing with technological difficulties.

Global progress in the Right to Repair (RTR) movement is taken with different legal approaches. Several states of the United States provide conditions the of repair right for electronics, appliances, and agricultural instruments and in the United States, New York, coloorado, minimissa, and California have RTR laws and by force in the United States Massachusetts is ready to enterprise and automotive repair rights. The FTC looks at monopolistic Repair restrictions, and security bypassing in some repairs is allowed under a 2024 DMCA exemption. The validity of the Right to Repair Directive (2024) has been debated as it adds to repair accessibility through extending repair warranties and establishing affordable repair services; however, scholars claim they should also extend manufacturer obligations. The 2024 Implementing Rules apply the repair rights to China's Consumer Protection Law, which also gives repair rights to Chinese consumers. However, there are relatively few modern RTR provisions for advanced electronics. There are no specific RTR laws in Japan but auto repairs are regulated under the country's Road Vehicles Act, in which major repairs needing government approval are obliged. Modern electronics do not receive the same regulatory

[63] Government of Japan, 'Regulatory reforms' (1999)

[64] Marieev Krista Princer, "Putting the Pieces Back Together: Using a Kintsugi-Influenced Directive to Promote Self-Forgiveness and Resiliency in Young Adults with Shame and Guilt", 2022 *Art Therapy* 4 (2022).

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support as do cultural traditions that support sustainability through grassroots repair initiatives. Even though RTR laws in most of the world are promulgated to benefit consumer rights and sustainability, inconsistencies among regions show the role for strong, common laws to enhance repair accessibility and minimize electronic waste.

V. Conclusion and the Way Forward

The right to repair in India can be traced back to the historical repair culture in India, where repairing and repurposing formed an inherent part of consumption. Traditionally, Indian markets have thrived on small-scale repair shops and repair professionals, thus making a repairability both culturally and economically significant. However, as the markets became more globalized and capitalized, restrictive manufacturer policies, proprietary repair models and technological barriers gradually started to promote over-consumption. Resultantly, this led to competition and consumer concerns, as well as environmental concerns, necessitating legal and policy interventions.

Considering that India contributes massively in e-waste generation globally, the Right to Repair cannot be reduced to merely a consumer rights issue, but also must be viewed as an instrument for economic sustainability and capacity-building—a RTR framework can operate as an enabling tool for the citizens to exercise their fundamental right against climate change meaningfully. The policies that extend life spans and reduce untimely disposals minimizes e-waste generation and promotes sustainable consumption patterns, as opposed to a disposability-culture that contribute to linear economy and exacerbate environmental degradation. Apart from that, by ensuring access to repair, India can empower small-scale professionals, thus reducing the corporate dependence and contributing to the circular economy. Strengthening repair rights thus aligns with the broader socio-economic goals of self-reliance, especially in a country like India, where the populace majorly relies on affordable repairs, rather than costly replacements.

From a legal standpoint, there is no express legislation providing formal recognition to this right in India, yet the existing consumer and competition legal framework provides a foundation for reinforcing this right. For instance, the Consumer Act, 2019 already acknowledges the significance of fair-trade practices and consumer rights. Similarly, the Competition, 2002, incorporates mechanism to address the monopolies in repair markets. These provisions can systematically be extended to include repairability clauses, preventing

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manufacturers from imposing unfair trade restrictions on independent repairers, and restricting consumer autonomy.

Furthermore, an effective right to repair framework must address the apparent contradictions between the Right to Repair and intellectual property laws—at first glance, the intellectual property rights, particularly copyright and patent, seem to restrict repairability, but a nuanced theoretical and pragmatic examination demonstrates that the IP law can, in fact, act as a catalyst for the Right to Repair framework, rather than a hindrance to repairability. The research underscores that the same theoretical justifications (both utilitarian and non-utilitarian justifications) that are used to justify the IP restrictions, can aid in balancing innovation incentives with public access. The right to repair one's own products, therefore, does not inherently violate intellectual property rights, and instead ensures a post-modernist view of innovation, accounting for societal needs.

Therefore, it becomes imperative that India must move beyond a fragmented legislative approach towards a more cohesive legal framework, to ensure that a Right to Repair framework can operate as an enabler of sustainable and equitable economic growth. To start with, the interpretations of the existing mani-fold legal instruments, must be revisited and restructured, to promote repairability as a right, rather than a corporate privilege. This shall require proactive policy decisions that deter anti-repair policies, along with active judicial engagement.

In this regard, the comparative analysis of various jurisdictions offers valuable lessons—the European Union's Ecodesign Directive enforces repair-friendly mandates for the manufacturers to provide spare parts and repair know-how. The US has also seen a significant progress, by way of Right to Repair legislations, particularly in the fields of digital goods and automobiles. Several other jurisdictions and many US states, despite not having repair legislations in place, have witnessed significant growth in this area, on account of a robust right-to-repair policy. India can draw inspiration from these models, to integrate mandatory repair provisions within the various intellectual property laws, along with consumer and competition framework. At the same time, such integration must also ensure that the lessons from global counterparts are not borrowed blindly, but are adapted in alignment with India's unique repair culture, existing legal infrastructure, suited to India's socio-economic realties.

A meaningful realization of the Right to Repair, therefore, demands a systemic shift, not only in the legal interpretation but also policy formulation. Establishing repairability as a legally protected right does not necessarily require focusing excessively on an express

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legislation; instead repair restrictions can be dealt with effectively, by way of legislative amendments, judicial clarity, and requisite policy decisions. Such a shift is imperative, not only from a legal lens, but also from a socio-economic and environmental lens. The research positions the required shift within a theoretical as well as a pragmatic framework, that can foster a robust repair ecosystem that advances sustainability, consumer welfare, and economic self-sufficiency. It is need of the hour for Indian Right to Repair infrastructure, to transition from a fragmented piecemeal approach to a unified, repair-friendly legal and policy framework.

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PRESERVING A LEGACY: EXPLORING MIZO INDIGENOUS SPORTS AND THEIR CULTURAL AND LEGAL SIGNIFICANCE

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ABSTRACT

Indigenous or Traditional sports deeply embedded within the socio-cultural fabric of communities worldwide transcend mere physical activity. They function as potent traditional cultural expressions (TCEs) embodying the history, values, knowledge and identity of their originating cultures. This article explores the critical role of traditional sports in preserving cultural legacy in an increasingly globalized world. These unique sporting forms act as living heritage, transforming ancestral knowledge, social customs and spiritual beliefs across generations. Their practice often involve specific riruals, music, attire and storytelling, further enriching their cultural significance. The importance of traditional sports in cultural preservation lies in their capacity to foster community cohesion, reinforce identity and provide a tangible link to the past. This research paper explores the rich tradition of Mizo indigenous sports and the challenges they face in the modern world. It discusses the importance of legal protection for preserving these cultural treasures. Mizo indigenous sports, rooted in the community's values and skills, include Inbuan, Insuknawr, Saihruipawh, Chawilung, Arpa Sual and Kalchhet. These sports are disappearing due to the decline of traditional practices and the influence of modern sports. Legal protection is crucial for preserving cultural identity, promoting tourism, encouraging well-being, and offering educational value. Potential legal frameworks include defining traditional sports, establishing governing bodies, recognizing player rights, and exploring intellectual property protection. By prioritizing preservation and fostering cultural pride, the legacy of Mizo indigenous sports can be secured for future generations.

I. Introduction

Nestled in Northeast India's lush greenery, Mizoram (literally "land of the *Mizos*") is a state bordered by Assam, Tripura, and Manipur. Its beauty lies in its evergreen hills and towering mountains. The people of Mizoram are predominantly from various sub-tribes who came together to form the *Mizo* identity. "*Lusei*" is a more accurate term for the original tribe, hinting at their origins.[1] Aizawl serves as the capital of this state, which officially became the 23rd state of India

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[1] Lalrimawia, Mizoram History and Cultural Identity, 1890-1947, Spectrum Publications, Guwahati, 1995.

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in February 1987. While details about the *Mizos* ancient past remain unclear, archaeological evidence and oral traditions suggest they migrated from the Tibeto-Burman region, similar to other Northeast Indian communities.

Unlike their professionalized counterparts, traditional games are deeply embedded within local cultures. These athletic expressions, specific to ethnic or folk traditions, often weave fierce competition with playful elements.[2] More than just winning, these games hold deeper meaning, connecting participants to their heritage through strong ritualistic significance.[3] It has been seen by some researchers that traditional games differ from mainstream sports due to their flexibility and local adaptation.[4] Unlike games with standardized rules overseen by international bodies, traditional games empower local organizers to set regulations that reflect the customs and traditions of their communities. This emphasis on local control allows for a rich tapestry of variations, with the same game potentially taking on different forms across regions. Dr. Jagadeesh Pillai[5] further emphasizes the significance of these games, arguing that they function as a cornerstone of symbolic patrimony for indigenous peoples. India boasts an ancient lineage of traditional games, tracing their roots back to the Vedic period (1500 BCE to 500 BCE). Notably, India is considered the birthplace of several games popular worldwide today, including *Kabaddi, Kho-kho*, Polo, and Chess (*Shatranj*).[6] These games demand a holistic approach, requiring both technical and tactical skills alongside physical attributes like speed, strength, stamina, agility, and coordination.

The *Mizos* of Mizoram exemplify the vibrant spirit of traditional games. Renowned for their love of fun and strong social bonds, the *Mizos* possess a rich tradition of indigenous sports passed down through generations.[7] These games not only showcase physical prowess and honed skills but often reflect the challenges faced in daily life. Despite limited resources, the *Mizos* passion for sports shines through in these diverse activities.[8] Some particularly famous examples

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2 Mibang Tamo and Chaudhari Sarit K (ed.,) Folk Culture and Oral literature from North East India, Mittal Publication, New Delhi, 2004.

3 Blanchard,K.,The Anthology of Sports, Bergin and Gravey, Westport, Connecticut- London 1995

4 Dr. Jagadeesh Pillai, The Indian Traditional Games: A Study of the Significance and Evolution of Indian Traditional Games, Notion Press (2023), p.2

5 *Ibid.*

6 Sharma, A.K., Chandra Shekhar & Sharma, O.P. (2007).Encyclopedia of sports, health and physical education. New Delhi: Khal Sahitya Kendra, 2007. Vol. I. p.21.

7 *Supra* note 2.

8 Lalram Chhana & V. Ratnamala, "Social Media & Sports in Mizoram: A Case Study of Inkhel.com Facebook"

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include *Insuknawr* and *Inbuan*, recognized by the Indian government for their cultural significance (Draft of Comprehensive National Sports Policy, 2007)[9]. Other well-loved traditional sports like *Saihruipawh* (*Inhruipawh*), *In Arpa Sual*, *Inbah*, *Kalchhet*, *Khanchhuakatangainvuakthlak* continue to be played, with ongoing efforts to preserve them for future generations.[10]

While colonial records and Welsh Missionaries offer glimpses into *Mizo* life their documentation of indigenous sports remains scarce.[11] This lack of historical detail makes preserving these traditional games even more critical. *Mizo* culture is deeply intertwined with these sports.[12] Many games, some still practiced, others fading from memory, embody the values and challenges faced by the *Mizo* people.[13] Unfortunately, these traditions are on the verge of disappearing. The modern world, with its abundance of technology and global influences, has led to a decline in exposure to traditional ways of life.[14] This is not just an urban phenomenon; children in rural villages are also impacted. The very essence of these games – fostering unity, brotherhood, strength and physical prowess and cultural identity – is at risk of being lost.[15] This paper aims to explore a specific selection of *Mizo* indigenous sports. This article examines both those still recognized and those being revived by the state government. Understanding these games and their profound influence on *Mizo* culture offers a glimmer of hope for reigniting this vital aspect of their heritage for future generations.

II. Mizo Indigenous Sports: A Legacy of Innovation and Community

The arrival of the British and Christian missionaries during the colonial period marked the first significant interaction between the *Mizos* and outsiders. This era also saw the initial

published in Futuristic Trends in Health, Physical Education and Sports, 170-182 (Lois Bet Print and Publication, 2019) *available at:* https://www.researchgate.net/publication/360865217_Social_Media_Sports_in_Mizoram_A_Case_Study_of_Inkhelcom_Facebook_Page (Last visited on June 3, 2023).

9 Draft Comprehensive National Sports Policy 2007, *available at*: https://yas.nic.in/sites/default/files/File371.pdf. (Last Visited May 3, 2025).

10 Mizo Infiamna, Tribal Research Institute (Directorate of Education, Mizoram, 1984), *available at*: https://archive.org/details/in.ernet.dli.2015.467316/page/n5/mode/2up (Last Visited June 3, 2025).

11 Sangkima, Essays on the History of the Mizos (Guwahati, Spectrum Publications, 2004) p 60.

12 *Supra* note 10.

13 *Ibid.*

14 *Supra* note 8 at 171.

15 *Ibid.*

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documentation of *Mizo* social and political life.[16] However, *Mizo* traditions of play and community entertainment extend far beyond this period. Evidence suggests a rich history of indigenous sports, some likely adopted from neighboring cultures, while many others were ingenious creations developed by the *Mizo* community itself as it evolved.[17] Sports have been deeply woven into the fabric of *Mizo* culture since time immemorial, seamlessly integrated into the social structure of the past. These activities went far beyond mere entertainment, serving crucial purposes related to rituals, warfare, and economic needs.[18] Unlike the view of sports primarily as leisure, games and sports in pre-colonial *Mizo* society played a particularly practical role. They served as training grounds for warriors, honing the strength and physical prowess essential for survival.[19]

Mizo society fostered a diverse range of traditional games. Some catered specifically to children, while others were enjoyed by men or women.[20] Information regarding these activities remains limited, but the *Mizos* know many served purely recreational purposes.[21] Notably, there were few games traditionally played by both genders, suggesting a focus on male participation.[22] The arrival of the British and Christian missionaries ushered in a period of social change.[23] New games and sports were introduced, often integrated into school curriculums as co-curricular activities. Unlike traditional practices, these new activities encouraged participation from both men and women, fostering a more inclusive approach to sports.[24]

Traditional *Mizo* society offered a distinct experience for young girls and boys. Without formal schooling, girls typically assisted their families with household chores suited to their age.[25]

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16 Lt. Col. J. Shakespear, The Lushei Kuki Clans, Macmillan and Co. Ltd, St. Martin's Street, London (1st edn.,1912) *available at*: https://www.academia.edu/36387178/Lushei_Kuki_Clans_by_Lt_Colonel_J_Shakespear_The_Library_of_University_of_California_Riverside_ (Last Visited June 3, 2025).

17 *Supra* note 10 at 37.

18 *Supra* note 16.

19 *Ibid.*

20 Nicky Lalrinsanga Lotlai, V. Ratnamala and Mangchungnunga Hangsing, "Representation of Women Athletes in Mizo Dailies" 12 (2) *Journal of North East India Studies* 27 (2022) *available at:* https://www.researchgate.net/publication/371491205_Gender_and_Sports_Representation_of_Women_Athletes_in_Mizo_Dailies (Last Visited June 3, 2025).

21 *Supra* note 17.

22 *Ibid.*

23 Malsawma, Sociology of the Mizos (Spectrum Publications, 2002).

24 A.G McCall, The Lushai Chrysalis (FIRMA KLM PRIVATE LTD. Calcutta, On behalf of Tribal Research Institute, Mizoram 1st edn.,1949) *available at:* https://archive.org/details/in.ernet.dli.2015.461697/page/n5/mode/2up?view=theater (Last Visited June 3, 2025).

25 *Ibid.*

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Boys, meanwhile, received training at the *Zawlbuk* (Bachelor's dormitory) and were generally exempt from such duties.[26] The *Zawlbuk* functioned as a comprehensive training institute for young *Mizo* boys.[27] Here, youths honed their skills in hunting, wrestling, and developed respect for their elders. The curriculum also instilled in them courage, artistic expression through dance, and the necessary abilities for warfare[28]. Evenings brought a time for shared enjoyment. After dinner, children would gather outdoors to play a variety of games. These playful evenings, often accompanied by folksongs or lullabies, were known as *Pawnto*.[29] These gatherings fostered a sense of community and provided a cherished outlet for children's energy and creativity.[30] Despite facing decline due to societal changes, several traditional *Mizo* sports, practiced for generations, offer a window into the cultural evolution and enduring values of the *Mizo* people.[31] These enduring sports have persevered despite external forces, and understanding them provides valuable insights.

Inbuan: A Mizo Tradition Enduring Through Time

Fig.1 Inbuan[32]

According to Mizo tradition, "*a inbuan*" or "to wrestle" referred to any activity where participants were equally matched. *Inbuan* stands as the most celebrated and enduring Mizo indigenous sport.[33] Unlike many others, it has captivated audiences for generations. Historical

[26] N.E. Perry, A Monograph on Lushai Customs and Ceremonies (FIRMA KLM PRIVATE LIMITED, Calcutta on Behalf of Tribal Research Institute, Aizawl, Mizoram, 1st edn.,1928), p.8.
[27] *Ibid.*
[28] *Supra* note 23 at 59-60.
[29] *Supra* note 17 at 171.
[30] *Ibid.*
[31] *Supra* note 8 at 182.
[32] Figure *available at:* https://lenkawl.khampat.com/2024/02/ (Last Visited May 3, 2025).
[33] *Supra* note 8.

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records[34] suggest *Inbuan* was a staple night-time activity for young men from 1871 to 1940. This tradition continues to this day, with *Inbuan* remaining the most popular sport among Mizo youth. No *Mizo* festival is complete without this vibrant activity.[35]

While the exact origin of *Inbuan*, which translates to "wrestle," remains shrouded in mystery, much like other traditional Mizo sports, oral traditions offer a glimpse into its possible beginnings.[36] These stories[37] suggest *Inbuan* may have emerged during the time the Mizos settled in the plains. Legend has it that during this period, Mizo ancestors lived in houses built directly on the ground. The Fanai clan, according to these stories, were the first to construct elevated houses. The narrative goes on to describe the Fanai chief's dissatisfaction with a particular pillar used in his house's foundation. Though the reason for his discontent is unknown, he decided to rebuild the entire foundation, requiring the house to be dismantled. However, during the demolition, one pillar proved exceptionally sturdy, refusing to budge. Legend tells of two mighty men who encountered a stubborn pillar during the dismantling of a house. The first man, renowned for his strength, strained against the pillar but could not dislodge it. Undeterred, the second man, equally powerful, stepped forward. With surprising ease, he managed to pull the pillar free. Triumphant, the second man declared his superiority. However, the first man countered, arguing that his initial efforts had loosened the pillar, making it easier for the second man to remove it completely. This disagreement, perhaps, sparked the competitive spirit that became the foundation of *Inbuan*. The spectacle of the two strong men grappling with the pillar sparked a debate among the villagers. To settle the question of who was truly stronger, they suggested the men try lifting each other, similar to their attempts with the pillar. In a display of strength and camaraderie, the men locked arms, each attempting to lift the other. However, neither gained the upper hand, proving their equal prowess. This display of strength, perhaps inspired by the pillar incident, is believed to have laid the foundation for the indigenous sport known as "*Inbanphawi*," literally translating to "lifting up the pillar of the foundation of the house." Over time, this term evolved into the word "*Inbuan*" Mizo know today. The legendary struggle between the two strong men, where they tightly grasped each other in an attempt to overpower the other, mirrored the effort of pulling a stubborn pillar

[34] *Supra* note 10 at 32.
[35] *Ibid.*
[36] *Supra* note 34.
[37] *Ibid* at 1-7.

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from the ground. This act of grappling became known as *Inbuan*, a sport that has since held a prominent place in Mizo society. The term "*inbanphawi*," the original name for the sport, also serves as a reminder of fair play. Unlike many cultures, Mizo history relies heavily on oral traditions passed down through generations. This rich tradition serves as the primary source of information about *Inbuan's* origins and development, since written records are scarce. Understanding this oral tradition is crucial. They reveal that *Inbuan* emerged from a strong sense of community, a cornerstone of Mizo culture. The skills and competitive spirit inherent in Mizo society likely played a role in the sport's development.

Face-to-Face: The Rules of Inbuan[38]

Inbuan is a two-player sport, unlike some games played individually or in teams. Even with multiple participants, matches are one-on-one. Winners from each pairing then face off against other victors in a single-elimination style tournament. Traditionally, *Inbuan* involved wrestlers tightly hugging each other in an attempt to lift their opponent. During a match, the shout "*inban phawiin aw*" serves as a warning to participants who might be using excessive force or gripping their opponent too tightly.This phrase emphasizes the importance of sportsmanship within *Inbuan.* However, with the development of cloth-weaving in Mizo society, a more comfortable practice emerged. Today, wrestlers wear a thick cloth belt tied around their waists to

The competitors lock arms in an unusual way. Each grabs the thick fabric tied around their opponent's waist with their left hand, reaching under their armpit. Their right hand reinforces their grip on the opponent's cloth, securing it near their navel for better leverage. After a synchronized three-part chant of "aw, aw, aw," they dig in their heels and unleash all their strength to begin the tug-of-war. To maintain balance and prevent their opponent from gaining an advantage, players wedge their right arm between their bodies. This creates a point of reference to gauge their opponent's position and resist being pulled off-center. Skilled players excel at maintaining this stable posture while applying constant pressure. This translates to a significant difference in effort compared to unskilled players, who may struggle to balance and exert force effectively. In *Inbuan*, raw strength is not everything. A skilled player can overcome a significant size, strength, or energy disadvantage. Even against a powerful opponent, a skilled *Inbuan* player, once able to manoeuvre and "cross-step" them, can gain a decisive advantage. This often involves lifting the opponent off-

[38] *Supra* note 34 at 8-11.

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balance, rendering their strength irrelevant. Ultimately, skill in *Inbuan* reigns supreme over brute force. The stronger wrestler, often the one who controls the fall, is declared the winner. Lifting the opponent is not necessary; simply controlling them on the ground secures victory. The goal is to take down your opponent without resorting to kicks, stepping out of the designated area, or bending your knees. Matches consist of three rounds, *Inbuan* is typically played in three rounds, each lasting 30-60 seconds, or until one player is lifted off the ground.

Fading Echoes: How the Decline of the Zawlbuk Impacted Inbuan Wrestling

Traditionally, young Mizo boys honed their skills in communal dormitories called Zawlbuk. Upon reaching puberty, they entered these dorms to learn essential life skills. *Inbuan* wrestling was a nightly staple at the *Zawlbuk*. Not just young boys, but even married men participated in evening matches. Hospitality played a big role too. Visitors staying overnight at the *Zawlbuk* were expected to partake in an *Inbuan* match. Even young children were encouraged to learn the sport, both within the *Zawlbuk* and amongst themselves. A quick game with friends was a regular part of their day, fostering both camaraderie and a connection to tradition, before they shouldered the responsibility of collecting firewood. With the end of the *Zawlbuk* tradition, regular *Inbuan* practice dwindled. *Inbuan* consequently became a traditional sport played by young people in the funeral grounds during gatherings to bury the deceased.

The Evolving Face of Inbuan Wrestling in Mizoram

As Mizoram became a state, *Inbuan* became primarily a festival sport or played locally for special occasions. However, state championships organized by the government have helped revive its popularity. As Mizo culture evolved, so did *Inbuan*. Formal rules[39] were developed, likely alongside a rise in competitive tactics aimed at exploiting loopholes. The traditional chant "aw, aw, aw" has been replaced by a single whistle blow, prompting players to immediately crouch low, almost scraping the ground, while firmly gripping their opponent's waist. The low crouch is a critical moment. Wrestlers waste no time, immediately pulling each other backward in a sudden tug-of-war. They hit the ground together, each aiming to leverage their position to pin their opponent. However, a skilled opponent is difficult to overpower from a prone position. There is a growing concern that the spirit of *Inbuan* has changed. While *Inbuan* wrestling traditionally

[39] Mizoram Wrestling Association: Mizo Infiamna Dan Bu (2008).

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emphasized skilful manoeuvring and footwork, a recent shift towards aggressive tactics threatens to overshadow the sport's finesse and strategy. This focus on brute force, some fear, diminishes the very aspects that made *Inbuan* a revered cultural treasure.Fortunately, the importance of safeguarding cultural heritage through traditional games and sports is recognized by the United Nations Educational, Scientific and Cultural Organization (UNESCO). This presents a valuable opportunity for *Inbuan's* revival.

From Zawlbuk to Today: The Enduring Legacy of Insuknawr

Fig 2.Insuknawr[40]

Insuknawr, a traditional *Mizo* sport, dates back to the 1940s and 1950s.[41] It thrived in *Zawlbuk*, a communal living dormitory for young *Mizo* men. In those days, *Insuknawr* was a popular pastime. *Insuknawr*, though less common today due to the decline of *Zawlbuk*, remains a way for young *Mizo* men to connect. It is a two-person contest that tests strength, and even today, it played wherever young *Mizo* men gather.[42] Traditionally, *Insuknawr*was not just a game, but a social event during harvest season. As young people (both boys and girls) set out to collect crops, girls would gather and tie husks. Meanwhile, boys waiting for them would use *Insuknawr* for friendly competition. It might have even served as a way to determine who would be the most

[40] Figure *available at:* https://mizohss.edu.in/insuknawr. (Last Visited May 3, 2025).

[41] *Supra* note 15 at p.19.

[42] Lalthangliana, Culture and Folkore of Mizoram (Publications Division, Ministry of Information and Broadcasting, 2005)p.238. *available at:* https://archive.org/stream/culturefolkloreo00lalt/culturefolkloreo00lalt_djvu.txt (Last Visited May 3, 2025).

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desirable match for the girls. This community sport fostered strong bonds, even among those who were not previously close.[43]

In *Insuknawr*, competitors wield a large pestle, traditionally used for grinding grains, tucked under their right arms.Their left hand often acts as a stabilizer, finding a nearby object for support. The goal is not to push the opponent completely out of the playing area, but rather to disrupt their stance. There is no specific distance requirement; any shift caused by the pestle's pressure signifies a successful move. Safety is paramount, with the pestle remaining securely under the right arm throughout the contest. While brute strength plays a role, skillful technique is the real key to winning *Insuknawr*.[44] A skilled competitor can easily outmaneuver a stronger opponent, strategically shifting their stance by just two or three steps due to the well-placed pressure of the pestle. Traditionally, a large pestle was used, but these days, thick bamboo can also be used as a substitute.[45] This heritage sport, passed down through generations, is a prime example of clean competition and deserves to be revived and promoted among today's youth.

***SaihruiPawh*: A Tug-of-War Rooted in Mizo Tradition**

Fig 3.Saihruipawh[46]

[43] *Supra* note 10 at 18.
[44] *Ibid.*
[45] See figure 2 at 40.
[46] Children in the village in Mizoram playing Saihruipawh, *available at:* https://www.instagram.com/mizoram_tourism/p/CSdmjhLMZBh/ (Last Visited May 4, 2025).

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Saihruipawh is deeply ingrained in Mizo heritage, a sport enjoyed by ancestors even before encountering similar games outside Mizoram.[47] It is important to acknowledge, however, that while many sports claim ancestral roots, the frequency of play often diminishes with changing times. *Saihruipawh* is no exception. Traditionally, this tug-of-war was not confined to designated fields. Villagers played in groups outside the *Zawlbuk* (Bachelor's dormtory) using the strongest tree roots they could find in the abundant forests.[48] These were not competitive matches, but rather a pastime enjoyed by those gathered at the *Zawlbuk*. It is possible that the practice honed their skills in manoeuvring ropes, potentially useful for hunting bison.[49]

Chawilung: A Stone Legacy of Mizo Strength

Lung Inchawisiak, a *Mizo* strongman competition, thrived during the *Zawlbuk* era and was known across *Lusei*tribes. This traditional sport, essentially *Mizo* weightlifting, involved lifting a heavy boulder called a "*chawilung*" (literally translated as "lifted rock").[50] Weighing around 50 kilograms, the *chawilung* was a common fixture outside *Zawlbuks*, often placed in busy areas for challengers, even those from neighboring villages passing through. The enduring presence of *chawilung* stones in many villages today stands as a testament to the sport's past popularity.Lifting the hefty *chawilung* was not for everyone. Only those with proven technique could attempt it. Successfully lifting the boulder above your waist was a mark of true strength, and the smoothest, most effortless lift determined the winner. Modern times have brought changes to *Lung Inchawisiak*.[51] The sport has embraced international weightlifting regulations, marking a significant departure from its traditional form. This shift reflects the evolving *Mizo* society.

Arpa Sual: A traditional Mizo game mimicking rooster fights

47 *Supra* note 10 at 20-23.
48 *Ibid.*
49 *Supra* note 47.
50 *Supra* note 7 at p.75.
51 *Supra* note 10 at 41.

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Fig 4.Arpa Sual[52]

Arpa Sual, a traditional *Mizo* game mimicking rooster fights, has existed for generations, though its exact origin remains unclear. Inspired by scuffles among their domesticated fowl, *Mizo* ancestors created this entertaining sport for boys and young men.[53]*Arpa Sual* demands strength, focus, and stamina. Players hop on one leg, aiming to strike their opponent's body with force. The key is to maintain a single-leg stance while gripping the opposite foot's upper part. The letting go of this grip results in disqualification. This physically demanding game provided amusement and a workout for young *Mizo* boys. *Arpa Sual*, a *Mizo* game mimicking rooster fights, is experiencing resurgence. Traditionally a rural pastime, it is finding its way back into festivals like *Chapchar Kut*, particularly among young boys.[54]

The Mizo tradition of Kalchhet

[52] Figure 53 Arpa Sual *available at:* https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.vanglaini.org%2Fthalai%2F2864&psig=AOvVaw3-BVniGTb. (Last Visited May 4, 2025).

[53] *Supra* note 10 at 36.

[54] *Supra* note 8 at 174.

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Fig.5 Kalchhet[55]

Kalchhet, a vibrant *Mizo* sport, translates to "walking/running with bamboo." This energetic team competition is a popular pastime among many Mongoloid communities, bringing people together for friendly competition and shared experiences. While the exact origins of *Kalchhet* remain shrouded in time, its deep integration into *Mizo* culture suggests it has been around for generations.[56] The widespread popularity of *Kalchhet* among Mongoloid communities across Asia hints at a shared ancestral origin.[57] Some theories suggest it might have originated as a practical skill for traversing difficult terrain or dense forests. Over time, it may have evolved into a social and competitive activity.[58]

Kalchhet is typically played as a relay race. Teams of two to four participants compete, using long bamboo poles to propel themselves forward. Each team member races a designated distance and then passes the bamboo pole to the next teammate in a baton-like fashion. The first team to complete the course with all team members finishing their leg wins the race.[59] Variations of *Kalchhet* might exist in different regions. Some versions might involve individual races instead of teams. The length of the bamboo poles and the distance covered in each leg could also vary.[60]

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55 Figure 55 Kalchhet, *available at*: https://www.instagram.com/mizoram_tourism/p/CSdmjhLMZBh/ (Last Visited May 4, 2025).
56 *Supra* note 10 at 106-109.
57 *Ibid.*
58 *Supra* note 23 at pg.106.
59 *Supra* note 56 at 108.
60 *Ibid.*

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Although potentially facing competition from modern sports, *Kalchhet* remains a cherished tradition in *Mizo* communities.[61] It continues to be played in villages and during cultural festivals, providing a fun and energetic way to connect with friends, family, and community. The shared experience and friendly competition foster a sense of belonging and cultural pride.[62]

III. Legal Protection Of Mizo Traditional Sports

Mizo traditional sports are an integral part of the rich cultural heritage of Mizoram. They embody the physical prowess, agility, and strategic thinking of the *Mizo* people.[63] However, like many intangible cultural assets, these sports face the risk of erosion due to various factors such as globalization, urbanization, and the increasing popularity of modern sports. To preserve these invaluable traditions for future generations, legal protection becomes imperative.[64]

Traditional sports and games are unique to specific places and reflect the culture of those areas. They are often enjoyed by groups and follow established rules. These games are popular and beneficial for health. Protecting and promoting traditional sports and games helps different cultures and communities understand each other better. They offer insights into current cultural, social, and sporting trends and can help us predict future changes. Traditional sports and games give people, communities, and governments a chance to show off their culture and be proud of it.[65]

The world is full of different kinds of physical activities and sports, and this variety is what makes them interesting. Traditional games, dances, and sports, both old and new, represent the amazing cultural heritage of the world and should be valued and supported.[66]

Traditional Sports as Traditional Cultural Expressions (TCEs)

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61 *Supra* note 8 at 171.

62 *Ibid.*

63 Akoijam Rima Devi, Samiran Chakraborty "Heritage to harmony: the social impact and health benefits of traditional sports" 11(1) *International Journal of Applied Research* 212-216 (2024) *available at*: https://doi.org/10.22271/allresearch.2025.v11.i1c.12285 (Last Visited June 3, 2023).

64 Nita Bandyopadhyay & Tuhin Das (2025) "Indian Traditional Games: An Intangible Cultural Heritage to Promote Good Life among Children" 8(3) *J Adv Sport Phys Edu* 36-40 *available at:* https://doi.org/10.36348/jaspe.2025.v08i03.002 (June 3, 2023).

65 *Supra* note 63.

66 International Charter of Physical Education, Physical Activity and Sport, Art.1.5. *available at:* https://unesdoc.unesco.org/ark:/48223/pf0000235409 (Last Visited May 4, 2023).

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Traditional Cultural Expressions (TCEs)[67] also often called "expressions of folklore" encompass a wide array of artistic and cultural forms deeply rooted in the heritage and identity of communities. These expressions are passed down through generations and are integral to the social and cultural fabric of indigenous and local populations worldwide. Traditional sports is deeply rooted in the cultural fabric of a community.[68] TCEs serve as potential markers of identity, distinguishing one community from another. They embody the unique history, values, beliefs and worldview of a group providing a sense of belonging and continuity across generations. Beyond aesthetics TCEs often encode traditional knowledge accumulated over centuries.[69] This can include ecological understanding reflected in songs about nature, medicinal practices embedded in rituals or agricultural techniques demonstrated through festive dances.[70]

Learning and participating in traditional sports often involves direct interaction between older and younger generations. This facilitates the transmission of cultural knowledge, language and social skills alongside the physical aspects of the game. They often involve unique movements, skills and physical conditioning that are specific to their cultural context. They showcase diverse forms of human athleticism and ingenuity, contributing to the richness of global sporting heritage. Some traditional sports are intertwined with spiritual beliefs and rituals. They may be performed during ceremonies, festivals, or other important cultural events holding deep symbolic meaning and reinforcing the community's connection to its traditions and beliefs.[71]

Well- preserved and promoted traditional sports can attract cultural tourism, providing economic opportunities for local communities and further incentivizing their preservation. In essence,

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[67] The indigenous communities across the world have sought for the protection of their folklore or expressions of folklore which is being taken up by the World Intellectual Property Forum (WIPO). The WIPO Intergovernmental Committee or IGC on Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources has tabled several documents till date to safeguard, preserve and protect TK, TCE and GR. The WIPO- UNESCO Model Provisions For National Laws on the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions was the first document whose aim was to strike a balance between protection of folklore and dissemination of it. There is no uniform protection yet to these expressions of folklore or TCEs. It is still an ongoing effort with WIPO taking the lead.

[68] Traditional sports and games, *available at*: https://www.unesco.org/en/sport-and-anti-doping/traditional-sports-and-games#:~:text=Traditional%20Sports%20and%20Games%20%7C%20UNESCO (Last Visited June 3, 2025).

[69] *Ibid.*

[70] Soraia Chung Saura, Ana Cristina Zimmermann, "Traditional Sports and Games: Intercultural dialog, Sustainibility and Empowerment" Front Psychol. (2021), *available at*: https://pmc.ncbi.nlm.nih.gov/articles/PMC7873946/ (Last Visited June 3, 2025).

[71] *Ibid.*

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traditional sports are far more than just games; they are dynamic expressions of cultural identity, history and social fabric. Their preservation and promotion are crucial for safeguarding cultural heritage and ensuring its transmission to future generations. UNESCO recognizes Traditional Sports and Games (TSG) as intangible cultural heritage, highlighting their significance in fostering intercultural dialogue, social cohesion and sustainable development.[72]

Legal Protection of Traditional Sports as Traditional Cultural Expressions

Legal protection for traditional cultural expressions (TCEs), also known as expressions of folklore is a complex and evolving area of law. There is no single, universally accepted international legal framework dedicated solely to their protection. However, various legal mechanisms and ongoing international discussions aim to address the misappropriation and unauthorised exploitation of these valuable cultural assets.[73]

Existing legal mechanism to afford protection to traditional sports is in the form of Intellectual Property Rights (IPRs) such as copyright, geographical indications, trademarks and collective marks, related rights (performers' rights). However, as traditional copyright law focuses on originality and individual authorship, it often falls short in protecting collectively created or community owned evolving TCEs. Under the copyright law, it may be possible to protect certain aspects of TCEs like contemporary adaptations or fixed artistic expressions derived from tradition.Geographical Indications (GIs) protect the link between a product and its geographical origin, which may be relevant for traditional handicrafts or products with a strong cultural association. Communities can also use trademarks and collective marks to distinguish their authentic traditional goods or services. The Beijing Treaty on Audiovisual Performances (2012) grants performers of folklore certain rights.

Several countries have developed or are considering specific laws also known as *sui generis* legislations, tailored to the unique characteristics of TCEs, often drawing inspiration form the WIPO-UNESCO Model Provisions on the Protection of Expressions of Folklore.[74] These laws often focus on community rights, the prevention of offensive or derogatory uses, and the fair

[72] *Supra* note 68.
[73] *Supra* note 67.
[74] *Ibid*.

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benefit-sharing arising from commercialisation. In many indigenous and local communities, customary laws and protocols govern the use and transmission of TCEs. Recognising and respecting these traditional systems is crucial for effective protection. Some countries protect TCEs under broader cultural heritage legislation, focusing on their preservation and safeguarding. Certain unfair competition laws can sometimes be invked to prevent misleading or infair commercial exploitation of TCEs such as false claims of authenticity.[75]

At the international fora, the World Intellectual Property Organisation (WIPO) has been actively engaged in discussions through its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC has finalised a treaty related to Genetic Resources in 2025, but TK, TCEs or Folkore continue to be discussed as there is no possibility yet of finalisng a treaty on protecting traditional knowledge or folklore.

Challenges in Legal Protection to Traditional Sports as TCEs

There are many challenges in protecting traditional sports. The diverse and evolving nature of TCEs makes it challenging to create a universally accepted legal definition. TCEs are not frozen in time. They are living, dynamic expressions that evolve within communities through ongoing practice, adaptation and transmission. Unlike most intellectual property, which emphasizes individual authorship, TCEs are often the result of generations of collective creativity. Identifying a specific author or owner in the traditional sense is usually impossible.

TCEs manifest in an incredibly wide range of tangible and intangible forms. These include verbal expressions such as stories, epics, myths, legends, proverbs, songs, chants, rhymes, oral histories.[76] Musical expressions are in the form of songs, instrumental music, rhythms, musical intsruments.[77] TCEs cover performances like dance, theatrical performances, rituals, ceremonies, games and

[75] Siddharth Mahajan, "Ownership of the game: IP in sports business" India Business Law Journal (2025), *available at:* https://law.asia/intellectual-property-sports/#:~:text=IPRs%20play%20a%20crucial%20role,delivering%20maximum%20benefit%20through%20monetisation. (Last Visited June 3, 2025).

[76] Brigitte Vezina, Traditional Cultural Expresions: Laying Blocks for an International Agreement, CIGI Papers No.169-2018, *available at:* https://www.cigionline.org/static/documents/documents/Paper%20no.169_1.pdf. (Last Visited May 5, 2025).

[77] Benjamin A Botkin (1938), *available at*: https://folkmyth.fas.harvard.edu/secondary-field (Last Visited May 5, 2025).

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sports.[78] Tangible expressions recognized as TCEs are artworks, crafts, textiles, architectural forms, tools, medicines, culinarytraditions.[79]

TCEs are deeply intertwined with cultural identity, spirituality, and social practices. They are not merely aesthetic objects or performances but carry profound cultural and spiritual significance. Legal definitions that focus solely on their artistic or commercial aspects may fail to recognize and respect this deeper significance. Since TCEs embody traditional knowledge, such as knowledge about medicinal plants, ecological practices, or craftsmanship techniques. Drawing a clear line between the expression and the underlying knowledge can be challenging for legal purposes.[80]

Another legal challenge lies in variations in TCEs which exist within a single community across different sub-groups, families or regions. Defining which specific variations should be protected and who within the community has the authority to decide can be complex.[81] TCEs are shared and adapted by others which may lead to legal difficulties in distinguishing between authentic expressions originating within the communityand later interpretations or commercialisations. TCEs are often considered "living heritage" constantly being recreated and reinterpreted. Legal frameworks designed for fixed works may struggle to accommodate this dynamic feature.[82]

Potential Frameworks in Protecting Traditional Sports

Crafting an effective legal and practical framework for protecting traditional sports as traditional cultural expressions requires a multi-faceted approach that goes beyond conventional intellectual property law.[83] The primary step involves empowering communities to document their traditional sports. This includes detailed descriptions of rules, playing areas, equipment, historical context,

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78 Traditional Cultural Expressions, *available at:* https://www.wipo.int/en/web/traditional-knowledge/traditional-cultural-expressions/index (Last Visited May 5, 2025).

79 Traditional craftsmanship article by UNESCO Intangible Cultural Heritage International Day of the Intangible Cultural Heritage 20th Anniversary of the Convention, *available at*: https://ich.unesco.org/en/traditional-craftsmanship-00057 (Last Visited May 5, 2025).

80 *Supra* note 23.

81 Traditional cultural expressions and fashion, *available at:* https://www.wipo.int/en/web/traditional-knowledge/fashion (Last Visited May 6, 2025).

82 Harvard Art Law Organisation Preseravtion or Protection the Intellectual Property Debate Surrounding Traditional Cultural Expressions *available at:* https://orgs.law.harvard.edu/halo/2025/03/13/preservation-or-protection-the-intellectual-property-debate-surrounding-traditional-cultural-expressions/ (Last Visited May 6, 2025).

83 Shivam Singh, Sports Law in India (1st edn, Thomson Reuters South Asia Pvt Ltd, April, 2025).

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cultural significance, associated rituals and variations within the community. Oral histories, video recordings and ethnographic studies would be crucial.[84]

Instead of a rigid legal definition, a flexible, descriptive approach that acknowledges the diverse forms and evolving nature of traditional sports may be adopted. The definition should emphasise their connection to cultural heritage, traditional knowledge and community identity.[85] The nature of the traditional sports may comprise of elements such origin in a specific community or region over a specific period of time; transmission through generations, often orally or through practice; holding cultural, social or spiritual significance for the community; potentially invoving unique skills, materials or playing environments tied to the local context.[86]

There is a need for the establishment of a national (and potentially regional or international) inventory or registry of documented traditionalsports. This would serve as a record of their existence and cultural significance, although registration would not necessarily confer ownership in the traditional IP sense. Communities would have the right to register their sports.[87]

The communities from which the traditional sports originate must be recognised as the collective owners and custodians. They may be empowered to define protocols for their practice, transmission and any potential commercial or representational uses. The communities right to govern the use of their traditional sports according to their customary laws and practices must be respected. Legal frameworks should aim to support and complement these existing systems.[88]

A free and Prior Informed Consent (PIC) of the concerened community must be followed for any external use, adaptation, or commercialisation. This includes clearly outlining the intended use,

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84 Yung-Cheng Hsieh, Tzu- Han Chen "Digital Archive Use in Physical Education and Sports Culture" 16 Society for Imaging Science and Technology" available at DOI : **10.2352/issn.2168-3204.2019.1.0.28** (Last Visited June 3, 2025).

85 Jike Gao, Constructing digital path for intangitable cultural heritage of ethnic minority traditional sports: Take Tibetan traditional sports as an example Journal of Sociology and Ethnology (2023) **DOI: 10.23977/jsoce.2023.050905** *available at:* http://166.62.7.99/assets/default/article/2023/09/22/article_1695396882.pdf (Last Visited June 3, 2025).

86 *Ibid*.

87 Thomas Margoni, "The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection" 46 *IIC- International Review of Intellectual Property and Competition Law* 386-417 (2016).

88 *Supra* note 82.

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potential benefits, and how the community's cultural integrity will be respected.[89] A mechanism for fair and equitable sharing of any benefit arising from the commercialisation or broader use of traditional sports, ensuring the originating communities are the primary beneficiaries must be established. This could be in the form of royalties, licensing fees, or investments in community development.

Legal and policy measures include enacting a specific legislation tailored to the unique characteristics of traditional cultural expressions, including traditional sports. This legislation should recognise community rights and custodianship; establish PIC requirements for external use: outline benefit-sharing mechanisms; prohibit disrespectful or derogatory uses; provides avenues for redress in case of misappropriation. The protection of traditional sports can be incorporated within broader national cultural heritage laws recognising their intangible cultural significance.[90]

The promotion and awareness of traditional sports can be achieved through inclusion in educational curricula and public awareness campaigns. This can help in the safeguarding of traditional sports through increased understanding and participation. The transmission of traditional sports to younger generations can be accomplished through workshops, festivals and community events so it is important to provide resources and support to communities to fund these activities.[91]

Due to the nature of traditional sports unauthorised commercialisation, misrepresentation or disrespectful use may take place both offline and online. Therefore legal sanctions and mechanisms for redressal of such issues may be implemented. It is important to foster international collaboration and information sharing on best practices for the protection of traditional sports advocating for their recognition within international cultural heritage frameworks.[92]

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89 *Supra* note 84.

90 *Supra* note 85.

91 Zenghong Li, Lei Zhang, Lin Li "National Traditional Sports Culture Elites and the Inheritance and Protection of National Traditional Sports Culture" Proceedings of the 2016 7th International Conference on Education, Management, Computer and Medicine (EMCM 2016) *available at*: https://www.atlantis-press.com/proceedings/emcm-16/25870524 (Last Visited June 3, 2025).

92 *Supra* note 84.

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As far as the practical implementation of protecting traditional sports is concerned, it is important to develop a framework in which there is full participation of the concerned communities.[93] The communities must be trained and provided with resources to document, manage and protect their traditional sports. It is equally important to establish mechanisms for monitoring the use of traditional sports and for enforcing community rights and legal protections.[94] We need to recognise that the framework may need to evolve over time to address new challenges and opportunites. Therefore regular review and adaptation in consultation with communities are essential.[95]

By adopting a holistic framework that combines community empowerment, tailored legal measures, educational initiatives, and international cooperation, it is possible to create a robust system for protecting traditional sports as vital expressions of cultural heritage. The focus should be on recognizing community rights, ensuring their self-determination, and promoting the respectful and sustainable safeguarding of these invaluable cultural assets.[96]

IV. Conclusion

Many *Mizo* sports honed skills are crucial for survival. Games like *Insuknawr*, which involved throwing a spear-like object, developed hunting prowess. Others like wrestling or log pulling enhanced strength and stamina, essential qualities for warriors and farmers alike. *Mizo* indigenous sports were social events. Often played in village common areas, they fostered interaction, camaraderie, and a sense of belonging. These games provided a platform for young people to showcase their talents and gain respect from elders. *Mizo* indigenous sports offer a captivating glimpse into the cultural heritage and values of the *Mizo* people. These games, some practiced for generations and others undergoing revival efforts, stand as testaments to *Mizo* ingenuity and adaptability. They transcended mere entertainment, serving as training grounds for warriors, fostering social cohesion, and promoting physical prowess. However, the decline of the *Zawlbuk*

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93 Han Bin, Liu Lanjuan "The Important Role of Traditional Sports Culture in Promoting the Development of Sports Population" 2019 5th International Conference on Education, Technology, Management and Humanities Science *available at:* https://www.webofproceedings.org/proceedings_series/ESSP/ETMHS%202019/ETMHS19099.pdf (Last Visited June 3, 2025).

94 *Ibid.*

95 *Supra* note 91.

96 *Supra* note 93.

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tradition and the growing influence of the modern world threaten the future of these unique sports.

While *Inbuan* remains popular, concerns arise over a growing emphasis on brute force over the traditional focus on skill and strategy. Other games like *Insuknawr* and *Saihruipawh* face diminishing play, and *Chawilung* continues to evolve, potentially losing its traditional essence. Despite these challenges, there are glimmers of hope. The *Mizo* government's efforts to revive traditional sports, the resurgence of *Arpa Sual* in festivals, and the continued popularity of *Kalchhet* showcase the enduring spirit of *Mizo* traditions. The recognition of *Inbuan* by the Indian government further highlights the importance of preserving these games. Moving forward continued efforts are crucial. Organizations like the Mizoram Indigenous Games Association (MIGA) are working to raise awareness and organize competitions, ensuring these cultural treasures are not lost. Educational programs can raise awareness about the significance of traditional sports. Integrating these sports into school curriculums or cultural events can expose younger generations to their rich heritage. Additionally, documentation of these games, both through written records and audio-visual formats, is critical for future generations. By prioritizing preservation and fostering a sense of cultural pride, the legacy of *Mizo* indigenous sports can be secured. The sports can continue to serve as a bridge between generations, connecting the *Mizo* people to their vibrant past and ensuring their cultural identity thrives in the years to come.

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E-SPORTS: A PLATFORM FOR GENDER EQUALITY IN SPORTS – A SOCIO-LEGAL ANALYSIS

Dr. Vasudha Bali[*]

ABSTRACT

Recently, India passed the first legislation to regulate online gaming and promote e-sports. The Promotion and Regulation of Online Gaming Act, 2025, aims at promoting online gaming, including e-sports. With the rapid advancement of technology and the impact of pandemics, "Electronic Sports" (hereinafter "e-sports") have emerged as a significant component of the gaming and sports industry. E-sports was a full-out medal event in the Asian Games 2022, conducted in Hangzhou, China. "E-Sports presuppose playing video games in a competitive setting, emphasizing increased 'institutionalization' of gaming activity through the organization of e-sports teams and official international competitions." It is a complex convergence of culture, technology, business, and sports. In India, e-sports is a fast-developing industry. It witnessed a whopping investment of $544 million from August 2020 to January 2021. India also has the E-Sports Federation. The Ministry of Sports & NITI Aayog has also taken some steps toward its regulation. The judiciary and legislature have clearly stated that such gaming activities do not fall within gambling and are a "game of skill," which is legal. As a virtual platform, e-sports transcends the biological distinctions emphasized in traditional sports. They offer women e-athletes a space that ensures privacy and autonomy. Yet, similar to conventional competitive sports, e-sports remain predominantly male-dominated. Due to the non-regularization of e-sports, females and non-binary players face overt barriers like gender violence, sexual harassment, pornography, etc., as well as subtle barriers like negative comments and men shaming when losing to a girl, etc., in e-sports. The Promotion and Regulation of Online Gaming Act, 2025, though an appreciable step towards streamlining the sector, overlooks critical challenges such as online harassment and specific concerns of women players. The paper examines the concept of e-sports and its socio-legal implications, with particular emphasis on women's participation in e-sports.

I. Introduction

Recently, India passed the first legislation to regulate online gaming and promote e-sports. The Promotion and Regulation of Online Gaming Act, 2025, aims at promoting online gaming, including e-sports. With the rapid advancement of technology and the impact of pandemics, "Electronic Sports" (hereinafter "e-sports") have emerged as a significant component of the gaming and sports industry. E-Sports are the modern, grander, and more technical version of video games that have been played in households since the '80s.

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According to the E-Sports Federation of India, "Esports (Electronic sports) is a competitive sport where gamers use their physical and mental abilities to compete in certain genres of video games in a virtual, electronic environment."[1] These games are played for titles and rewards in the form of prizes and trophies. Players of these games are formally referred to as "E-Athletes".[2] Games like fantasy sports, Poker, rummy, and teen patti, etc., are not included in e-sports. E-sports have become an important part of the economy. Most countries, including India, are taking steps to provide a boost to E-Sports and other online gaming as well. It is also gradually becoming part of traditional sports events, although a debate about whether it is a "sport" or not is still ongoing.

Though largely male-dominated, e-sports has witnessed a significant increase in female participation, with many achieving global recognition. The ability to play from home offers privacy, accessibility, and anonymity, creating opportunities for women who face social barriers in traditional sports. Unlike physical sports, where biological differences in speed and strength necessitate segregation, e-sports have the potential to serve as a genuine model of gender-integrated competition. However, realizing this potential requires addressing both overt barriers such as sexual harassment and exposure to pornography, as well as subtle challenges like gender -based ridicule, for instance, men shaming opponents when defeated by women.

The article aims to analyze the impact of women's participation in e-sports. To achieve this, it examines broad issues such as the concept of e-sports and their socio-legal implications, with a particular focus on women in the field. The paper is divided into five parts. Apart from the Introduction in Part I and the Conclusion in Part V, Part II explores the meaning of e-sports, its difference from traditional sports, and its influence on the global economy. Part III, titled "E-Sports in India," discusses their contribution to the Indian economy and elaborates on the existing legal framework. Part IV "Women in E-Sports" highlights female participation, the opportunities and challenges they face, and examines the legal framework against sexual harassment in sports, which is a major barrier to women's growth in e-sports.

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[1] What is E-sports, available at: file:///E:/E%20sports/India%20&%20E-sports/Introduction%20ESFI%20_%20Esports%20Federation%20of%20India.html (Last visited on 1st Feb., 2025).

[2] *Ibid.*

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I. E-Sports

Meaning

Electronic sports, popularly known as e-Sports, are professional competitive video games played by skilled gamers.[3] "It is formally defined as an area of sports activities in which people develop and train mental or physical abilities in the use of information and communication technologies."[4] It can be a multiplayer game played as a team, called "team-oriented multiplayer online battle arenas (MOBAs)"[5] or individual single-player games, as in "single-player first-person shooters, to survival battle royales[6], and like other sports, it is played live with an audience and bystanders.[7] It is defined as "the competitive play of video games in public settings (e.g., in online settings or streaming gameplay for spectators)."[8] It is also defined as, " a form of sports where the primary aspects of the sport are facilitated by electronic systems; the input of players and teams as well as the output of the eSports system are mediated by human-computer interfaces."[9] It is said to include several elements of traditional professional sports like "…fans, playoffs, uniforms, training, comebacks, upsets… exists both at the amateur and professional level."[10] Like other games, it has some important broadcasting channels such as ESPN, Turner Broadcasting System, YouTube, Twitch, etc.

The first e-sport event was organized at Stanford University in 1971, where "The Spacewar" game was played between various students for the prize of a one-year subscription to the highly sought-after "Rolling Stone Magazine".[11] Its perspective as a competitive sports event was seen in 1980, when the "Space Invaders" Championship was organized, where some 10,000

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3 Difference Between Esports and Gaming, available at:file:///E:/E%20sports/Difference%20Between%20Esports%20and%20Gaming%20_%20Difference%20Between.html (Last visited on 19th Jan., 2025)

4 Marko Marelić & Dino Vukušić, E-Sports: Definition and social implications 11(2) *EQOL Journal* 50 (2019)

5 Aayush Sharma, Are E-Sports sports? An Empirical Analysis vis-à-vis Developments so far 2(1) *Global Sports Policy Review* 110 (2021).

6 *Ibid.*

7 *Supra* note 3.

8 Omar Ruvalcaba, Jeffrey Shulze, Angela Kim, Sara R. Berzenski, and Mark P. Otten, Women's Experiences in eSports: Gendered Differences in Peer and Spectator Feedback During Competitive Video Game Play 00(0) *Journal of Sport and Social Issues* 2 (2018).

9 *Supra* note 5.

10 *Supra* note 8.

11 *Supra* note 5 at 111.

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players participated.[12] One of the key reasons for the rise of e-sports is the broadening of broadcasting platforms. Now, the internet is one of the leading broadcasting media.[13]

E-Sports v. Other Online Games

To understand e-sports better, it is important to recognise that while e-sports involve playing online video games, not all online games qualify as e-sports. Unlike e-sports, most online games do not feature human-to-human competition. In many games, a single player focuses on completing personal tasks or advancing through levels, and in some, competes against bots or artificial intelligence. These games typically lack elements central to e-sports, such as live competition, team play, broadcasting, trophies, or an audience.

E-sports also differ from 'fantasy sports'. Fantasy sports involve the selection or compilation of real-life sportspersons by the "Manager," i.e., Player.[14] It is a virtual team of real-life sportspersons, where points are gained based on the real performance of the selected players.[15] Therefore, a player's winning or losing depends on external factors. There are "Fantasy E-Sports" as well, where e-athletes/avatars of real-life players are selected to create a virtual team.[16]

E-Sports v. Traditional Sports

There is an ongoing debate in the world of sports about whether "e-sports" is a sport. Most believe that e-sports have most elements of sports, besides some differences in physical activity. E-Sports, like traditional sports, are competitions between humans, have rules and regulations, viewers/audience, sponsors, prizes, and broadcasting. Most sports jargon, like a match, team, player, skill, practice, offence, defense, tactic, etc., is used in e-sports as well. To analyze further, we need to define 'sport', and like 'e-sport', it has no one definition.

According to the common Oxford Dictionary definition, sport is an activity that you do for pleasure and that needs physical effort or skill, usually done in a special area and according to

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12 *Ibid.*

13 *Supra* note 4.

14 Fantasy Sports vs Esports- All You Need to Know, available at: file:///E:/E%20sports/Fantasy%20Sports%20vs%20Esports%20-%20What%20are%20the%20Differences_.html (Last visited on 12th Jan., 2025).

15 What is Fantasy Sports?, available at: https://fanarena.com/fantasy-sports/ (Last visited on 13th Jan., 2025).

16 *Supra* note 14.

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fixed rules."[17] In some studies, the physical activity of e-athletes was determined based on "metabolic equivalent" and "cortisol levels", and it was found that levels were the same in traditional and e-sports players.[18] Based on this, it was concluded that though e-sports may not have the same kind of physical activity as required in traditional sports, it is not "sedentary" as often described.[19] Although health & mental benefits associated with sports are missing in e-sports, gaming companies are taking initiatives to improve the well-being of their e-athletes.[20]

Types of E-Sports

Most esports are categorized as MOBA, FPS, and RTS. "Multiplayer Online Battle Arena" (MOBA) like DOTA 2, League of Legends, etc., which have the highest prize money and audience.[21] "The game is played in teams of 5 players each, havingtheir roles and purpose is to defeat opponents' protected structure and at the same time defend their own".[22] "First Person Shooter" (FPS) like Counter-Strike: Global Offensive is a military-style combat game played in teams consisting of 5 members.[23] "Real Time Strategy" (RTS) like Starcraft 2 is played mostly as one-on-one. "In this genre, each player has parallel control of multiple units (covering offensive units, production units, scouting units, etc.) and through tactics and skill defeats the opponent's forces."[24]

E-Sports' impact on the world economy

E-Sports is one of the largest economically valued industries. "In 2022, the global e-sports market was valued at just over 1.38 billion U.S. dollars. Additionally, the e-sports industry's global market revenue was forecast to grow to as much as 1.87 billion U.S. dollars in 2025. Asia and North America currently represent the largest e-Sports markets in terms of revenue, with China alone accounting for almost one-fifth of the market."[25] China alone generated approximately

[17] Definition of Sport, Oxford Learner's Dictionary, available at: https://www.oxfordlearnersdictionaries.com/definition/english/sport_1(Last visited on 6th Feb., 2025).
[18] *Supra* note 4 at 51.
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid*
[25] eSports market revenue worldwide from 2020 to 2025, available at: https://www.statista.com/statistics/490522/global-esports-market-revenue/ (Last visited on 12th Jan., 2025).

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"360.1 million U.S. dollars within the industry".[26] In terms of prize money, the e-sports industry has some of the highest pools of prize money. "The e-sports game with the greatest tournament prize pool in 2022 was Dota 2, exhibiting a cumulative prize pool valued at 32.85 million U.S. dollars. This cumulative prize pool was only slightly higher than the runner-up, Arena of Valor, which had a cumulative prize pool of 32.73 million U.S. dollars during this period."[27]

In terms of the highest earning countries, the players of China brought home "almost 37.96 million U.S. dollars" through prize money in 2021, followed by the USA with 23 million U.S. Dollars.[28] One of the largest elements of sports is an audience that brings more money, sponsors, and broadcasting earnings to the game. In 2022, e-sports had 261.2 million e-sports enthusiasts and an additional 270.9 million occasional viewers of e-sports.[29] Such is the wide viewership of e-sports, which is further going to increase in the coming years.

II. E-SPORTS IN INDIA

In 2022, the Government of India brought an amendment to the Government of India (Allocation of Business) Rules, 1961, and officially allocated "E-Sports as a part of Multi-sports event" to the Ministry of Youth Affairs and Sports. [30] With the same amendment, "matters related to online gaming" were allocated to the Ministry of Electronics and Information Technology. [31] On August 22nd, 2025, the Promotion and Regulation of Online Gaming Act, 2025 came into force (hereinafter referred to as "PROG Act"). The PROG Act aims "at promoting and regulating the online gaming sector, including esports, and to protect individuals, especially youth and vulnerable populations, from the adverse social, economic, psychological and privacy-related impacts of such games" among other aims.[32]

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[26] Esports Market revenue worldwide in 2021, by region, available at: file:///E:/E%20sports/Global%20eSports%20market%20revenue%20by%20region%202021%20_%20Statista.html (Last visited on 12th Jan., 2025).

[27] Christina Gough, Leading e-sport games worldwide 2022, by tournament prize pool, available at: https://www.statista.com/statistics/501853/leading-esports-games-worldwide-total-prize-pool/ (Last visited on 12th Jan., 2025).

[28] *Ibid.*

[29] *Ibid.*

[30] The Government of India (Allocation of Business) (Three Hundred and Seventieth Amendment) Rules, 2022.

[31] *Ibid.*

[32] Preamble to the Promotion and Regulation of Online Gaming Act, 2025.

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E-Sport Economy of India

E-Sports and online gaming are not played just for pleasure these days. It is rapidly becoming part of international inter-country sports events. Tirth Mehta brought the first medal for India in esports by winning a bronze medal in the Asian Games of 2018.[33] In the 2022 Asian Games, esports is going to be a medal event, and India is sending its 18-member contingent for the event.[34] At the first-ever inter-country, Commonwealth E-sports Championship, India's DOTA 2 team won a bronze medal by defeating New Zealand.[35] Such performance at the international level will bring more revenue to India in the form of brands, gaming industry setups & broadcasting, etc. In 2021, the Indian e-sports industry had revenue of around 2.5 billion Indian rupees, which is estimated to grow to 11 billion Indian rupees in 2025.[36] The viewership of e-sports is constantly on the increase, with 17 million viewers in 2021, which is further estimated to increase to 85 million people by 2025.[37]

Besides the gaming industry, Indian e-sports players have also become important contributors to the Indian economy. According to the E-Sports earnings, "…. .1,052 Indian e-sports players have been awarded a total of USD 4,184,954.41 in prize money across 656 tournaments. The highest award-winning game was "PlayerUnknown's Battlegrounds Mobile" with USD 2,175,802.74, making up 51.99% of all earnings by Indian players. Nihal Sarin is the highest earning Indian player with USD 142,437.94 in prize money won overall, with USD 140,862.94 or 98.89% won from playing in Chess.com tournaments."[38] Harika Dronavalli is the highest-earning female e-sports player with $23,504.13.[39]

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33 Indian DOTA 2 Team wins bronze medal at Commonwealth Esports Championship 2022, available at: https://www.timesnownews.com/technology-science/indian-dota-2-team-wins-bronze-medal-at-commonwealth-esports-championship-2022-article-93409516 (Last visited on 12th Jan., 2025).

34 Asian Games 2022: India's 18-member esports team identified, available at: https://olympics.com/en/news/asian-games-2022-indian-esports-team-athletes-qualified-full-list (Last visited on 11th Jan., 2025).

35 Tasmayee Laha Roy, How India's first Commonwealth Games Medal in esports will affect brands' interest, available at: https://www.cnbctv18.com/storyboard18/how-indias-first-commonwealth-games-medal-in-esports-will-affect-brands-interest-14456822.htm (Last visited on 12th Jan., 2025).

36 Tanushree Basuroy, eSports revenue in India FY 2021-2025, by category, available at: file:///E:/E%20sports/India%20&%20Esports/India_%20eSports%20revenue%20by%20category%202025%20_%20Statista.html (Last visited on 12th Jan., 2025)

37 *Ibid.*

38 Esports Earnings, available at: https://www.esportsearnings.com/countries/in (Last visited on 12th Jan., 2025).

39 *Ibid.*

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According to Statista, "Vivek Aabhas Horo, also known as 'Clutchgod' within the online gaming community, was one of India's most prominent e-sports athletes in terms of overall earnings that grossed over 52 thousand U.S. dollars by 2021. Owais was the second-best-earning eSports player in India that year, with total winnings amounting to nearly 51 thousand U.S. dollars."[40] In 2021, India had about 390 million online gamers, which was an 8% increase from last year and is estimated to increase to 450 million by 2023.[41] Around 150 million Indian E-Athletes were recorded in 2021, which is estimated to increase to 1.5 million by 2025.

Legal Status of E-Sports

Before the PROG Act, India had no legal framework to regulate e-sports. Section 2 (c) of PROG Act defines "e-sports" as "an online game which (i) is played as part of multi-sports events; (ii) involves organised competitive events between individuals or teams, conducted in multiplayer formats governed by predefined rules; (iii) is duly recognised under the National Sports Governance Act, 2025, and registered with the Authority or agency under section 3; (iv) has outcome determined solely by factors such as physical dexterity, mental agility, strategic thinking or other similar skills of users as players; (v) may include payment of registration or participation fees solely for the purpose of entering the competition or covering administrative costs and may include performance-based prize money by the player; and (vi)shall not involve the placing of bets, wagers or any other stakes by any person, whether or not such person is a participant, including any winning out of such bets, wagers or any other stakes". After the PROG Act, it is expected that MOYS will also give recognition to the Esports Federation of India as a National Sports Organisation, for representing India at the international level.

E-Sports: Skill or chance?

The question of the legality of online games like fantasy sports has arisen in several cases. The issue in all these cases was whether online gaming or fantasy sports were games of skill or chance. High Courts in various decisions, like *Varun Gumber* v. *UT of Chandigarh*[42], *Gurdeep*

[40] *Supra* note 36.

[41] Number of online gamers in India 2017-2021, available at: https://www.statista.com/statistics/1064010/number-of-online-gamers-india/ (Last visited on 11th Jan., 2025).

[42] 2017 SCC OnLine P&H 5372.

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Singh Sachar v. *Union of India*[43], *Chandresh Sankhla* v. *State of Rajasthan & Ors*.[44] and *Ravindra Singh Chaudhary* v. *Union of India*[45] has held that "organized internet gaming events and fantasy games are 'games of skill' and 'games of chance' like gambling.

So far, no such issue has arisen concerning e-sports. But it is important to understand what "games of skill" are. The Apex Court in *State of Bombay* v. *R.M.D. Chamarbaugwala*[46] observed that "a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognized to be of a gambling nature." Therefore, the competition that has a "substantial" element of skill will not fall under gambling, even though it may have a slight chance. In *State of Andhra Pradesh* v. *K. Satyanarayan & Ors*.,[47] the Apex Court first time dealt with the question of what constitutes a "game of skill". The issue revolved around the game of "Rummy" and whether it is a "game of skill or chance". The Court held that the game of rummy, without any element of profit or gain, in itself is a game of skill even though it has some element of chance.

In *Dr. K.R. Lakshmanan* v. *State of Tamil Nadu*[48], while deciding the issue of horse riding, the Apex Court explained the difference between "a game of skill" and "a game of chance". The Court observed, "A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, and the shuffling of the cards are all modes of chance. In these games, the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice are thrown, the wheel stops its revolution or the dealer has dealt with the cards." While explaining the "game of skill" the Court explained, "A game of skill, although the element of chance necessarily cannot be entirely eliminated, is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player…. There are few games, if any, which consist purely of chance or skill, and as such, a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. It is the dominant element - "skill" or "chance" - which determines the character of the game. On

[43] Judgment dated 30th April 2019 in Criminal P.I.L. No. 16 of 2019.
[44] 2020 SCC OnLine Raj 264.
[45] 2020 SCC OnLine Raj 2688.
[46] 1957 SCR 874.
[47] AIR 1968 SC 825.
[48] (1996) 2 SCC 226.

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analyzing the e-sports in light of the above explanation, it will unmistakably fall under "game of skill" and not a chance.

Legislative Framework

The PROG Act is a new legislation enacted to regulate the gaming industry, including e-sports. It impacts the online gaming ecosystem that comprises e-sports, casual games, educational games, and online money games, which were operating without any legal framework. The PROG Act aims to address the online money games that have significant social and financial harm. Section 3 of the Act provides for recognition and registration of e-sports agencies, establishment of training academies, and other necessary measures to promote the e-sports sector.

The Public Gambling Act, 1867 (hereinafter referred to as "1867 Act") is widely used to control gambling in sports. However, Sec 12 of the 1867 Act clearly states that it does not apply to games of "mere skill".[49] As discussed above, e-sports are "games of skill" and not chance; therefore, the 1867 Act will not have an application to the act of playing e-sports. But any gambling done on the outcome of esports will come under the 1867 Act.

"Sports" is a "State" subject under Entry 33 of List II of Schedule VII of the Constitution of India, 1950. Consequently, some state legislation on online gaming is worth noting. The Sikkim Online Gaming (Regulation) Act, 2008, aims to regulate electronic and non-electronic gaming. The Act defines "online gaming" as "any gaming, where any player enters or may enter the game or takes or may take any step in the game or acquires or may acquire or may acquire a chance in any lottery, by means of a telecommunication device, including the negotiating or receiving of any bet by means of a telecommunication device."[50] "Sports Gaming" is defined as "games involving the prediction of the results of sporting events and placing a bet on the outcome, in part or in whole, of such sporting event."[51]

Similarly, the State of Nagaland has enacted the "Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015" (hereinafter "Nagaland Act"). The Act aims to "prohibit gambling and promote online game skills". The Nagaland Act defines "a

[49] "Sec. 12. Act not to apply to certain games.—Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played."
[50] Sec. 2(k) of the Sikkim Online Gaming (Regulation) Act, 2008.
[51] Sec. 2(p) of the Sikkim Online Gaming (Regulation) Act, 2008.

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game of skill" in line with the Apex court interpretation as "all such games where there is preponderance of skill over chance, including where the skill relates to strategizing the manner of placing wagers or placing bets or where the skill lies in team selection or selection of virtual stocks based on analyses or where the skill relates to the manner in which the moves are made, whether through deployment of physical or mental skill and acumen."[52] The Sec. further explains that "Games of Skill" may be "where the skill relates to the manner in which the moves are made, whether through deployment of physical or mental skill and acumen."[53] Sec. 2(10) defines virtual as "games played online by means of computer automation and exercise of skill." The definitions are clearly in line with how e-sports are defined. Nagaland also contains a Schedule which lists out the category of games that fall under "games of skill". The list is wide enough to include all types of esports.

Though "Sports" is a state subject, for national & International sports development, the Union government exercises residuary power under Article 248 with Entry 97[54], Entry 10,[55] and Entry 13[56] of List I. In *Mr. Narinder Batra* v. *Union of India*[57], it was observed, "The power to make laws with respect to sports as per Entry 33 in List II of the State legislature is to be construed as a power to legislate and regulate sports restricted to the precincts of the state and ending at its boundaries."[58] It was further observed that "…..to represent India as a nation at international sports meets as well as international forums, it is an essential part of Government function that scrutiny is effected by the sporting event or the forum in which participation is proposed. The source of the legislative competence of the Government to do so is derived from entries 10 and 13 of List I."[59]

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[52] Sec. 2(3) of the Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015.

[53] Explanation to Sec. 2(3) of Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 provides, "Explanation: For the purposes of this Act:- (I) All games provided in Schedule A of this Act shall fall under the category of "Games of skill" (ii)'Games' which have been declared or determined to be 'games of skill' by Indian or international courts or other statues, or games where there are domestic and international competitions and tournaments, or games which can be determined to be 'games of skill' shall further be entitled to be included in Schedule A. (iii) Games of skill may be (a) Card based and (b) action/ virtual sports/ adventure/mystery and (c) calculation/strategy/quiz based".

[54] "Any other matter not enumerated in List II or List III, including any tax not mentioned in either of those Lists."

[55] "Foreign affairs; all matters which bring the Union into relation with any foreign country".

[56] "Participation in international conferences, associations, and other bodies and implementation of decisions made thereat".

[57] W.P. (C) 7868/2005.

[58] *Id.* at Para 68.

[59] *Id.* at Para 85.

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Based on the above observations, it was held, "….sports, when construed from the aspect of Entry 33 in List II has to be confined to sports at the state level alone."[60] Therefore, like other sports, for the national and international promotion of e-sports, the Government of India has to take initiatives.

Presently, e-sports in India are looked after by the E-Sports Federation of India, which is a member of various international e-sports federations.[61] Unfortunately, it is yet to be recognized as the national sports federation by the Ministry of Youth Affairs and Sports. The Lok Sabha member, Dr. Shashi Tharoor, introduced the private bill on online gaming titled "The Sports (Online Gaming and Prevention of Fraud) Bill, 2018."[62]. Although the Bill could not be discussed due to the dissolution of the session, the online gaming industry highly appreciated it for bringing the matter before the legislation.

In 2022, "the Online Gaming (Regulation) Bill, 2022" was introduced in the Lok Sabha to regulate online gaming. Besides, the "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021" and the "Digital Personal Data Protection Act, 2023" have been released by the Ministry of Information Technology, which will have an impact on e-sports and online gaming.

III. Women In E-Sports

"In 2021, 41.5 percent of video gamers in the United States were females,"[63] and "in contrast to 41% of males, only 15% of females are fans of e-sports.[64] Globally, about 22% of females are fans of e-sports, with the highest number of females in South Korea.[65] In India, as of April 2022, "About 60 percent of females and 70 percent of males played games online in the

[60] *Id.* at Para 89.

[61] About E-Sports Federation of India, https://esportsfederation.in/ (Last visited on 3rd Feb., 2025).

[62] The Sports (Online Gaming And Prevention Of Fraud) Bill, 2018, available at: https://theleaflet.in/wp-content/uploads/2019/01/THE-SPORTS-ONLINE-GAMING-AND-PREVENTION-OF-FRAUD-BILL-2018.pdf (Last visited on 10th Jan., 2025).

[63] Distribution of video game users in the United States in 2021, by gender, available at: https://www.statista.com/forecasts/494867/distribution-of-gamers-by-gender-usa (Last visited on 12th Jan., 2025).

[64] Level of interest in eSports in the United States as of September 2021, by gender, available at: https://www.statista.com/statistics/1108273/esports-interest-gender (Last visited on 12th Jan., 2025)

[65] Christina Gough, Global Female esports audience share 2019, by country, available at: file:///E:/E%20sports/About%20E-Sports/Global%20female%20eSports%20audience%20by%20country%202020%20_%20Statista.html (Last visited on 12th Jan., 2025).

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surveyed time duration."[66] Some of the famous female e-sports players, having a huge fan following, are Shafgupta Iqbal aka "Xyaa", Payal Dhara, Deepanshi Rawat, aka "Dobby," Krutika Ojha & Saloni Panwar, the first Indian woman to compete at an International E-Sports Tournament held in Thailand.[67]

As e-sports is gaining recognition as "a multi-sport event," it is important that it adheres to the basic principles of sports. One such principle recognized by all sports organizations or federations is "Gender Equality". The fundamental principles of the Olympic charter provide for the freedom to play sports irrespective of sex or sexual orientation.[68] According to the statute of the International E-Sports Federation, one of the missions is to "ensure the open access to E-sports regardless of gender & sexual orientation".[69] To achieve this mission, some concrete measures need to be taken by all stakeholders in the e-sports industry.

Opportunities for women in E-Sports

Esports have a great opportunity to develop as one of the most gender-neutral sports. It presents various opportunities to women and others, irrespective of their gender. However, there is a need to address some challenges that can harm women's participation in e-sports.

Sex Integrated Sport

The modern Olympic Games, first held in 1896, were intended as an all-male event. Eventually, when women's participation was allowed, the social structure was such that sports events, like other sectors, were segregated based on sex. In 1928, 5 American women participated in the track event, which was strongly opposed.[70] But in 1932, Mildred "Babe" Didrikson Zaharias disproved this perception otherwise by setting the Olympic record in three track events, playing with a male baseball team, winning a first golf tournament, and in 1950 was chosen as Women's

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66 *Supra* note 36.

67 Michelle, Top 5 female Streamers Conquering the Gaming Industry in India,available at: E:/E%20sports/Gender%20&%20Esports/Top%205%20Female%20Streamers%20Conquering%20The%20Gaming%20Industry%20in%20India%20-%20FanClash.html (Last visited on 12th Jan., 2025).

68 Kruthika N. S., ESports and Its Reinforcement of Gender Divides, 30 *MARQ. Sports L. REV*. 349 (2020).

69 Statutes of International E-Sports Federation, available at: https://iesf.org/wp-content/uploads/2022/04/IESF-Statutes-2021.pdf (Last visited on 10th Jan., 2025).

70 Karen Tokarz, *Women, Sports and the Law: A comprehensive Research Guide to Sex Discrimination in Sports* 4 (W.S. Hein, New York, 2000).

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Athlete of the Half Century by the Associated Press.[71] In 1973, Billie Jean King, in her 30's, defeated Bobby Riggs in the famous 'Battle of the Sexes'.[72]

In 1972 American Congress passed *Title IX of the Education Amendment of 1972,* which resulted in a huge increase in women's participation in sports in America.[73] But *Title IX* proved to be a double-edged sword. Although it increased the opportunity for women in sports, it also formalized the normative binary sex segregation in sports in America. Many feminists, authors, and women athletes started questioning whether separate opportunities for women in sports lead to equality in sports. Those who support such binary classification argue on the grounds of distributive justice and positive discrimination. But those who oppose argue that sex segregation is based on the assumption that women are not equal to men, and it reinforces the gender stereotype in sports.[74] The response of the US judiciary on this issue is mixed. In *O' Connor* v. *Board of Education*[75], U.S. Supreme Court upheld the sex segregation in basketball games, but in later decisions like *Beattie* v. *Line Mt. Sch. Dist.,*[76] the Court held that excluding female high school wrestlers from all-male wrestling teams violated the Equal Protection Clause.

In India, Articles 14 to 16 lay the principle of equality before the law without any discrimination based on sex. But the social roles and norms have always created barriers to the effective enforcement of this right. *C. B. Muthamma* v. *Union of India,*[77] *Air India Etc.* v. *Nergesh Meerza & Ors*.,[78] and the recent decision of the *Secretary, Ministry of Defence* v. *Babita Puniya*[79], are some of the cases where women challenged decided sex roles and won their right to equality. So far, in India, there have been no judicial challenges to sex-segregated sports. It has been conveniently accepted because of our social structure.

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[71] *Id.* at 5.

[72] Susan Ware, *Game, Set, Match: Billie Jean King and the Revolution in Women's Sports* 75 (The University of North Carolina Press, 2015).

[73] *Id.* at 9.

[74] Nancy Leong, "Against Women's Sports" 95(1) *Washington University Law Review* 1 (2018).

[75] 449 U.S. 1301 (1980).

[76] 992 F. Supp. 2d 384 (M.D.Pa.2014).

[77] 1979 AIR 1868, 1980 SCR (1) 668.

[78] 1981 AIR 1829, 1982 SCR (1) 438.

[79] 2020 SCC Online SC 200.

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Despite the rising voices against sports segregation, traditional competitive sports are still segregated based on sex. The prevailing binary structure in sports also creates challenges for transgender/intersex individuals. But e-sports organizations have an opportunity to overcome this and provide an equal platform to all genders by organising mixed-player games. The nature of e-sports is such that it does not rely on physical strength or speed, which are typically the primary reasons for segregating traditional sports. Rather than physical ability, e-sports emphasize mental agility and quick strategic thinking to outmaneuver opponents. In this way, the e-sports industry has a huge opportunity and scope to promote gender equality by organizing all-gender integrated e-sports competitions. It will provide an equal platform to women and other genders as well.

Access & Anonymity

E-sports are virtual sports, which can be played conveniently at home. There is no need for physical presence. Moreover, the majority of esports can be played on mobile devices, which are widely accessible to women today. Such kind of access to sports is not available in traditional sports. Women who are not allowed to physically mingle with the outside world, due to religious or social reasons, can also have access to e-sports. Another important feature of these e-sports is anonymity. Most e-athletes have characters in games called "avatars," and players can name their avatars as they like. Therefore, there is no need to provide any kind of personal information to the outside world. A person of any gender, sexual orientation, or occupation can play these sports without disclosing their true identity to the outside world. Hence, e-sports can provide freedom and equal space to such women who otherwise would not be able to play traditional sports.

According to the 19-year-old PUBG and DOTA participant, Mahrukh, from Gilgit-Baltistan, Pakistan, "I just want to prove….. people say I cannot be like boys, that thinking makes me more frustrated, and that might be the reason for me playing these games."[80] As per the study conducted in Gilgit-Baltistan, Pakistan, "The participants unveiled that they use e-sports to show their true selves and to escape the collectivistic culture and societal norms. Additionally, various social and psychological factors motivated participants to use e-sports as a vehicle for liberation and freedom."[81] Some of the primary reasons that motivated them to participate in e-sports were

[80] Umer Hussain, Bo Yu, George B. Cunningham & Gregg Bennett, "I Can be Who I Am When I Play Tekken 7": E-sports Women Participants from the Islamic Republic of Pakistan, 16(8) Games and Culture 979 (2021).
[81] *Id*. at 986.

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"freedom, autonomy, escapism, and privacy".[82] Women deliberately used "gender camouflaging" to keep themselves anonymous and to avoid any kind of sexual harassment & abuse.[83] E-sports provided them with privacy, which they were not able to find in their social structure.[84] Hence, e-sports can be a great way to build confidence and a sense of achievement in women, which they otherwise lack in conventional sports.

Barriers for women in E-Sports

Even though a large number of women are engaged in e-sports, they still face social and cultural barriers. To overcome these barriers, it is necessary to address the following concerns faced by women in e-sports.

Sexual Harassment

The misogynist approach seen in traditional sports also prevails in the world of online gaming. Men who lose to women often take an abusive approach. This abusive behavior often leads to sexual harassment and rape threats. Recently, an Indian e-sports player threatened rape and murder like the Nirbhaya incident while streaming live on YouTube.[85] According to a female e-athlete, "When guys get to know that I am a woman, they sometimes send me inappropriate messages, for instance, sexual messages. I do not like that at all."[86] "Gamergate", an "Online Harassment" campaign, is one of the worst examples of harassment in online gaming. It started after one of the male gamers accused his girlfriend of infidelity at a gaming platform, which resulted in a full-fledged sexual harassment or mob lynching type campaign where not only the ex-girlfriend of the player but all the women who came in her support were brutally abused and even threatened with rape.[87] In another incident, a transgender e-athlete was harassed with sexist

[82] *Id.* at 987, 988.
[83] *Id.* at 987.
[84] *Id.* at 989.
[85] Mayank Mohanti, Indian Gamer Threatens Sexual Assault In YouTube Video, With Nirbhaya Rape Reference, available at: https://www.indiatimes.com/technology/news/indian-gamer-threatens-sexual-assault-in-youtube-video-nirbhaya-rape-reference-537828.html (Last visited on 10th Jan., 2025).
[86] Umer Hussain, Bo Yu, George B. Cunningham & Gregg Bennett, "I Can be Who I Am When I Play Tekken 7": E-sports Women Participants from the Islamic Republic of Pakistan, 16(8) Games and Culture 994 (2021)
[87] Caitlin Dewey, The only guide to Gamergate you will ever need to read, available at: https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/ (Last visited on 11th Jan., 2025).

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and transphobic comments.[88] There have been many incidents of sexual harassment by the team players and even coaches of the e-sports team, which have been resolved with minor fines and punishment. Recently, in a class civil action suit against "League of Legends" publisher Riot Games for pay disparity, gender, and sexual harassment, Riot Games agreed to pay 100 million dollars as settlement money.[89] Even female media critics have been harassed for raising issues related to female characters in games.[90]

Indecent Character Representation

The world of games is a virtual world, and the characters created in this world are often far from reality. Avatars are depicted as perfect body specimens far from reality, and such portrayals often have a negative effect. In the words of the female player, "…..they try to portray a woman, which is strong and beautiful, but chubby and broad women can be strong, but they try to portray women's image, which is strong, and she is bad-ass at the same time, and she is beautiful and perfect".[91]According to some of the studies, online games are often made for the "male gaze", hence, they often have characters and portrayals according to males.[92] The female characters are objectified and often depicted in a sexualized manner, whereas male characters are depicted more as muscular.[93] Since the games are made from the male perspective, women players are often criticized for playing such games and wasting their time.[94] According to some studies, the sexualized representation of women in video games also discourages women players from participating in such games, as it often leads to online harassment from male players.[95] Although

[88] John T. Holden, Thomas A. Baker III, & Marc Edelman, The #E-Too Movement: Fighting Back Against Sexual Harassment in Electronic Sports, 52 Ariz. St. L.J. 12 (2019).

[89] Esports: League of Legends publisher Riot Games settles gender discrimination case for $100 million, available at: file:///E:/E%20sports/Gender%20&%20Esports/Esports_%20League%20of%20Legends%20publisher%20Riot%20Games%20settles%20gender%20discrimination%20case%20for%20$100%20million%20-%20Sportstar.html (Last visited on 12th Jan., 2023).

[90] Kruthika N. S., ESports and Its Reinforcement of Gender Divides, 30 MARQ. Sports L.REV. 357 (2020)

[91] Umer Hussain, Bo Yu, George B. Cunningham & Gregg Bennett, "I Can be Who I Am When I Play Tekken 7": E-sports Women Participants from the Islamic Republic of Pakistan, 16(8) Games and Culture 994 (2021).

[92] Kruthika N. S., ESports and Its Reinforcement of Gender Divides, 30 MARQ. Sports L.REV. 352 (2020).

[93] *Supra* note 91.

[94] *Supra* note 92 at 353.

[95] *Id.* at 354.

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it is the virtual world, to bring e-sports to the same platform as other sports, e-sports must be made closer to reality.

Stereotype Attitude

As discussed earlier, often when any male player loses to a women player, it is not taken with a healthy sportsmanship attitude. Such a negative stereotype attitude also creates a hurdle for women players. In 2016, SeYeon Kim, a professional e-sports player, was accused of cheating through program-enhancing codes, as no one was willing to believe that a teenage girl showed good skills in online gaming.[96] Ultimately, she had to prove her innocence by going public and live-streaming her skills.[97] Such stereotypical attitudes create obstacles for women players in e-sports and online gaming. In traditional games, women are treated as weaker than men in speed and strength, but e-sports have an advantage in this respect. Therefore, the societal stereotype attitude needs to be addressed in high-tech e-sports culture to encourage more women's participation.

Legal Framework against Sexual Harassment

According to the Declaration on the Elimination of Violence against Women, 1993, violence against women includes, "Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere…"[98] The fourth World Conference on Women defines "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."[99] It encompasses "Physical, sexual and psychological violence occurring within the general community, including… sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere…".[100] Article 11 of the Convention on the Elimination of all Forms of

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96 *Ibid.*

97 *Ibid.*

98 Article 2(b) of the Declaration on Elimination of Violence against Women, 1993, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women (Last visited on 10th Dec., 2024).

99 The United Nations Fourth World Conference on Women, 1995, available at: https://www.un.org/womenwatch/daw/beijing/platform/violence.htm (Last visited on 25th July, 2024).

100 *Ibid.*

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Discrimination against Women, 1979 (CEDAW) requires state parties to take measures to eliminate discrimination in employment and provide a safe environment for women.[101] Art. 1.4 of the Olympic Code of Ethics states, "Respect for international conventions on protecting human rights insofar as they apply to the Olympic Games activities and which ensure in particular: the rejection of all forms of harassment and abuse, be it physical, professional or sexual, and any physical or mental injuries."[102]

Indian Legal Framework

In *Vishakha* v. *State of Rajasthan*[103], then Chief Justice J.S. Verma, while giving the guidelines on the matter of sexual harassment, observed, "Each such incident results in a violation of the fundamental rights of 'Gender Equality' and the 'Right of Life and Liberty'. It is a clear violation of the rights under Articles 14, 15, and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) to practice any profession or to carry out any occupation, trade or business."

The "Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013" (hereinafter "2013 Act"). The 2013 Act lays out a wide definition of "Sexual Harassment" under Sec. 2(n)[104] to be read with Sec. 3[105] of the 2013 Act. Under Sec. 2(o) (iv) of the 2013 Act, "Workplace" includes "any sports institute, stadium, sports complex or competition or games venue, whether residential or not, used for training, sports or other activities relating

[101] "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment to ensure, on basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."

[102] IOC Code of Ethics, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Leading-the-Olympic-Movement/Code-of-Ethics/EN-IOC-Code-of-Ethics-2016.pdf (Last visited on 25th Jan., 2025)

[103] (1997) 6 SCC 241

[104] An act of "Sexual Harassment" includes, "any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely: (*i*) physical contact and advances; or (*ii*) a demand or request for sexual favours; or (*iii*) making sexually coloured remarks; or (*iv*) or (*v*) any other unwelcome physical, verbal or non-verbal conduct of sexual nature."

[105] "(*2*) The following circumstances, among other circumstances, if it occurs, or is present in relation to or connected with any act or behavior of sexual harassment may amount to sexual harassment:—
(*i*) implied or explicit promise of preferential treatment in her employment; or
(*ii*) implied or explicit threat of detrimental treatment in her employment ; or
(*iii*) implied or explicit threat about her present or future employment status; or
(*iv*) interference with her work or creating an intimidating or offensive or hostile work environment for her; or
(*v*) humiliating treatment likely to affect her health or safety".

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thereto." The 2013 Act lays down in detail the internal complaint & investigation procedure to be followed by the "employer," which will include all government and non-government sports organizations. To further clarify the provisions, in the exercise of a power conferred under Sec 29 of the 2103 Act, the government passed the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013.[106]

In online sexual harassment, the Information Technology Act, 2000 (hereinafter "IT Act") is also relevant. "Sending offensive messages through a communication service" is a punishable offence under Sec. 66A of the IT Act.[107] Whosoever "intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent" is punished for violation of privacy under Sec. 66E of the IT Act. Publication or transmission of "obscene material"[108], "material containing sexually explicit acts",[109] and "material depicting children in a sexually explicit act"[110] in electronic form is punishable under various provisions of the IT Act. Since the PROG Act does not contain provisions related to online harassment, the IT Act will be the main legislation applicable in cases of harassment in online gaming and e-sports, along with the 2013 Act and the Bhartiya Nyaya Sanhita, 2023.

IV. CONCLUSION

Advancements in information technology have impacted various sectors of the economy, including sports. E-sports are competitive video games played in a professional setup by gamers called "e-athletes". It is rapidly becoming an important part of the economy, including in India. Though it is still looking for recognition at the Olympics, a large number of international and inter-country e-sports events are being organized. The anonymity and easy access to their privacy

[106] the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013, *available at:* https://www.iitk.ac.in/wc/data/Rules_Sexual-Harassment-at-Workplace.pdf (Last visited on 10 Dec., 2025)

[107] "Sec. 66A. Punishment for sending offensive messages through communication service, etc.–Any person who sends, by means of a computer resource or a communication device,– (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine."

[108] Section 67 of the Information Technology Act, 2000.

[109] Section 67A of the Information Technology Act, 2000.

[110] Section 67B of the IT Act, 2000.

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provide amazing opportunities to women who are otherwise not able to participate due to social and cultural barriers. E-sports also affords prospects for "sex-integrated" or "mixed sports," which are otherwise difficult due to biological reasons in traditional sports. This virtual sports platform can break the traditional barriers that impact women's participation in sports. But unfortunately, the gaming industry is also affected by traditional masculine thinking. The e-sports being largely dominated by men face gender stereotypes and stigmas, like online sexual harassment, etc. To overcome such hurdles, all stakeholders need to address such hostile work environment attitudes.

India has recently allocated the "promotion of e-sports as a multi-sports event" to the Ministry of Sports & Youth Affairs. At the same time, "online gaming" was allocated to the Ministry of Information Technology. But e-sports are not separate from online gaming. To promote it as a "sport," both ministries will need to work in coordination. The PROG Act, although a landmark step towards regulating online games, does not address the issue of online harassment and women in esports. Other legislations that impact e-sports, like the IT Act, 2000, and the Sexual Harassment Act, 2013, etc., will have to be amended to deal with the emerging issues of e-sports. The E-Sports Federation of India needs to be recognized by the Government of India and encourage corresponding state e-sports federations to recognize e-sports talent in India. A regulated pool of players will also discourage gender harassment and other online violence, as the players will have a sense of responsibility as e-athletes. It will also act as a platform to encourage participation, irrespective of gender, in Indian e-sports.

Given that the virtual world transcends national boundaries, there is a clear need for an international body to regulate e-sports in a coordinated manner. As e-sports continue to emerge and evolve, it is crucial to address issues related to women's and other genders' participation from the outset. Collaborative efforts by countries to tackle gender harassment and related concerns will foster a more inclusive and diverse environment, encouraging broader gender participation in e-sports.

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AN EXAMINATION OF INTELLECTUAL PROPERTY FRAMEWORKS FOR THE PROTECTION OF TRADITIONAL MEDICINAL KNOWLEDGE: VINDICATING INDIA'S DEFENSIVE AND DEVELOPMENTAL STRATEGY

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Vivek Trivedi[**]

ABSTRACT

Existing scholarship on the intersection of intellectual property rights (IPR) and traditional medicinal knowledge (TMK) is often polarized, presenting a false dichotomy between the perceived inadequacies of conventional IPR systems and the vulnerabilities of TMK to misappropriation. Certain critical analyses further mischaracterize robust national protection strategies, such as India's Traditional Knowledge Digital Library (TKDL), portraying them as instruments of state appropriation rather than defense. This paper respectfully disagrees with such untenable positions. We argue that these critiques fundamentally misread the geopolitical context of a post-TRIPS world and fail to appreciate the strategic necessity of a multi-pronged protection architecmere. This paper asserts a corrective thesis: India's multifaceted approach, which integrates defensive documentation (the CSIR-TKDL), a coherent legislative framework (The Patents Act, 1970; The Biological Diversity Act, 2002), and proactive international diplomacy, constitutes a legitimate, necessary, and replicable model for safeguarding national heritage while enabling equitable innovation. By examining the synergy between these defensive and positive protection measures, we demonstrate that India's strategy is not a paradoxical appropriation but a sovereign fortification of cultural and intellectual territory. The recent adoption of the WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge on 24 May 2024, which enshrines the principle of mandatory disclosure long championed by India, serves as a powerful vindication of this long-standing and principled stance. This paper provides a definitive reframing of the debate, positioning India's model as a blueprint for global policy in an era of increasing biopiracy.

I. Introduction: Situating the Scholarly and Political Contest

Since the establishment of the World Trade Organization (WTO) and the implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a profound and contentious debate has emerged concerning the protection of

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traditional knowledge (TK), and particularly traditional medicinal knowledge (TMK).[1] For developing nations rich in biodiversity and traditional lore, such as India, this debate is not a mere academic exercise; it is a critical defense of national sovereignty, cultural identity, and economic potential.[2] The prevailing international IPR regime, designed primarily for individualistic, novel, and formally documented inventions, has proven itself to be an ill-fitting, and often hostile, environment for knowledge systems that are typically collective, inter-generational, and orally transmitted. This systemic dissonance has created a vacuum, enabling the widespread misappropriation of TMK by third parties a phenomenon pejoratively but accurately termed "biopiracy". The global response has been bifurcated.[3] On one hand, there is a persistent call for the development of a sui generis (of its own kind) international legal instrument specifically designed to protect TK. On the other, nations have erected defensive measures to prevent the erroneous granting of patents on existing traditional knowledge by leveraging the very mechanisms of the conventional IPR system. India has been a global leader in this latter approach through its pioneering Traditional Knowledge Digital Library (TKDL), an initiative of the Council of Scientific and Industrial Research (CSIR).[4]It is at this juncture that a significant scholarly failing must be addressed. Some contemporary critiques have profoundly misconstrued the purpose and effect of such defensive systems. For instance, some have characterized the TKDL as a mechanism through which the Indian state asserts national interests that potentially conflict with the rights of local communities, connecting its genesis to "irrelevant aspects that include religion and politics". The argument posits that by documenting and classifying TK in a patent-searchable format, the state is, in effect, appropriating this knowledge from its traditional holders for its own strategic and economic benefit. We are compelled to state that this line of critique is fundamentally flawed. It demonstrates a critical failure to comprehend the siege mentality imposed upon developing nations by a global IPR system that systematically devalues and endangers their traditional knowledge systems. Furthermore, it constructs a false opposition between national defence and community rights, ignoring that the former is a necessary precondition for the latter in the face of international

1 World Trade Organization, "Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)", 1994, available at: https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

2 World Health Organization, "Traditional Medicine: Questions and Answers" (August 2023).

3 James, T.C., "Traditional Medicine and Intellectual Property Rights: Law and Policy Perspectives", FITM Discussion Paper No. 1 (Research and Information System for Developing Countries, New Delhi, 2024).

4 "Traditional Knowledge and Intellectual Property Rights for Ayurveda", 14 Research Journal of Agricultural Sciences, 24 (2023).

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biopiracy.[5] As some authors assert in a direct response, such analyses are predicated on "subjective" literature and draw "unwarranted connections," thereby distorting the "very objective of a resource that has been developed to protect a country's heritage as its legal rights".

This paper, therefore, forwards a tripartite defensive thesis to correct this scholarly misinterpretation. First, we situate the challenge of TMK protection within its proper historical context: a global IP landscape that, by default, relegates undocumented TK to a vulnerable "public domain," ripe for exploitation. Second, we precisely pinpoint the shortcomings of critiques that view national defensive measures like the TKDL in isolation. These analyses fail to recognize the TKDL as one crucial component within a comprehensive and integrated "fortress architecture" of protection that also includes robust domestic legislation and a relentless campaign of international diplomacy. Third, we assert our corrective authority by positing that India's integrated strategy combining the defensive fortification of the TKDL with positive legal frameworks for access and benefit-sharing (ABS) and a diplomatic push for global norms represents a coherent, ethically necessary, and ultimately vindicated model for the effective stewardship of TMK.

II. The Contested Terrain: Biopiracy and the Limits of Conventional IPR

To understand the architecture of India's response, one must first survey the terrain of the conflict. TMK, as defined by the World Health Organization (WHO), is "the sum total of the knowledge, skills, and practices based on the theories, beliefs, and experiences indigenous to different cultures... used in the maintenance of health". In India, this knowledge is both codified in ancient texts of Ayurveda, Siddha, and Unani, and uncodified, passed down orally through generations of folk healers. This rich heritage, which informs the medicinal use of over 7,000 plant species, represents a significant asset that is perpetually at risk. The primary threat is biopiracy: the patenting of non-original "inventions" that are merely iterations of existing TK, often without the consent of or benefit to the original knowledge holders. The infamous cases of patents granted on the wound-healing properties of turmeric (Curcuma longa) and the antifungal properties of the neem tree (Azadirachta indica) serve as stark reminders of this vulnerability. In both instances, patents were granted by foreign offices the United States Patent and Trademark Office (USPTO) for turmeric and the European Patent Office (EPO) for neem

[5] World Health Organization, "Intellectual Property and Traditional Medical Knowledge", WIPO Background Brief No. 6 (2023).

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on knowledge that has been documented and practiced in India for centuries.[6] While India successfully challenged and revoked these patents, the victories came at a great cost, revealing a systemic flaw: patent examiners in foreign jurisdictions lack access to, or fail to consult, documented evidence of TK from other countries, which would otherwise constitute "prior art" and invalidate the patent claims for lack of novelty.[7]

This systemic failure stems from the fundamental incompatibility between the tenets of conventional IPR and the nature of TMK. The patent system, the most relevant IPR tool for medicinal innovations, is built on criteria that TMK often cannot meet.

Novelty and Inventive Step

The patent system rewards inventions that are new and non-obvious. Most TMK, by its very "traditional" nature, is ancient and has been passed down through generations, thus failing the novelty test ab initio if it has been previously disclosed.

Identifiable Inventor and Collective Ownership

Patent law requires the identification of specific inventors. TMK, however, is often generated, held, and refined collectively by a community over time, making it impossible to attribute inventorship to a single person or a discrete group.

Documentation and Codification

While some Indian TMK is codified, a vast amount remains oral and uncodified. Patent systems rely heavily on written prior art, and oral traditions have historically been difficult to establish as legally recognized prior art in many jurisdictions.

It is this chasm between the structure of IPR law and the reality of traditional knowledge that has necessitated the creation of novel protection strategies. These strategies fall into two broad categories, which we contend are not mutually exclusive but complementary: defensive protection and positive protection.[8] Defensive protection aims to prevent the illegitimate acquisition of IPR by third parties over TMK, primarily by ensuring that TK is documented and available as searchable prior art for patent examiners. Positive protection involves the

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6 Anusree Bhowmick, Smaranika Deb Roy and Mitu De, "A brief review on the turmeric patent case with its implications on the documentation on the documentation of traditional knowledge", 1 NDC-EBIOS Journal 83 (2021).

7 Johny Solomon Raj & Swaraj Singh Raguvanshi, "Nature of IPR Protection Given by Law in Turmeric Case", S.S. RANA Legal Publication (April 2022).

8 World Intellectual Property Organization, "Use of Turmeric in Wound Healing Case Study", WIPO Official Document.

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proactive granting of rights to TK holders themselves, allowing them to control the use of their knowledge and benefit from its commercialization, often through sui generis legal frameworks. It is the profound misunderstanding of the critical, foundational role of defensive protection that lies at the heart of the flawed critiques we seek to correct.

III. The Fortress Architecture of India's TMK Protection Regime

Contrary to interpretations that view India's actions as disjointed or contradictory, we argue that they form a coherent, multi-layered "fortress architecture" designed for comprehensive defence and strategic engagement. This architecture operates on three interlocking levels: a defensive outer perimeter (the TKDL), fortified legislative main walls, and an assertive diplomatic inner citadel.

Outer Perimeter: The Defensive Imperative of the Traditional Knowledge Digital Library (TKDL)

In 2001, in direct response to the turmeric and neem biopiracy episodes, the Government of India, through the CSIR, established the Traditional Knowledge Digital Library (TKDL). The TKDL is not, as its critics imply, a tool for commercial exploitation by the state; it is a meticulously designed defensive weapon.[9] Its primary and explicit objective is to prevent the grant of erroneous patents on Indian TMK by making this knowledge available to international patent offices as searchable prior art.

The architecture of the TKDL is itself a testament to its strategic purpose:

Comprehensive Documentation

The TKDL has digitized and documented vast amounts of information from classical Indian texts of Ayurveda, Unani, Siddha, and Yoga.

Patent-Oriented Structure

This vast corpus of knowledge is structured in a patent application format and translated into five international languages (English, German, French, Spanish, and Japanese) to be readily understood by patent examiners globally.

Innovative Classification

[9] "Traditional Knowledge Digital Library: Widening Access Database to Users", Press Information Bureau, Government of India (September 2022).

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To overcome the challenge of searching for traditional concepts within modern classification systems, an innovative Traditional Knowledge Resource Classification (TKRC) system was developed, which maps TMK concepts to the International Patent Classification (IPC) system.

The success of this defensive strategy is empirically verifiable. To date, the TKDL has been leveraged in over 225 patent applications filed at various international patent offices, leading to their withdrawal, rejection, or amendment by the applicants themselves upon being presented with TKDL evidence. This demonstrates the TKDL's efficacy not as a tool of appropriation, but as a powerful deterrent.[10]It is therefore untenable to frame a defensive prior art database designed explicitly to place knowledge beyond the reach of illegitimate patent claims as a form of state misappropriation.[11] Such a claim ignores the fundamental legal principle that making information available as prior art destroys its novelty, thereby placing it in the public domain for patenting purposes and preventing anyone, including the state itself, from obtaining an exclusive patent on that specific knowledge.[12] Some authors' prior assertion that the TKDL makes knowledge "more manageable, and exploitable" directly contradicts a more recent critical stance, revealing a fundamental inconsistency in the analysis. The controlled access provided to patent offices under non-disclosure agreements is not a mechanism for restriction, but a necessary safeguard to prevent the database itself from being misused by commercial entities while still allowing it to serve its defensive purpose.[13] The government's recent decision to widen access to the TKDL for researchers and industry is not a change in purpose, but an evolution a move to stimulate legitimate innovation and R&D based on this heritage, now that the defensive perimeter has been firmly established.

Main Walls: A Coherent Legislative and Institutional Framework

The defensive shield of the TKDL is buttressed by a robust set of legislative "main walls" that codify the principles of sovereignty, community rights, and equitable benefit sharing. This legal framework is not a haphazard collection of statutes but an integrated system designed to regulate access to biological resources and the associated knowledge.

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10 Raghavan, Chakravarthi, "Neem Patent Revoked by European Patent Office", Third World Network (May 2000).

11 "India's Traditional Knowledge and the Role of CSIR's TKDL", CSIR Success Stories Publication (2025).

12 "Traditional Knowledge Digital Library", Dau University Academic Publication.

13 "Impact of TKDL on Patent Applications in the Field of Bio-resources", Journal of Intellectual Property Rights, NISCAIR (2024).

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At the heart of this framework, two key pieces of legislation work in tandem. The first is The Biological Diversity Act of 2002, which stands as the cornerstone of India's protection regime.[14] Fulfilling India's commitments to the Convention on Biological Diversity, the Act establishes a meticulous three-tiered structure to oversee the nation's bio-resources. At the top, the National Biodiversity Authority operates at the central level, supported by State Biodiversity Boards and, crucially, by local Biodiversity Management Committees.[15] This structure ensures that any party wishing to access Indian biological resources or traditional knowledge for research or commercial purposes must first obtain prior informed consent and agree to terms that guarantee fair and equitable benefit-sharing with the knowledge-holding communities.[16] The Act gives the National Biodiversity Authority the power to challenge intellectual property applications anywhere in the world if they are based on knowledge or resources taken from India without proper authorization.[17] At the grassroots level, the local committees are responsible for creating People's Biodiversity Registers, which document local knowledge and resources, complementing the centrally managed Traditional Knowledge Digital Library with vital community-level records.[18]

The second pillar of this legal structure is The Patents Act of 1970, which has been strategically amended to create a firewall against the improper patenting of traditional knowledge. Its most powerful tool is Section 3(p), a provision that explicitly declares that an "invention" which is effectively traditional knowledge, or simply a repackaging of the known properties of traditional components, is not patentable.[19] This gives patent examiners a clear and potent legal basis to reject such claims outright. Reinforcing this, the Act also mandates that any patent application using biological material must disclose its source and geographical origin. A failure to do so, or providing false information, is a valid reason to oppose or even revoke a patent that has already been granted.

Together, these laws create a powerful, interlocking system. The Biological Diversity Act acts as the gatekeeper, managing access and ensuring benefits flow back to the

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14 The Biological Diversity Act, 2002, No. 18 of 2002, Government of India

15 National Biodiversity Authority, "Guidance Manual Under the Biological Diversity Act, 2002", NBA Official Publication.

16 Government of India, "National Biodiversity Authority: Overview and Functions" (2024).

17 The NBA - Environment Portal", Rajasthan State Government Publication (2001).

18 "Traditional Medicinal Knowledge under Biological Diversity Act 2002", Woxsen Law Review (August 2013).

19 Impact of IPR on Protection of Traditional Knowledge through the Biodiversity Act", iPleaders Legal Analysis (October 2021).

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communities, while the Patents Act stands as a guard, preventing the knowledge itself from being improperly privatized. This legislative combination firmly refutes any notion that India's strategy is purely defensive. Instead, it creates a clear pathway for legitimate, ethical innovation rooted in benefit-sharing, a principle perfectly illustrated by the case of **Jeevani**.[20]The Jeevani case is a landmark example of this integrated approach in action. It began with the traditional knowledge of the Kani tribe in South India, who understood the anti-fatigue properties of the local arogyapaacha plant. Scientists at the Tropical Botanic Garden and Research Institute used this tribal know-how as a lead to conduct further research, successfully isolating the active compounds and developing a standardized restorative drug. Importantly, the institute patented the process for creating the formulation a novel scientific invention not the traditional knowledge itself. In a crucial step that pioneered the principles of benefit-sharing, a trust was established to ensure a significant portion of the royalties from the drug's commercial license was paid directly to the Kani community.[21] The Jeevani model showcases how intellectual property rights can be applied not to expropriate traditional knowledge, but to protect the value added through modern science, all while ensuring the original custodians of the knowledge are ethically and financially recognized for their invaluable contribution.

Inner Citadel: Proactive Diplomacy and the Shaping of International Norms

The final layer of India's fortress is its assertive and persistent diplomatic engagement in international forums. Recognizing that domestic laws alone are insufficient to combat biopiracy originating from foreign jurisdictions, India, alongside a coalition of like-minded developing countries, has waged a decades-long campaign to reform the international IP landscape. This diplomatic offensive has been concentrated in two key arenas:

The WTO TRIPS Council

Since the review of Article 27.3(b) of the TRIPS Agreement, India has been a leading proponent for amending the agreement to introduce a mandatory international requirement for patent applicants to disclose the source and country of origin of genetic resources and associated TK used in an invention. This disclosure would also need to be accompanied by evidence of PIC from the competent authority and evidence of fair and equitable ABS.

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20 "A Critical Study on Kani Tribal Community and their Benefit Sharing Model", 3 Online International Interdisciplinary Research Journal (November-December 2013).

21 "The Arogyapacha Plant and the Kani Tribe's Journey to Access and Benefit Sharing", SSRN Working Paper (September 2024).

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The WIPO Intergovernmental Committee (IGC)

In 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Within the IGC, India has consistently argued for the development of a binding international legal instrument to provide positive protection for TK, moving beyond purely defensive measures. India has advocated for the recognition of collective rights and the protection of both codified and uncodified knowledge systems.

For over two decades, this advocacy was met with staunch resistance from developed nations, who viewed such proposals as burdensome to innovation. However, this persistent diplomatic pressure has finally borne fruit. On 24 May 2024, the WIPO Diplomatic Conference adopted a historic new Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.[22] The centerpiece of this treaty is a legally binding international obligation for patent applicants to disclose the country of origin or source of the genetic resources and associated TK when the claimed invention is based on them. This treaty represents a monumental victory for the demandeur countries and a profound vindication of India's long-held diplomatic position. While the treaty establishes a minimum standard and leaves certain issues, such as Digital Sequence Information (DSI) and derivatives, for future review, it fundamentally alters the global patent landscape. It internationalizes the core principle of disclosure embedded in India's own patent law and creates a global transparency mechanism to track the use of TMK in patent applications, thereby supporting the implementation of ABS obligations under the CBD and national laws like India's Biological Diversity Act.

IV. Discussion: Synthesizing the Model and Neutralizing Counterarguments

The analysis of India's three-tiered fortress architecture reveals a sophisticated, dynamic, and ethically grounded model. It is a system that synthesizes defensive and positive protection, using the tools of the existing IP system to guard against its own inherent flaws while simultaneously building a parallel framework for equitable access and benefit sharing. This integrated model proactively neutralizes the standard counterarguments leveled against the protection of TMK. A primary counterargument posits that IPR is fundamentally

[22] "Taking Forward the Review of Article 27.3B of the TRIPS Agreement", Africa Group Draft, Institute for Agriculture and Trade Policy.

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antithetical to the collective and inter-generational nature of TMK.[23] India's approach demonstrates a pragmatic rather than an ideological response to this tension. The state recognizes that the vast majority of TMK as such is not, and should not be, patentable. Therefore, the primary strategy is defensive: use the TKDL and Section 3(p) of the Patents Act to place this knowledge firmly outside the bounds of patentability, protecting it for community use and from illegitimate private monopoly. Simultaneously, the framework allows for the positive protection of new, patentable inventions derived from TMK, as seen in the Jeevani case, but only when coupled with legally mandated ABS obligations under the Biological Diversity Act. This is a nuanced bifurcation, not a blanket application of an unsuitable regime. Another critique targets the central role of the state, suggesting it usurps community authority. This argument fails the test of realpolitik. Individual, often marginalized, communities lack the financial, legal, and technical resources to monitor patent applications across thousands of jurisdictions or to mount costly legal challenges against multinational corporations.[24] As some research shows, local business performers are often reluctant to engage with the formal IPR system due to its perceived complexity and cost, preferring their own informal methods of protection. In this context, the state's role is not one of appropriation but of custodianship and defense. The CSIR and the NBA are acting as national-level institutional proxies, wielding the necessary resources to defend the collective national heritage on behalf of all its communities.

The Indian model is thus a system of "responsible sovereignty," where the state leverages its institutional capacity to create a protected space within which community rights can be meaningfully realized. It is a pragmatic recognition that in a globalized world, the protection of local knowledge requires a robust national shield.

V. Conclusion

The long and arduous journey to secure a just and equitable international framework for the protection of Traditional Medicinal Knowledge has reached a watershed moment. For decades, the global intellectual property regime, architected primarily around Western conceptions of individual, novel, and time-bound invention, remained fundamentally misaligned with the nature of Traditional Medicinal Knowledge a body of knowledge that is communally held, incrementally evolved, and transmitted across generations. This systemic

[23] WIPO Negotiations on Intellectual Property, Genetic Resources and Associated Traditional Knowledge", SSRN Academic Paper (December 2023).

[24] World Intellectual Property Organization, "The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore", Background Brief No. 2 (2023).

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incongruity rendered a vast corpus of invaluable traditional knowledge, particularly from developing nations rich in biodiversity and cultural heritage like India, legally vulnerable, categorizing it as part of a global "public domain" and thereby sanctioning its misappropriation by third parties without consent, recognition, or equitable benefit-sharing. The notorious cases involving the patenting of the wound-healing properties of turmeric and the anti-fungal properties of neem by foreign entities stand as stark monuments to this era of systemic failure and what has rightly been termed biopiracy. In response to this untenable state of affairs, we have pursued a robust, dual-pronged strategy encompassing both defensive national fortification and proactive international diplomacy. Domestically, India pioneered a globally recognized model of defensive protection through the establishment of the Traditional Knowledge Digital Library in 2001. A collaborative initiative of the Council of Scientific and Industrial Research and the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy, the Traditional Knowledge Digital Library represents a monumental undertaking to digitize and catalogue India's codified Traditional Medicinal Knowledge from systems like Ayurveda, Unani, Siddha, and Yoga. By structuring this knowledge in a patent-compatible format and making it accessible to major international patent offices in five languages, the Traditional Knowledge Digital Library serves as an irrefutable repository of prior art, effectively preventing the grant of erroneous patents based on pre-existing knowledge. The demonstrable success of the Traditional Knowledge Digital Library in preempting or revoking hundreds of illegitimate patent applications globally validates this approach not merely as a passive database, but as a strategic defensive bulwark—a fortress protecting our national heritage from misappropriation. However, we recognized that a purely defensive posture, while necessary, was insufficient. The ultimate resolution required a fundamental recalibration of the international legal architecture. Consequently, for over two decades, India, alongside a coalition of like-minded developing nations, has been at the vanguard of a persistent diplomatic campaign within the world's preeminent multilateral forums, most notably the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and the World Trade Organization TRIPS Council. Our central, unwavering demand has been the establishment of a binding international legal instrument that mandates the disclosure of the source or origin of genetic resources and any associated Traditional Knowledge within patent applications. This was consistently presented not as a mere procedural formality, but as an ethical and legal imperative to ensure transparency, prevent

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misappropriation, and create a functional link between the patent system and the access and benefit-sharing principles enshrined in the Convention on Biological Diversity.

The culmination of this quarter-century struggle was realized on May 24, 2024, with the historic adoption of the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge. We can now declare, with definitive authority, that this treaty marks a triumphant and paradigm-shifting victory for the global South and for the principles of equity and justice in the international intellectual property system. The treaty's core provision creates, for the first time, a mandatory international obligation for patent applicants to disclose the country of origin or source of the genetic resources and/or associated Traditional Knowledge used in a claimed invention. This simple yet profound requirement fundamentally alters the dynamics of the global patent system, enhancing transparency and providing a critical tool to monitor and curb the misappropriation that has long plagued custodians of traditional knowledge. While we acknowledge that the treaty establishes a floor, not a ceiling, for protection—setting minimum standards and leaving critical issues such as Digital Sequence Information and derivatives subject to future review—it is precisely this structure that safeguards national sovereignty and empowers further action. The treaty unequivocally preserves the right of contracting parties to implement broader and more stringent disclosure requirements and sanctions within their own legal systems, as provided for under Indian law through instruments like The Biological Diversity Act, 2002. This framework thus validates and reinforces our robust domestic legislative and institutional mechanisms, including the pivotal role of the National Biodiversity Authority in regulating access and ensuring equitable benefit-sharing. The new international disclosure mandate will work in a mutually supportive manner with the Convention on Biological Diversity and its Nagoya Protocol, creating a coherent global governance regime where the intellectual property system actively supports, rather than undermines, access and benefit-sharing obligations. Looking forward, this new legal landscape will catalyze a more ethical and sustainable paradigm for innovation. The era of plausible deniability for pharmaceutical and biotechnology firms is over. The legal certainty provided by the treaty will foster authentic, good-faith partnerships based on Prior Informed Consent and Mutually Agreed Terms with the communities who are the true custodians of this knowledge. Furthermore, India continues to lead by example. The recent decision to widen access to the Traditional Knowledge Digital Library database for researchers, innovators, and businesses signals a strategic evolution from purely defensive protection to the positive promotion of innovation based on our rich heritage. We are not merely locking our

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knowledge away; we are creating pathways for its legitimate and equitable utilization, ensuring that it can address unmet national and global needs while generating benefits that flow back to its source communities. In finality, the protection of Traditional Medicinal Knowledge has been elevated from a peripheral concern to a central tenet of the international intellectual property discourse. This transformation was not incidental; it was the result of a deliberate, sustained, and principled defense of our cultural and intellectual sovereignty. The journey from challenging the turmeric patent to championing a global treaty is a testament to the resilience of our position and the unassailable logic of our cause. We have successfully defended our collective heritage against systemic vulnerabilities and, in doing so, have helped forge a more balanced, transparent, and just future for global innovation—one that finally recognizes and respects the profound contributions of traditional knowledge and its rightful holders.

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HARMONISING PROCEDURAL FAIRNESS AND EFFICIENCY: STRIKING A BALANCE IN ARBITRATION

*Prince Kumar Singh**

ABSTRACT

Arbitration has become a preferred means of dispute resolution in commercial disputes, commended for its flexibility, party autonomy and potential for swift resolution of disputes. However, this has largely been matched by the need to ensure procedural fairness, which can lead to increased cost, time, and complexity. Procedural due process mandates that all legal actions be fair and that each party engaged should be given notice of the arbitral proceedings and be treated equally before the legally constituted arbitral tribunal. Though in Arbitration the due process requirements are of great importance, where are their limitations? Can the equal treatment and procedural fairness occurs at the cost of arbitral efficiency? How far can this be stretched? The parties in arbitration are often worried about the delays, increased costs and extra "judicialization of the arbitral process" making it almost formal and parallel to litigation. The tension between procedural fairness and efficiency has emerged as a hallmark challenge for arbitration in modern contexts. Overindulgence in due process—commonly referred as "due process paranoia" can lead tribunals to over-accommodate procedures in anticipation of the validity of their awards, while overindulgence in efficiency can undermine the right of parties to a fair hearing. This article offers a critical evaluation of the underlying tension between these twin goals by examining institutional rules, national arbitration law, and related case law. Through comparative examination of India, the United Kingdom, Singapore, and international soft law regimes, the article explains how arbitral tribunals, institutions, and parties reconcile these competing demands. The article espouses a principled approach based on proportionality, procedural flexibility, and contextually determined discretion. It concludes by offering practical recommendations designed to harmonize fairness and efficiency, and thereby optimize the legitimacy and utility of arbitration as a means of resolving disputes.

I. Introduction

Arbitration has become the focal point of contemporary dispute resolution, both domestically and globally, in commercial contexts. Once historically an afterthought to state-backed court systems, arbitration has, in the last few decades, undergone a dramatic conversion into the preferred choice—if not the default choice—of resolving sophisticated, high-value, and cross-border disputes. Not coincidental, this transformation indicates a broad shift in international commercial and legal thinking toward mechanisms that emphasize efficiency,

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party autonomy, and procedural flexibility without compromising the legitimacy of the arbitral award.

Its roots can be traced back to the mid-20th century; however, its sheer expansion has been specially encouraged since the 1980s. One of the key driving factors behind this expansion has been the international legal framework that guarantees the recognition and enforcement of arbitral awards. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is widely recognized as one of the most successful private international law treaties with over 170 signatories[1]. The treaty facilitates the enforcement of arbitral awards across the globe with minimal assistance from courts. This is a convenient and dependable alternative to the conventional lawsuits.

The 1985 UNCITRAL Model Law on International Commercial Arbitration is significant.[2] It has served as a model for the law of arbitration in numerous states such as India, Singapore, Canada, and Australia. The Model Law renders the law of arbitration more standardized and predictable, thus improving the terms of international business under the law.

The commercial rationale for the spread of arbitration is also compelling. In a globalized world of global commerce, joint ventures, and multinational enterprise, parties increasingly do not want to risk their assets before foreign or potentially biased foreign tribunals. Arbitration offers a neutral forum where parties can select not only the seat and rules of arbitral procedure but also the governing law to be applied and the arbitrators. Such a degree of control is attractive to sophisticated commercial operators who prefer control, certainty, and confidentiality in the resolution of disputes.

In addition, arbitration will often be a more effective substitute for litigation, if only hypothetically. Institutional rules will often have streamlined procedures, flexible schedules, and the possibility of expedited procedures. Unlike litigation, arbitration will often be private, thus protecting business relationships and keeping sensitive commercial information out of public eyes.

[1] United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, adopted 10 June 1958, entered into force 7 June 1959, available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards

[2] United Nations Commission on International Trade Law (UNCITRAL), *Model Law on International Commercial Arbitration*, adopted on 21 June 1985, with amendments as adopted in 2006, available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

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In highly technical, high-stakes sectors such as construction, energy, intellectual property, and international finance, arbitration enables the use of specialist arbitrators who have expertise in the relevant areas, a quality that is commonly lacking in traditional court systems. Such an expert-input-based process is not merely more capable of dealing with difficult legal and factual issues but also renders the process more efficient.

In India, the arbitration process has seen a sea change, especially after the Arbitration and Conciliation Act of 1996 was enacted. Though the early stages of adoption were tainted by judicial interference and procedural lags, the subsequent amendments that occurred, most significantly in 2015, 2019 as well as 2021, tried to bring Indian practices in arbitration in sync with global benchmarks. Some of the significant amendments are the imposition of timelines for the delivery of arbitral awards, the introduction of expedited proceedings, and limiting judicial interference.

The Indian judiciary has played a two-edged role in shaping the arbitration landscape, sometimes championing it with a pro-arbitral bias, sometimes leading through unpredictable or interventionist judgments. Despite such volatility, one of the major trends spotted in recent years has been the trend of judicial restraint coupled with an inclination towards arbitration, as seen through the actions of the Indian Supreme Court. Efforts like the New Delhi International Arbitration Centre (NDIAC) and the setting up of arbitration centers at Mumbai and Hyderabad reflect India's desire to become a leading international arbitration hub.

Among the institutional environments, leading international arbitration centers such as the International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), Hong Kong International Arbitration Centre (HKIAC), and American Arbitration Association (AAA) have served as key factors in making the arbitration process professional and effective. These centers offer sophisticated procedural rules, administrative facilities, and administration of panels of arbitrators, thus greatly improving the credibility and effectiveness of the arbitration process. Most organizations have begun employing rapid ways, emergency arbitration procedures, and innovative concepts (such as virtual hearings and electronic filing systems) to maintain pace with the mounting demand for quickness and lower costs. These new concepts have transformed arbitration into a contemporary, diverse, and common process.

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While arbitration in itself remains in high esteem, it is replete with contradictions inherent in it. The very essence of the arbitration process is an inherent dialectical contradiction: the need to generate outcomes that are simultaneously procedurally equitable and protective of the rights of all concerned parties, and yet simultaneously moving with alacrity and economically efficient resolution of disputes. These two objectives are not usually compatible. A highly conciliatory process with a focus on speed can sacrifice fairness if parties are not afforded proper time to be heard. Conversely, a highly complex methodology based on sophisticated procedural protection may render arbitration less effective and more expensive—thereby defeating the very purpose of choosing arbitration in the first place.

The dialectical tension has intensified over the period of "due process paranoia." Here, arbitrators, sensitive to the risk of challenge to the legitimacy of their awards, can be inclined to over-accommodate by allowing procedural delay or tolerating an over-superfluity of submissions on the part of the parties. Conversely, in the meantime, the institutional imperative to enhanced efficiency in procedural terms—demonstrated by steps such as summary dismissal and restrictions on document production—has raised questions as to whether the pursuit of efficiency is at the expense of procedural fairness. This article aims to examine the intense tension underlying this phenomenon and how different legal regimes, institutional procedures, and arbitration practices strive to balance an equilibrium between fairness and efficiency. This research endeavor aims to contribute to the current scholarly and practical debate regarding the traits of an ideal arbitration process both at the national and international levels.

II. The Dialectical Relationship: Inherent Tension or Constructive Coexistence?

Concurrent arbitral practice is driven by two underlying imperatives: the imperative of procedural justice and the imperative of effective resolution of disputes. Both imperatives are essential to the legitimacy of arbitration; but both are in tension with each other in the practice. The drive for efficiency, in the interests of saving costs, time, and resources, becomes the over-riding commercial goal, especially in high-value financial stakes or multi-jurisdictional cases. But this goal cannot be at the cost of procedural justice, which not only maintains the integrity of the arbitral process but is also essential to the enforceability of arbitral awards under international as well as national law.

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The arbitral process doctrine of procedural fairness is characterized by a code of standard principles: fairness in treatment of parties, right to be heard, and impartiality and independence of the arbitral tribunal. These principles have been well articulated in the UNCITRAL Model Law on International Commercial Arbitration, 1985, which mandates that all parties must be given equal opportunity to present their cases on a fair basis and must be treated equally before the tribunal.[3] The Indian law on arbitration structure follows these principles, as stipulated under Section 18 of the Arbitration and Conciliation Act, 1996, which enshrines the doctrine of party equality and right to fair hearing.[4] Fairness thus is just not a moral obligation or a mere hope but a legal mandate, violation of which could lead to the award of an arbitral award to be challenged or to its non-enforceability.[5] One of the most important interpretational issues is the tension between the procedural fairness and the autonomy of the parties. While parties have the right to devise procedures as mandated by Section 19 of the Act, tribunals cannot compel party-agreed procedures that deviate from principles of fundamental fairness.[6] However, how far this is limited is arguable, particularly while balancing procedural innovations (such as summary dismissal and limited disclosure) with traditional ideas of fairness.

The solution lies in the appreciation that party autonomy is not unfettered but limited by the procedural legitimacy of the arbitral process. The arbitrator hence plays a double role: to facilitate and supervise—ensuring autonomy is being exercised within equitable boundaries, and protecting that efficiency should not trade-off against legitimacy.

But stressing fairness can lead to over concern with procedure. Arbitrators attuned to the possibility of review that awards are subject to in enforcement or annulment procedures may be tempted to overly procedural solutions to avoid accusations of partiality or failure to respect due process. This state of affairs, commonly called "due process paranoia," contributes to tribunals allowing broad discovery, lengthy hearings, or repeated cycles of submissions, each taking away from overall efficiency. The consequences are serious: increased cost, procedural delays, and ultimately the loss of arbitration's benefit as a swift and inexpensive alternative to litigation.

[3] UNCITRAL, *Model Law on International Commercial Arbitration*, Art. 18, U.N. Doc. A/40/17 (1985).
[4] Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI), (2019) 15 SCC 131.
[5] The Arbitration and Conciliation Act, 1996, s. 18, No. 26 of 1996, Acts of Parliament, 1996 (India).
[6] The Arbitration and Conciliation Act, 1996, s. 19, No. 26 of 1996, Acts of Parliament, 1996 (India).

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Efficiency in arbitration refers to the ability of the arbitral process to resolve disputes promptly, economically, and with the minimum procedural inefficiency.[7] This includes the prompt appointment of arbitrators, the avoidance of unnecessary procedural formalities, the speedy resolution of issues of substance, and the conduct of effective hearings. Arbitration is procedurally more flexible than litigation, but the flexibility has to be exercised with intent to prevent any risk of inefficiency.

Efficiency tends to be multi-faceted, i.e.:

i. Temporal efficiency– minimizing unwarranted postponement in adjudication
ii. Economic efficiency – reducing the costs to the parties and to the tribunal
iii. Procedural efficiency– doing away with superfluous or redundant procedural steps.[8]

Efficiency is not desirable—it is essential to ensuring that people have faith in arbitration as an effective mechanism for resolving disputes. When arbitration is as slow and costly as litigation, its value proposition is greatly reduced.

Efficiency, although not significantly based on legislative texts, is highly appreciated in institutions' regulation and reform. Institutions like the Singapore International Arbitration Centre (SIAC) and the International Chamber of Commerce (ICC) have instituted expedited procedures and summary dismissal to reduce delays.[9] Such procedural innovations try to achieve proportionality and expediency and, simultaneously, guarantee fairness; however, their application in practice is generally left to the tribunal's discretion. The 2015 and 2019 amendments to India's Arbitration and Conciliation Act also tried to enhance procedural discipline by inserting strict time frames for the rendering of awards, especially in the case of domestic arbitrations.[10] These legislative amendments, however, have raised issues about whether enshrining efficiency through statutes undermines arbitral independence and fairness.

The inherent challenge lies in the binary thinking of fairness and efficiency as mutually exclusive. In practice, the two factors have to be balanced and not conceived as competitive. A biased process is necessarily inefficient since it stands to be overturned or not applied and

[7] G. Born, *International Commercial Arbitration*, 3rd ed., Vol. I (Kluwer Law International, 2021), pp. 230–233
[8] T. Cook and A. Garcia, *International Arbitration: A Practical Guide* (Globe Law and Business, 2014), pp. 147–149.
[9] Singapore International Arbitration Centre (SIAC) Rules, 2016, r. 5 (Expedited Procedure); International Chamber of Commerce (ICC) Arbitration Rules, 2021, art. 30.
[10] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016, s. 29A; The Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019.

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hence defeats the purpose of settlement. Conversely, an overly complex process can satisfy all the technical requirements of fairness and fail to satisfy the commercial goals of the parties. Effective arbitration requires a high-level understanding of fairness that is contextual, proportional, and detached from procedural idealism. Arbitral tribunals are required to use discretion circumspectly, based on the particular facts, expectations of the parties, and the nature of the dispute to achieve a balance result to the context. Institutional rules and judicial precedent can guide them, but the ultimate task is to leave it to the tribunal to devise proceedings which are equitable, but commercially reasonable. As the next section illustrates, legal systems and arbitral institutions have evolved various mechanisms to facilitate this exercise in balancing, but unevenly.

III. Institutional and Legal Approaches to Balancing Fairness and Efficiency

This tension between procedural fairness and operational efficiency has been keenly noted by arbitral institutions and legal systems in general. These institutions and legal systems have therefore pursued varied methods that seek to balance these two principles without changing the essential nature of arbitration as a party-centered process that is flexible. These efforts have been made through the form of institutional rules, soft law recommendations, and legislative reforms—each seeking to provide arbitrators with tools to guarantee fairness without compromising procedural efficiency.

Conceptually, procedural fairness and efficiency are inversely related to each other—transitioning to improve one will seem to undermine the other. For example, extensive cross-examination or large document discovery may improve fairness but may cause delay and added cost. On the other hand, keeping strictly to calendars or stopping procedural motions might speed up the process, but at the risk of possibly unfair processes.[11]

But this two-stage view is becoming more and more seen as too simplistic. Scholars like Jan Paulsson and Emmanuel Gaillard have contended that fairness and efficiency are compatible, but they are mutually exclusive.[12] A fair process, when it is done correctly,

[11] Gary Born, *International Arbitration and Forum Selection Agreements*, 6th ed. (Kluwer Law International), p. 57.

[12] J. Paulsson, "Standards of Procedural Fairness in International Arbitration," *Arbitration International*, Vol. 22, No. 3 (2006), pp. 337–346.

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increases efficiency by reducing opportunities for challenges and conflicts. On the other hand, an equally efficient process increases fairness by being cheaper and quicker to attain.

Arbitral institutions are earnestly striving towards achieving fair and efficient results. The International Chamber of Commerce (ICC) has simplified procedures by implementing case management meetings, filing timetables, and determining preliminary steps.[13] The ICC Rules of 2021 enable tribunals to adopt procedures commensurate with the significance and complexity of every case, while making hearings impartial and utilizing resources efficiently.[14] Likewise, the London Court of International Arbitration (LCIA) facilitates the early resolution of disputes by its 2020 Rules and encourages arbitrators to utilize time and costs wisely.[15]

Concurrently, demand for faster processes grows. SIAC, HKIAC, and ICC are where one can opt for faster decisions, minimize what they need to bring, and utilize one arbitrator for some cases.[16] These processes are for less complicated cases, sacrificing elaborate steps for quicker results. They don't, though, deprive the parties of rights since they can opt-out or revert to a more elaborate process if justice requires. Generally, these systems strike a good balance between fairness and efficiency.

In addition to binding formal rules, soft law instruments are useful guidelines. The IBA Rules on the Taking of Evidence in International Arbitration (2020) are not legally binding, yet most utilize them to make evidence processes reasonable and just.[17] The rules permit arbitral tribunals to restrict the quantity of documents and witness statements, yet also ensure it is possible for both sides to present their case reasonably. In the same way, the UNCITRAL Notes on Organizing Arbitral Proceedings (2016) provide efficient and flexible case management, with a focus on adjusting procedural guidelines to meet the specific needs of each case without compromising key fairness principles.[18]

Different jurisdictions have enacted different laws catering their own demands and aspirations regarding the arbitration in their country. India has decidedly gone towards strict legislation. The 2015 amendment to the Arbitration and Conciliation Act included a twelve-

[13] ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, 2021.
[14] ICC Arbitration Rules 2021, Art. 22(1).
[15] London Court of International Arbitration (LCIA) Arbitration Rules, 2020, art. 14.6.
[16] SIAC Rules, 2016, r. 5; Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, 2018, sch. 4; Stockholm Chamber of Commerce (SCC) Arbitration Rules, 2017, Appendix II.
[17] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 2020.
[18] UNCITRAL, *Notes on Organizing Arbitral Proceedings*, 2016, para. 7.

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month limit for domestic arbitrations under Section 29A, with a six-month extension at the consent of both the parties.[19] Although this regulation was meant to assist, it has been criticized for being overly strict in intricate cases, where strict deadlines can damage equity[20]. The 2019 amendment attempted to rectify this by permitting international commercial arbitration to not adhere to the established time limits if they wish so, understanding the necessity for flexibility based on circumstances.[21]

Singapore and Switzerland have adopted a beneficial approach. Rather than imposing rigid deadlines, they provide tribunals with room for maneuver in adhering to rudimentary principles of fairness. For instance, the Singapore International Arbitration Act does not establish numerous detailed rules, inviting tribunals to be prompt and equitable.[22] This minimalist law demonstrates reliance on the abilities and expertise of arbitrators and parties, with court intervention restricted to particular grounds of challenge or invalidation.

National courts guarantee fairness and efficiency through the manner in which they enforce the law. In Associate Builders v. DDA, the Indian Supreme Court stated that violation of the rules of fairness is contrary to public policy but cautioned against interference by courts unless there has been real prejudice.[23] This line of jurisprudence is an evolving recognition that not every procedural irregularity indicates a lack of fairness warranting intervention by the courts. The Court emphasized the point that the notion of fair hearing does not include unlimited opportunities to advance one's case and that the power of the arbitrator to control the procedure must be preserved, subject to its not causing a miscarriage of justice.

In *Ssangyong Engineering & Construction Co. Ltd*. v. *NHAI*, the Court reaffirmed that procedural fairness is an indispensable element of the public policy ground, but the inquiry should extend only to cases of "patent illegality" apparent within the award itself or cases of a violation of natural justice.[24] In this case the tribunal has unilaterally amended the basis of the contract in the award under consideration, robbing the claimant of an opportunity to react—this constituted a violation of natural justice making annulment apt. But the ruling also

[19] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A.
[20] B. N. Srikrishna, "Institutional Arbitration in India: A Way Forward," *Indian Journal of Arbitration Law*, Vol. 5, No. 2 (2016), pp. 1–9.
[21] The Arbitration and Conciliation (Amendment) Act, 2019, s. 29A(1), proviso.
[22] Singapore International Arbitration Act (Cap. 143A, 2002 Rev Ed.), s. 12.
[23] *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49.
[24] *Ssangyong Engineering & Construction Co. Ltd. v.* National Highways Authority of India, (2019) 15 SCC 131.

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enunciated an express restraint, underscoring that courts should refrain from stepping into the review of merits or reconsideration of evidence under the guise of ensuring fairness.[25]

A similar doctrine was laid down by the Delhi High Court in the case of NTPC v. M/s Voith Hydro JV, where the Court held that arbitral tribunals are not required to grant an open-ended or unlimited hearing and are privileged to place some limits on cross-examination or submissions, if such limits are proportionate to the needs of the case.[26] The decision emphasized that efficiency should never be set against fairness and believed that tribunals are best equipped to rationalize proceedings unless deviation results in evident prejudice.

Globally, courts have taken a restrictive approach when hearing allegations of due process violations. In Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd. (UK), the court declined to set aside the award based solely on one party's assertion that the tribunal would not allow further rebuttal, stating that the "right to be heard" does not encompass unlimited access to argument.[27] Likewise, in Guangdong Longyuan Construction Co. Ltd. v. CDE, the Singapore High Court reiterated the position that the rule of fairness must be considered in its specific context, and arbitral discretion is typically regarded as valid unless there is clear evidence of unfairness.[28] These rulings reflect the judiciary's bias in favor of the procedural autonomy of tribunals and contextual as opposed to rigid interpretation of fairness.

These developments point to a changing legal consensus that fairness and efficiency are not necessarily conflicting values but have to be judiciously balanced. The courts have been willing to affirm procedural guidelines created by tribunals and have only interfered in cases of patent miscarriage of justice. The guiding principle that can be ascertained from case law is not whether both sides had all opportunities presented to them, but whether both sides were presented with a fair opportunity to place their case on the basis of the original expectations set out. Previously, institutions and legal traditions have moved away from the simplistic binary opposition to one where the need to balance equity and efficiency in arbitration proceedings has been better understood. The proportionality thesis has emerged as the signature of current institutional thinking with legislative and judicial evolution being centered on greater deference to the discretions exercised by arbitral tribunals. Yet, this quest for balance is a continuous and

[25] Ibid., at para 42
[26] *NTPC Ltd. v. Voith Hydro JV*, 2023 SCC OnLine Del 2130.
[27] *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd.*, [1985] 2 EGLR 14 (QB).
[28] *Guangdong Longyuan Construction Co. Ltd. v. CDE*, [2020] SGHC 96.

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never-ending endeavor as arbitration continues to evolve to counter evolving expectations of parties and the necessities of international dispute settlement.

IV. Case Study of India: Legislative Reforms, Judicial Trends, and Practical Challenges

India's arbitration process is where to look to see how fairness and efficiency are changing. In the past decade, new laws and court rulings have sought to ensure that arbitration is a dependable process to settle disputes. There are, however, practical issues with change implementation, along with ongoing issues with formal arbitration, that hinder the proper balance between efficiency and fairness from being struck.

The law reform process started on a positive note with the Arbitration and Conciliation (Amendment) Act, 2015.[29] The bill aimed to minimize court interference, place time limits, and provide the parties with more autonomy. The most significant reform was the addition of a new Section 29A, which gave a twelve-month time frame to finish local arbitrations. This measure was implemented to put an end to the long delays in arbitration, which have been a problem in India for decades.[30] But its extension to all arbitrations, irrespective of their complexity, soon came under attack. Where matters are intricate, justice takes a long time to read documents, opinion of experts, and cautious deliberation, which cannot be achieved within the time limit granted.[31]

Noting this tension, the 2019 Amendment exempted international commercial arbitration from Section 29A and provided tribunals with more latitude in cross-border arbitration. Meanwhile, the amendment shifted the point of departure of the timeline from the constitution of the tribunal to the completion of pleadings, providing more scope for maneuver. These amendments imply that legislature recognized that procedural efficiency must be calibrated according to circumstances, not applied uniformly to every case.

However, legislative skill has not always been accompanied by institutional capability. The failure to develop a strong institutional ecosystem of arbitral institutions in India, in spite of legislative promulgation of institution-based arbitration by the Arbitration Council of India

[29] The Arbitration and Conciliation (Amendment) Act, 2015, Statement of Objects and Reasons.
[30] The Arbitration and Conciliation Act, 1996, s. 29A, No. 26 of 1996, Acts of Parliament, 1996 (India).
[31] P. Tiwari, "The One-Year Deadline: Issues and Challenges," *Indian Journal of Arbitration Law*, Vol. 6, No. 1 (2017), pp. 34–42.

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(ACI) under the 2019 Act, has stalled procedural innovation.[32] The Council is still non-operative, and ad hoc arbitration remains the default.[33] Under such circumstances, a lack of professional case management and codified procedural rules usually results in inconsistency and inefficiency, even when tribunals intend to be impartial.

Judicial reactions to this dilemma have differed significantly. Indian judiciary bodies have progressively acknowledged that procedural equity is not synonymous with procedural extremism. In the case of Larsen and Toubro Ltd. v. MMRDA, the Bombay High Court noted that the obligation to provide a "fair opportunity" does not require the acceptance of all procedural requests made by the parties.[34] Likewise, in Delhi Metro Rail Corporation Ltd. v. M/s Telecommunication Consultants India Ltd., the Delhi High Court asserted that rigid compliance with timelines must not take precedence over the principles of natural justice, particularly when delays are not attributable to the parties involved.[35] These judgments reinforce a tenet of proportionality within procedural frameworks—ensuring that fairness does not serve as an excuse for delay.

But the judiciary has stepped in where pursuit of efficiency has intruded upon fairness. In the case of Project Director, National Highways v. M. Hakeem, the Supreme Court struck down an arbitral award on the ground that the tribunal had awarded amounts greater than the contract stipulated, holding that such behavior was against the public policy requirement.[36] Although the main concern of the case was with jurisdictional excess, the case indirectly established the doctrine that procedural expediencies—where they intrude upon substantive rights—cannot be justified under the cloak of efficiency.

Practical challenges persist at the enforcement stage. The habitual appeal to "public policy" and "patent illegality", section 34 grounds of setting aside of awards is an expression of a mix of suspicion of arbitral awards and a persistent judicial predisposition against reviewing substantive merits in the service of maintaining equity.[37] While judicial attitude has relaxed in recent years, it is a barrier to procedural efficiency because tribunals anticipate more

[32] The Arbitration and Conciliation Act, 1996, s. 43B, No. 26 of 1996, Acts of Parliament, 1996 (India).
[33] A. Singh, "Institutional Arbitration in India: Myth or Reality?", *NLS Business Law Review*, Vol. 6 (2020), pp. 15–24.
[34] *Larsen and Toubro Ltd. v. MMRDA*, 2016 SCC OnLine Bom 5806.
[35] *Delhi Metro Rail Corporation Ltd. v. Telecommunication Consultants India Ltd.*, 2022 SCC OnLine Del 2469.
[36] *Project Director, National Highways v. M. Hakeem*, (2021) 9 SCC 1.

[37] *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263; *Ssangyong Engineering*, supra n. 6.

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judicial scrutiny and therefore turn to cautious, time-consuming procedure—a phenomenon already recognized in the domain of "due process paranoia."

In addition, their interaction with various regulatory frameworks has given rise to an increase in procedural complications. For instance, government contract arbitrations are usually subjected to concurrent proceedings by the Comptroller and Auditor General (CAG), Vigilance Commission, or departmental inquiries, all of which prolong arbitral proceedings and cause uncertainty to private parties.[38] Such inherent issues reduce the effective implementation of both fairness and efficiency unless met with comprehensive policy reforms.

Parties often seek successive adjournments or make frivolous applications under arbitration on the pretext of seeking procedural rights in order to have a fair hearing.[39] For example, in DMRC v. Delhi Airport Metro Express Pvt. Ltd.,[40] the Delhi High Court noted that Indian arbitration participants have been known to employ procedural tactics as a subtle forum shopping and to create delay. Some parties willfully make enormous document demands or disclosures against their counterparts to exhaust their time and resources. Though fairness demands reasonable access to evidence, very broad discovery tends to lead to less efficiency.[41]

Parties have historically objected to appointment of arbitrators or jurisdiction of the tribunal at more than one stage—pre-arbitration, arbitration, and post-award under Section 34 or 37 and thus turn arbitration into a drawn-out litigation-type exercise. Courts have increasingly become sensitized to such tactics. In National Highways Authority of India v. Gayatri Projects,[42] the court cautioned against the "weaponization of due process rights" to forestall the efficiency requirements under Section 29A.

Not all arbitral institutions are so well-situated to impose effective yet fair proceedings. The absence of uniform standards and differences in procedural rigour among institutions exacerbate the problem. Many Indian arbitral centres lack case managers, procedural calendars, and review mechanisms. Their absence limits their ability to advise tribunals on timeliness and procedural balance.[43] While leading institutions like SIAC or ICC have provision for summary

[38] S. Narayan, "Public Sector Contracts and Arbitration in India," *Economic and Political Weekly*, Vol. 54, No. 7 (2019), pp. 10–13.
[39] Born, G., *International Commercial Arbitration*, 3rd ed. (2021), p. 1347.
[40] *Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd.*, (2021) SCC OnLine Del 3031.
[41] Paulsson, J., "Fairness and Efficiency: Friends or Foes?" in *Arbitration: The Next Fifty Years* (ICCA Congress Series, 2018), pp. 57–75.
[42] *National Highways Authority of India v. Gayatri Projects*, 2022 SCC OnLine Del 3122.
[43] Malhotra, O.P., *Law and Practice of Arbitration and Conciliation*, 7th ed. (2020), Vol. 1, pp. 451–456.

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procedures, video hearings, and procedural calendars, smaller or regional institutions have archaic or skeletal rules. This results in inconsistency and unpredictability in procedural design. Unlike international institutions, Indian centres hardly impose real cost sanctions for party misbehaviour or procedural abuse, reducing deterrence for delay tactics. The Law Commission of India, in its 246th Report (2014), pointed out that India's arbitration infrastructure must be urgently standardised and professionalised to deliver efficient and fair proceedings.[44] Progress, however, has been piecemeal.

Though amendments to laws (such as Sections 5 and 34 of the Arbitration and Conciliation Act) seek to limit court intervention, judicial interference is a major issue. Parties approach courts at the pre-arbitration or post-award stage, raising grounds of fairness like non-hearing or bias of the arbitrator. Courts averse to being stigmatised as unfair at times allow such challenges freely, at the expense of efficiency. Indian courts vary considerably on matters such issues as limitation under Section 29A, ambit of natural justice violations, and how to determine a "patently illegal" award.[45] Such variation induces uncertainty, which gives rise to over-cautiousness, a hindrance to efficiency. Even arbitration being final and binding, Section 34 or 37 challenges are used by parties to re-agitate facts, significantly prolonging the life cycle of the dispute. In Hindustan Construction Co. Ltd. v. Union of India,[46] the Supreme Court recognised the adverse effect of excessive post-award litigation, implying that arbitral autonomy should be maintained to ensure efficiency.

The COVID-19 pandemic necessitated immediate procedural innovations, such as remote hearings, electronic filing, and asynchronous submissions. While efficient, these innovations also gave rise to concerns about fairness. Not every witness, or every party, possessed stable internet, secure networks, or private rooms for remote participation. Virtual hearings at times reduced effectiveness of witness examination and cross-examination, straining procedural integrity. Parties inexperienced in e-discovery or virtual platforms carried higher procedural burdens, especially in document-intensive or technical cases. Post-pandemic, hybrid models are more necessary to ensure efficiency gains without compromising procedural dignity and access.

[44] Law Commission of India, *246th Report on Amendments to the Arbitration and Conciliation Act, 1996* (2014), Paras 10–12.
[45] See contrasting rulings in *Ssangyong Engineering v. NHAI*, (2019) 15 SCC 131 and *South East Asia Marine Engg. v. Oil India Ltd.*, (2020) 5 SCC 164.
[46] *Hindustan Construction Co. Ltd. v. Union of India*, (2020) 17 SCC 324.

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The Indian experience underlines the difficulty of balancing procedural justice with efficiency through legislative reforms only. While the reforms that have put in place good mechanisms and institutionalized transparency in standards, residual institutional and infrastructure shortcomings—coupled with an unresponsive judiciary—still hinder concrete advancement. The test of the future lies in overcoming strict rule-based regulation to include capacity-building exercises that can make tribunals as well as litigants adapt arbitral procedures that are contextually suitable, equitable, and efficient.

V. Comparative Insights and International Jurisdictions and Their Best Practices

The balance between fairness and efficiency is not an Indian issue exclusively. A comparison shows that all the major seats of arbitration and international institutions have developed methods—official and unofficial—to achieve a good balance. The methods differ in the extent to which they are used and applied, but all agree that freedom of procedure has to be used discretely and wisely. This section deals with some chosen locations and international systems that achieve a good balance of fairness and efficiency.

The UNCITRAL Model Law on International Commercial Arbitration has been adopted by over 85 nations, including India. It provides general rules for the procedure while being respectful of the parties' choices and giving the tribunal freedom to handle the case.[47] Article 18 demands equal treatment of all parties and that everyone is given an equal opportunity to present themselves—this is regarded as an essential element of fair procedures.[48] Tribunals are not, however, obligated to provide absolute freedom in the way they handle the procedures. The Explanatory Note by the UNCITRAL Secretariat asserts that the jurisdiction of the tribunal to control time, hearings, and submissions is legitimate, with the proviso that the chance to be heard is substantial and reasonable.[49]

The United Kingdom, not being a Model Law follower, is now a leading arbitration seat, largely because of the Arbitration Act of 1996 that grants significant discretion to arbitral tribunals.[50] Under Section 33 of the Act, arbitrators are to apply procedures that reduce

[47] UNCITRAL Model Law on International Commercial Arbitration (1985), as amended in 2006.
[48] Ibid., Art. 18.
[49] UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the Model Law, para 7.
[50] Arbitration Act, 1996 (UK).

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unnecessary expense and delay and that are fair and just in treatment of all parties.[51] English courts, generally, are inclined to respect the administration of arbitral tribunals. In Primera Maritime v. Jiangsu Eastern Heavy Industry, the Court held that the right to be heard does not imply an absolute right to produce evidence or extend proceedings, thus reaffirming that procedural efficiency does not have to come at the cost of fairness.[52]

Singapore, often cited as a model of arbitration efficiency, incorporates the UNCITRAL Model Law through the International Arbitration Act, complemented by robust institutional rules and judicial support.[53] In China Machine New Energy Corp v. Jaguar Energy Guatemala LLC, the Singapore Court of Appeal reaffirmed the need for balance by holding that procedural fairness must not be assessed in a vacuum; efficiency measures such as limited cross-examination were upheld as long as they were disclosed in advance and applied uniformly.[54] The Court emphasized that tribunals are not bound to "tick every procedural box" but must ensure that parties have a real opportunity to present their case.[55]

France, which follows a civil law tradition, provides perhaps the most arbitration-friendly judicial stance. The French Code of Civil Procedure allows minimal court intervention and strongly favors the finality of awards.[56] In Fouchard Gaillard Goldman on International Commercial Arbitration, it is noted that French courts presume procedural fairness unless there is manifest evidence to the contrary.[57] The Paris Court of Appeal has consistently held that an arbitral award will only be annulled if the denial of due process had a material effect on the outcome.[58] This threshold-based approach avoids tactical challenges aimed merely at prolonging enforcement or setting aside procedures.

The United States, governed by the Federal Arbitration Act (FAA), prioritizes efficiency, often at the cost of expansive procedural safeguards.[59] In Hall Street Associates v. Mattel Inc., the U.S. Supreme Court limited judicial review of awards, affirming that parties could not contractually expand grounds for setting aside an award beyond those provided in

[51] Ibid., Section 33(1).
[52] *Primera Maritime v. Jiangsu Eastern Heavy Industry Co. Ltd.*, [2013] EWHC 3066 (Comm).
[53] International Arbitration Act (Cap. 143A, Rev. Ed. 2002) (Singapore).
[54] *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC*, [2020] SGCA 12.
[55] Ibid., at para 95.
[56] French Code of Civil Procedure, Book IV.
[57] Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (Kluwer Law International, 1999), p. 1041.
[58] *Paris Court of Appeal, Judgment of 4 Nov. 2014*, Revue de l'Arbitrage 2015
[59] Federal Arbitration Act, 9 U.S.C. 1–16.

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the FAA.[60] Although U.S. courts occasionally intervene for due process violations, the bar remains high. In Tempo Shain Corp. v. Bertek Inc., the Second Circuit found a due process violation where the arbitrator summarily excluded expert testimony central to the claimant's case.[61] However, such cases are rare, and the general trend favors arbitral discretion and time-bound proceedings.

Across these jurisdictions, institutional rules serve as critical procedural templates. The ICC, LCIA, SIAC, and HKIAC have incorporated best practices such as:

i. Procedural timetables customized at an early stage,
ii. Expedited procedures with opt-in or opt-out clauses,
iii. Page limits, strict deadlines, and limits on witness/expert testimony,
iv. Cost penalties for dilatory tactics,
v. Summary dismissal procedures for manifestly unmeritorious claims.[62]

Such innovations demonstrate that procedural fairness can be safeguarded within a rigorously managed procedural framework. The focus has shifted from formal equality to functional fairness—ensuring each party has a genuine, not unlimited, opportunity to present their case. This functional approach is more adaptable to modern commercial expectations, where time and cost are critical factors in dispute resolution.

Importantly, these jurisdictions also invest in judicial education and institutional infrastructure to support arbitration. Unlike India, where ad hoc proceedings remain dominant and institutional oversight is weak, advanced jurisdictions have fostered ecosystems that support consistent, fair, and efficient arbitration practices.[63]

International best practices reveal that procedural fairness and efficiency are not mutually exclusive but are mutually reinforcing when tribunals are guided by principles of proportionality, transparency, and party equality. Indian arbitration stands to benefit from these global lessons—particularly in encouraging institutional arbitration, training arbitrators in case management, and ensuring judicial minimalism consistent with party autonomy.

[60] *Hall Street Associates v. Mattel Inc.*, 552 U.S. 576 (2008).
[61] *Tempo Shain Corp. v. Bertek Inc.*, 120 F.3d 16 (2d Cir. 1997).
[62] ICC Rules (2021); LCIA Rules (2020); SIAC Rules (2016); HKIAC Rules (2018).
[63] C. Born, *International Commercial Arbitration*, 3rd ed. (Kluwer Law International, 2021), pp. 2189–2195.

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VI. Harmonising Procedural Fairness and Efficiency: Reforms and the Way Forward

In light of the dialectical tension and contemporary challenges examined above, the need for structural, doctrinal, and institutional reforms to better align procedural fairness and efficiency has become imperative. Effective arbitration in the 21st century must preserve the legitimacy conferred by fair process while delivering on the promise of expedited and cost-effective resolution. Reform strategies must, therefore, be layered—encompassing tribunal practice, institutional architecture, legislative design, and judicial restraint.

Reforming Arbitral Practice: Towards Proactive Tribunal Management

Early Issue Framing and Timetabling:

Tribunals should exercise proactive case management from the outset, for example, by deciding on key issues, outlining procedural steps, and allocating time for hearings. This would allow parties to visualize the process flow without allowing last-minute scope creep or delays.[64]

Proportional Procedural Customization:

Procedures may be adapted according to the complexity of the case and dispute at stake. Documentary-only procedures and expedited timelines may be adopted for less complicated claims, for example, and more layered procedures may be saved for complicated ones.[65] A sense of fairness is increased where procedures are proportionate to the dispute.

Discouraging Procedural Abuse through Cost Orders:

Tribunals can use cost allocation more often as a deterrent to procedural abuse. The use of adverse cost sanctions can deter frivolous adjournments, obstructive document tactics, or repetitive objections.[66]

Reasoned Procedural Orders:

[64] LCIA Arbitration Rules, Art. 14.5; ICC Rules, Art. 24.
[65] S. Krishnan, "Tailored Arbitration: Adapting Process to Dispute Complexity," *Indian Journal of Arbitration Law*, Vol. 9, No. 1 (2021), pp. 33–45.
[66] ICC Commission Report on Decision on Costs (2015), pp. 8–12.

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In deciding against procedural motions (e.g., for continuances, further discovery, or cross-examination of experts), tribunals should enter short but reasoned orders. This promotes transparency, enables judicial deference, and reassures parties of procedural fairness.[67]

Enhancing Institutional Design and Standardization

Strengthening Indian Arbitral Institutions:

Indian arbitral centres must upgrade their procedural support mechanisms. This includes appointing experienced case managers, introducing standard procedural checklists, and ensuring regular training of arbitrators.[68]

Unified Model Procedural Framework:

A model procedural code—similar to the IBA Rules—can be developed for domestic arbitration in India, to promote uniformity in discovery, evidence, and timelines. This would reduce ad-hocism and aid less experienced tribunals.

Incentivising Efficient Conduct via Fee Structures:

Arbitral institutions may consider rewarding efficient conduct by arbitrators (e.g., timely award issuance, adherence to timelines) through performance-based honoraria.[69] Likewise, parties could be incentivised to cooperate procedurally through reduced administrative costs.

Digital Infrastructure for Arbitration Management:

Institutions should deploy secure platforms for digital filings, virtual hearings, and collaborative case scheduling. Digital tools reduce delays and enhance participation for all stakeholders.

Legislative and Judicial Reforms

Clarifying "Public Policy" and "Natural Justice" Grounds:

[67] S. Ravindra Bhat, "Procedural Orders and the Role of the Tribunal," *Arbitration Bar Association Lecture Series* (2022).
[68] Law Commission of India, 246th Report (2014), Paras 78–81.
[69] A. Redfern, *Law and Practice of International Commercial Arbitration*, 6th ed., p. 215.

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Courts should adopt a narrow interpretation of Section 34 grounds, especially those based on natural justice or procedural irregularity. As established in Ssangyong Engineering, only patent violations—not mere procedural disagreements—should attract judicial interference.[70]

Standardising Court Timelines under Section 34:

Amendments may be considered to prescribe outer timelines for disposal of Section 34 applications. Delays at the post-award stage render procedural efficiency at the arbitral level meaningless.

Limiting Grounds for Interlocutory Appeals:

Interim applications challenging procedural decisions (e.g., rejection of evidence or jurisdictional orders) should be entertained only in exceptional circumstances, to avoid judicial micromanagement.

Institutionalised Training for Judges Handling Arbitration Matters:

Special arbitration benches in High Courts, staffed by trained judges familiar with arbitral norms and international practice, can ensure a more informed and consistent jurisprudence on fairness and efficiency issues.

Soft Law, Ethics, and Cross-Border Learning

Adoption of International Best Practices:

Indian arbitration stakeholders should draw upon global instruments such as the IBA Rules, the UNCITRAL Notes on Organising Arbitral Proceedings, and the Prague Rules to contextualise and improve domestic practices.[71]

Ethical Standards for Arbitrators and Counsel:

Codes of conduct—such as the 2020 LCIA and ICC guidelines on party representation—should be localised and implemented in India. Ethical behaviour by arbitrators and counsel supports both fairness and procedural economy.

[70] *Ssangyong Engineering and Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131.
[71] UNCITRAL Notes on Organising Arbitral Proceedings (2016); IBA Guidelines on Party Representation (2020).

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Capacity Building and Stakeholder Awareness:

Workshops, certifications, and continuing education for arbitrators, counsel, and parties can spread awareness about the importance of procedural discipline, early cooperation, and realistic expectations.

Collaborative Rule Reforms across Institutions:

Leading arbitral institutions in India (e.g., MCIA, DIAC, ICA) should coordinate on developing common procedural innovations—such as standardised fast-track procedures, model procedural timetables, and cost schedules.

VII. Conclusion

The tension between procedural fairness and efficiency remains at the heart of contemporary debates in international and domestic arbitration. While both principles are essential for the legitimacy and effectiveness of arbitration as a dispute resolution mechanism, their inherent tension can complicate efforts to ensure that arbitration meets the expectations of all parties. In the Indian context, this challenge is particularly acute, as the arbitration ecosystem is still evolving, with significant disparities between arbitral institutions, judicial practices, and stakeholder expectations.

This article has explored the theoretical underpinnings of fairness and efficiency in arbitration and their practical implications. It has also explored the contemporary problems of abuse of process, institutional inconsistency, and judicial interference, which can cause arbitration to fail to work smoothly. These problems are not insurmountable, however measures to reform institutional and procedural elements, combined with a more consistent approach to judicial interpretation, can facilitate the harmonious coexistence of fairness and efficiency in the arbitral process.

The reforms, as advocated in this article—active tribunals' case management, institutional strengthening, legislative reform, judicial restraint's promotion, and the adoption of soft law—are vital to the establishment of a more resilient, credible, and efficient arbitration regime in India. With the adoption of these reforms, Indian arbitration can proceed towards the vision of being an international dispute resolution model, reconciling the demand for justice with the demand for speedy and cost-effective results.

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As arbitration goes forward, it is crucial that stakeholders—such as tribunals, institutions, parties, and courts—be attentive to the need to harmonize procedural protections intended to ensure fairness without clogging the process with inefficiency. Only with a concerted effort to harmonize these principles can enable arbitration to truly fulfill its potential as a fair, efficient, and effective means of resolving disputes.

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AI IN ACADEMIA: REIMAGINING PEDAGOGY, POLICY AND PUBLISHING IN THE DIGITAL AGE

Dr. Naresh Mahipal[*]

ABSTRACT

Artificial Intelligence (AI) has emerged as a transformative force across all sectors, with academia experiencing profound disruptions and opportunities in equal measure. From streamlining administrative tasks to revolutionising pedagogical practices and research methodologies, AI's multifaceted influence warrants a detailed examination. This article critically explores the implications of AI in academic domains such as teaching, learning, research, ethics, academic integrity, and institutional policy. It evaluates the evolving role of educators, the rise of intelligent tutoring systems, algorithmic bias, data privacy concerns, and the challenges posed by AI-generated content. While AI promises enhanced efficiency, accessibility, and innovation, it simultaneously raises concerns about dehumanisation, dependency, and ethical boundaries. This paper argues for a cautious yet proactive approach, advocating policy-driven, human-centric integration of AI within academia.

I. Introduction

Artificial Intelligence is no longer a distant technological concept but a lived reality within academic ecosystems. Once confined to computer science laboratories, AI now permeates virtually every academic function. AI applications range from natural language processing tools that assist in automated essay grading to adaptive learning platforms that personalise instruction. At the research front, AI is accelerating data analysis, predicting outcomes, and aiding hypothesis generation. Nonetheless, these capabilities bring with them a host of implications that challenge traditional educational models, academic ethics, and institutional frameworks. It has rapidly evolved from a niche innovation to a central element of academic life, influencing how knowledge is delivered, acquired, and created. In the past, AI was largely associated with theoretical experiments or specialised technical research in computer science departments. Today, it is deeply embedded in the everyday operations of educational institutions, transforming both administrative and scholarly activities. One of the most visible impacts of AI in academia is the automation of tasks that were traditionally time-consuming. Tools driven by natural language processing now assist teachers in grading assignments, evaluating student essays, and even providing feedback. This automation not only saves time but also aims to ensure consistency and objectivity in assessments. Furthermore, AI-

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powered learning platforms have introduced new ways to deliver education by adapting content to each student's pace, understanding, and learning style. These systems help identify individual weaknesses, tailor exercises accordingly, and support students in a manner that conventional classroom settings often struggle to achieve.

In the domain of research, AI has become a valuable companion in analysing large datasets, identifying correlations, and even suggesting research directions. By processing information at a scale and speed unattainable by human researchers alone, AI contributes significantly to fields such as biomedical research, social sciences, and digital humanities. Its application in data mining and predictive analytics helps scholars uncover trends and patterns that might otherwise remain hidden. However, the growing reliance on AI also brings significant challenges. The traditional models of education which are based on human interaction, mentorship, and ethical reasoning are being tested as machines take on more active roles. Academic institutions must now reconsider foundational principles such as authorship, originality, and intellectual contribution in an era where machines can co-author or even independently generate scholarly content. Moreover, the use of AI in academia raises questions about the role of educators, the validity of student assessment, and the future of scholarly publishing. As institutions strive to balance innovation with academic integrity, they face the critical task of establishing policies and practices that preserve the human values of education while embracing technological advancements.

II. AI in Teaching and Learning

AI's impact on pedagogy is perhaps the most visible and widely discussed. Intelligent Tutoring Systems (ITS), such as Carnegie Learning's MATHia and Squirrel AI, offer tailored feedback and learning pathways based on real-time student performance. These systems promise to bridge learning gaps and cater to individual learning styles.[1] However, over-reliance on such technologies may reduce the teacher's role to that of a supervisor, potentially eroding the humanistic element of education. AI also facilitates automated content delivery through platforms like Coursera and edX, integrating AI-driven analytics to adapt course materials dynamically. Such practices help track student engagement, predict dropouts, and enhance retention. However, while these technologies improve accessibility, they raise questions about the quality of interpersonal learning experiences and the extent to which machines can emulate the nuances of human instruction.[2] It is

1 Baker, Ryan S. J. d., "Modeling and Understanding Students' Online Learning Behaviors: A Review," 12(1) *Journal of Educational Data Mining* 1-17 (2020).

2 Karsenti, Thierry, "Artificial Intelligence in Education: The Urgent Need to Address Ethical and Pedagogical Challenges," 16(1) *International Journal of Educational Technology in Higher Education* 1-11 (2019).

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reshaping the way education is delivered and experienced, particularly in the realm of teaching and learning. The integration of AI in pedagogy has led to the emergence of tools that personalise education in ways previously unimaginable. These systems, known as Intelligent Tutoring Systems (ITS), function by analysing how students interact with educational content in real time. Based on this data, they adjust lessons, offer individualised support, and provide targeted feedback to help learners grasp difficult concepts. Such technologies are designed to address the diverse needs of students, offering a more customised approach compared to the traditional one-size-fits-all classroom model.

The use of AI-driven platforms has enabled students to learn at their own pace and receive assistance exactly when they need it. In large classrooms or virtual settings, where individual attention may be limited, AI steps in to fill the gaps. It monitors patterns of understanding and confusion, helping to ensure that no student is left behind. Moreover, platforms like Coursera and edX now incorporate AI systems that track user engagement, measure progress, and recommend resources, thereby enhancing the overall learning experience and improving course completion rates. However, the growing dependency on such technologies also brings to light important pedagogical concerns. One of the key challenges is the potential marginalisation of the teacher's role. As machines begin to assume more responsibilities in delivering content and evaluating student progress, educators risk becoming facilitators rather than active contributors to the learning process. This shift may lead to a diminished emphasis on human values such as empathy, moral reasoning, and critical dialogue, the elements that are essential to a holistic education but difficult for machines to replicate. Additionally, while AI offers a structured and data-informed approach, it lacks the capacity to interpret emotional cues, foster spontaneous discussions, or adapt to the unstructured dynamics of a real-world classroom. The richness of human interaction where learning often occurs through debate, reflection, and shared experience cannot be fully replicated by algorithms. This raises important questions about the long-term effects of AI-led learning on student development, communication skills, and intellectual maturity.

AI in Research and Knowledge Production

Academic research has significantly benefited from AI, particularly in data-intensive fields. Machine learning algorithms assist in mining large datasets, detecting patterns, and generating predictive models. In the social sciences and humanities, tools like natural language processing help

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in textual analysis and thematic clustering.[3] AI's capability to process voluminous information at unmatched speed accelerates literature reviews, meta-analyses, and bibliometric evaluations. However, reliance on algorithmic tools poses epistemological challenges. Questions arise regarding the objectivity of machine-generated findings, the potential perpetuation of biases inherent in training data, and the marginalisation of non-quantitative insights. Moreover, academic authorship becomes contentious when AI co-authors papers or generates entire drafts.[4] Institutions must grapple with revising authorship guidelines and redefining intellectual contribution in light of AI-generated research. It is revolutionising the landscape of academic research and knowledge production, offering tools and methodologies that dramatically enhance the speed, scope, and accuracy of scholarly work. From automated data processing to content generation, AI has become an indispensable companion in modern research, particularly in data-intensive fields such as biomedical science, economics, linguistics, and climate studies. However, this transformation is not without its complexities, raising new questions about the nature of inquiry, authorship, and the epistemological foundations of academic knowledge.

One of the most significant advantages of AI in research lies in its ability to process and analyse vast datasets far more efficiently than traditional methods. Algorithms powered by machine learning can detect patterns, establish correlations, and identify anomalies in datasets that might be too large or complex for human researchers to navigate. For instance, in medical research, AI is used to analyse genomic sequences, detect biomarkers, and predict patient responses to treatments. In the social sciences, natural language processing tools assist in evaluating political speeches, social media trends, and large-scale surveys, thereby enabling more nuanced and comprehensive insights. Moreover, AI aids in systematic literature reviews by automating the identification, extraction, and summarisation of relevant academic articles. Researchers can use AI tools to generate bibliometric analyses, visualise citation networks, and even forecast emerging areas of scholarship. This allows for a more strategic and efficient engagement with existing literature, freeing scholars from the laborious aspects of data collection and enabling them to focus on higher-order analysis and critical interpretation. In addition to data handling, AI is also transforming the writing and publication process. Tools that assist with grammar correction, referencing, and formatting are now common, but more advanced applications are capable of generating entire research drafts or suggesting revisions based on academic standards. These developments raise critical questions about intellectual

3 Munafò, Marcus R. et al., "Machine Learning and Artificial Intelligence for Psychology: Prospects and Pitfalls," 31(6) *Psychological Science* 751-760 (2020).

4 Stokel-Walker, Chris, "AI Writing Tools: The Authors of the Future?", 614 *Nature* 22-25 (2023).

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contribution and authorship. When an AI system significantly aids in developing arguments or structuring content, the line between human and machine-generated knowledge becomes increasingly blurred.

Further ethical and methodological concerns arise when considering the opacity of certain AI algorithms. Many machine learning models function as "black boxes," providing outputs without transparent reasoning. In academic contexts, where reproducibility and methodological clarity are vital, such opacity challenges the credibility and verifiability of AI-assisted research. Additionally, if the data used to train these algorithms is biased or incomplete, the results may reflect and perpetuate existing disparities or inaccuracies. Another issue pertains to inclusivity and accessibility. Institutions with access to advanced AI infrastructure may enjoy research advantages that widen the gap between resource-rich and resource-constrained settings. This could lead to a concentration of knowledge production in a few elite institutions, undermining the global and democratic ideals of academic inquiry.

Academic Integrity and Ethical Concerns

Perhaps the most pressing issue in academia's AI adoption is the threat to academic integrity. Tools like ChatGPT, Sudowrite, and Writesonic can generate essays, thesis outlines, and even legal arguments with remarkable fluency. This raises the spectre of academic dishonesty, where students might submit AI-generated assignments as original work.[5] Turnitin and other plagiarism detection software have begun integrating AI-detection capabilities, but these tools are not infallible. The question of authorship becomes complicated when students use AI to assist rather than replace their thinking. How much AI support is acceptable? Can ideas sourced through AI be considered original? These ambiguities require universities to revise academic conduct policies and incorporate clear guidelines on AI usage.

The rapid integration of Artificial Intelligence into academic environments has created new challenges related to academic integrity and ethical behaviour. While AI tools offer significant benefits for learning and productivity, they have simultaneously blurred the boundaries of originality, authorship, and intellectual effort. The ease with which platforms like ChatGPT, Sudowrite, and Writesonic can produce coherent, well-structured text on virtually any topic has raised serious concerns about their misuse in academic work. At the core of the issue lies the increasing possibility that students may pass off AI-generated content as their own, bypassing the learning process and

5 Silverman, Rachel Emma, "Colleges Grapple with ChatGPT and Cheating," *The Wall Street Journal*, January 18, 2023.

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undermining the educational purpose of assignments. Unlike traditional forms of plagiarism, where content is copied from identifiable sources, AI-generated material is often unique in wording and structure, making it harder to detect with conventional plagiarism tools. Although newer systems like Turnitin have begun incorporating AI detection algorithms, these methods are still in development and are not always reliable. The subtle nature of AI-generated assistance means that it can often evade detection, especially when students use the content selectively or edit it slightly.

Furthermore, the ethical dilemma becomes even more complex when students use AI not to cheat outright, but as a tool to brainstorm ideas, refine arguments, or improve grammar and style. In such cases, the line between acceptable support and academic dishonesty becomes increasingly unclear. Unlike calculators or spelling checkers, generative AI tools can contribute substantively to the intellectual content of a piece of work. As a result, the question arises: how much reliance on AI is too much? If a student uses an AI tool to generate an outline or draft that they later refine, is the work still their own? Does the intellectual effort lie in the final product or the process that led to it? These ambiguities call for a fundamental re-evaluation of academic conduct policies. Institutions must provide explicit guidelines that clarify what constitutes acceptable AI use in academic submissions. Such policies should distinguish between supportive uses such as grammar correction or citation formatting and substantive uses that affect the originality or intellectual ownership of the work. Moreover, universities should incorporate education on responsible AI use into their orientation and academic skill-building programmes, ensuring that students understand the implications of their choices. There is also a growing need for faculty awareness and adaptability. Educators must be trained not only to detect possible AI misuse but also to rethink assessment strategies that minimise the temptation to rely on such tools. Oral exams, in-class essays, and research-based assignments that require critical thinking and reflection may serve as better indicators of genuine student learning than standard take-home tasks.

Redefining the Role of Educators

The proliferation of AI tools alters the educator's role from content delivery to content curation, mentorship, and ethical stewardship. Teachers must now focus on fostering critical thinking, ethical reasoning, and metacognitive skills areas where AI still lags.[6] Furthermore, educators need training in AI literacy to effectively integrate AI tools without undermining pedagogical objectives. Faculty resistance to AI often stems from fear of redundancy, data misuse, or diminished academic

[6] Popenici, Stefan D. and Kerr, Sharon, "Exploring the Impact of Artificial Intelligence on Teaching and Learning in Higher Education," 12(1) *Research and Practice in Technology Enhanced Learning* 1-13 (2017).

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authority.[7] However, instead of viewing AI as a threat, educators must be empowered to leverage it as an ally that enhances teaching quality and reduces administrative burden. For example, AI can automate routine tasks such as grading, attendance tracking, and feedback generation, allowing teachers to devote more time to mentoring.

The rise of Artificial Intelligence in academic spaces is prompting a fundamental shift in the role of educators. Traditionally seen as the primary source of knowledge and instruction, teachers are now navigating an evolving landscape where information is readily accessible, and AI systems can deliver content with speed, consistency, and adaptability. In this new paradigm, educators are no longer just transmitters of information; they are becoming facilitators of learning, curators of knowledge, and mentors in the intellectual and ethical development of their students. This transformation requires educators to focus less on rote delivery and more on cultivating essential skills that AI cannot replicate. Critical thinking, creativity, ethical reasoning, and emotional intelligence are areas where human guidance remains indispensable. As AI tools become increasingly capable of handling factual content, the teacher's role is shifting toward guiding students in questioning assumptions, evaluating sources, interpreting diverse perspectives, and drawing nuanced conclusions. In short, the classroom is evolving into a space for dialogue, reflection, and deeper understanding, the elements that are not easily programmed into machines.

Another emerging responsibility for educators is to foster AI literacy among students. Teachers must not only understand how AI functions but also help learners navigate the risks and benefits associated with its use. This includes addressing questions around digital ethics, data privacy, bias in algorithms, and responsible use of generative tools. Educators are becoming the ethical stewards of the digital age, responsible for shaping students' understanding of how technology intersects with academic integrity, civic responsibility, and professional conduct. Despite these opportunities, many educators remain cautious or even resistant to the use of AI. Their concerns are not without merit. Some fear that automation will render their roles obsolete or undermine their authority in the classroom. Others are uneasy about the implications of data collection, surveillance, or institutional dependency on third-party AI providers. Such apprehensions must be addressed through proactive institutional support, professional development programmes, and inclusive decision-making processes that involve faculty voices in shaping AI policy and practice.

[7] Selwyn, Neil, "Should Robots Replace Teachers? AI and the Future of Education," 50(6) *British Journal of Educational Technology* 1243-1252 (2019).

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Instead of perceiving AI as a threat, educators should be encouraged to see it as a collaborative tool that can enhance their teaching. For instance, AI can streamline administrative workloads by automating grading for objective assessments, generating individualised feedback, monitoring student performance trends, and handling repetitive documentation. These efficiencies free up time for more meaningful educator-student interactions, such as personalised mentoring, academic counselling, and project-based learning facilitation. Furthermore, teachers can use AI to gain deeper insights into student needs. Analytics generated by AI platforms can highlight areas where learners are struggling, allowing instructors to tailor interventions and instructional strategies accordingly. Rather than replacing the educator, AI extends their reach and responsiveness. In this context, the future of education depends on reimagining the educator's identity, not as a passive dispenser of knowledge but as a dynamic guide who bridges the human and technological realms. Empowering educators to embrace this evolving role with confidence and creativity is essential to ensuring that AI enhances, rather than diminishes, the richness and purpose of academic engagement.

Bias, Discrimination, and Data Privacy

One of the overlooked aspects of AI in academia is algorithmic bias. If AI systems are trained on historical data that reflects gender, racial, or socioeconomic disparities, the outputs may perpetuate these biases. For instance, an AI-based admission screening tool may inadvertently favour applicants from certain demographics if its training data is skewed.[8] Moreover, academic institutions increasingly collect student data to fuel AI models. While this can personalise learning experiences, it also raises concerns about data security, informed consent, and misuse. Institutions must implement robust data governance frameworks that prioritise transparency, privacy, and accountability.

As Artificial Intelligence becomes more deeply embedded in academic systems, the issues of bias, discrimination, and data privacy demand urgent attention. While AI promises to enhance decision-making and personalise education, it also introduces the risk of reinforcing systemic inequalities and violating fundamental rights if not managed carefully. Often operating behind opaque algorithms and massive datasets, AI systems can mirror and magnify the very biases they are expected to overcome. Algorithmic bias stems from the nature of the data on which AI is trained. If historical data used to develop AI tools reflect existing social, racial, gender, or economic disparities, then the outputs generated by those tools will likely carry forward those distortions. In academic settings, this can have serious implications. For instance, AI-based screening tools for admissions or scholarship

[8] Eubanks, Virginia, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor, St. Martin's Press, 2018.

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evaluations may favour students from privileged backgrounds if prior data reflect biased access to resources such as advanced test preparation, extracurricular opportunities, or academic recommendations. Similarly, language processing tools used for grading essays might rate students differently based on writing styles influenced by cultural or linguistic diversity, thereby penalising students from non-dominant backgrounds.

Another concerning aspect is the growing use of student data for training AI systems. Institutions collect vast amounts of information such as grades, attendance, behavioural patterns, and even engagement on learning platforms to develop predictive models and enhance personalised learning. While such practices can help tailor educational content and identify at-risk students, they raise significant concerns regarding privacy, consent, and surveillance. Students are often unaware of how their data is being used or whether they have any control over it. Without transparency, data collection becomes not a tool for empowerment, but a mechanism for control. The risk of data misuse is heightened when academic institutions partner with external vendors or technology companies that operate under different privacy standards. Sensitive student information may be stored, shared, or analysed in ways that compromise confidentiality or lead to unintended consequences. Even anonymised data can sometimes be re-identified through cross-referencing, further endangering personal privacy. In this environment, safeguarding student trust becomes a critical challenge.

To counter these risks, academic institutions must build robust data governance frameworks that ensure ethical AI deployment. This includes clear policies on data collection, storage, sharing, and disposal. Informed consent must be a prerequisite for all data-related practices, with students and faculty fully aware of their rights and the implications of participation. Institutions should also commit to algorithmic transparency, making AI decision-making processes understandable and auditable. Regular reviews and audits must be conducted to detect bias and recalibrate systems as necessary. Moreover, a multidisciplinary approach is required bringing together educators, technologists, ethicists, and students to design AI systems that uphold fairness, equity, and human dignity. Training and awareness programmes on digital ethics and data rights should become part of academic culture, empowering stakeholders to question and influence how AI is used in their environments.

III. Policy Responses and Institutional Frameworks

The integration of AI into academia necessitates policy innovation. Universities must draft comprehensive AI usage guidelines that cover areas such as permissible student use, faculty responsibilities, data ethics, and disciplinary action in case of misuse. These policies should be

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regularly updated in tandem with technological advancements.[9] Global academic bodies such as UNESCO and the OECD have started issuing AI ethics guidelines, but localisation remains key. Indian universities, for example, must tailor these frameworks to accommodate infrastructural limitations, linguistic diversity, and socio-economic disparities. The rise of Artificial Intelligence in academic environments demands not only technological adaptation but also the formulation of clear, forward-looking policies. As AI tools become more prevalent in classrooms, research labs, and administrative offices, universities must take a proactive approach in defining how these technologies should be used. Without comprehensive and thoughtful regulation, institutions risk exposing students and faculty to ethical uncertainties, data vulnerabilities, and uneven access to academic opportunities. Effective AI governance in academia begins with the creation of transparent and inclusive policies. These guidelines must articulate the acceptable scope of AI use for students, clarifying when and how AI tools may be employed in assignments, examinations, or project work. It should be clear whether AI assistance is permitted for brainstorming, editing, or drafting, and to what extent such usage must be disclosed. Ambiguity in this area can lead to confusion, inconsistency in enforcement, and unintentional misconduct.

For faculty, the policies should define their responsibilities in using AI tools for grading, content generation, and student engagement. They must be made aware of the potential for algorithmic errors, the importance of verifying outputs, and the ethical considerations when relying on AI in pedagogical decisions. Additionally, institutions should establish processes for handling violations, with proportionate disciplinary measures that reflect the intent and impact of AI misuse rather than adopting a one-size-fits-all approach. Another key policy area is data governance. Universities increasingly collect student data to feed AI systems, often without detailed disclosure or consent mechanisms. Policies must therefore emphasise data minimisation, purpose limitation, and secure storage practices. Students and faculty should be educated on how their data is collected, what it is used for, and how long it is retained. These safeguards are essential for maintaining trust and upholding academic freedom. While international organisations like UNESCO and the OECD provide valuable ethical guidelines for AI use in education, these frameworks must be adapted to local realities. In countries like India, where educational institutions face infrastructural challenges and wide disparities in access to technology, policies must account for these differences. A centralised, rigid model would likely fail to address the nuanced needs of rural, regional, or

[9] UNESCO, "Ethics of Artificial Intelligence in Education: Guidance for Policy-Makers," 2021.

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economically disadvantaged institutions. Instead, universities should be encouraged to develop customised guidelines that align with national values while incorporating international best practices.

IV. Future of Academic Publishing

AI is transforming academic publishing through tools that assist in proofreading, formatting, plagiarism checks, and even peer review automation. Journals are experimenting with AI-based triaging systems that screen submissions for quality, relevance, and originality.[10] While this improves efficiency, it may also lead to gatekeeping based on opaque algorithms. Additionally, the rise of AI-generated content blurs the boundary between human and machine authorship. Ethical dilemmas emerge regarding citation practices, intellectual ownership, and the role of peer reviewers in validating AI-produced manuscripts. Publishers and academic bodies must develop clear protocols on the acceptable use of AI in publishing workflows. The integration of Artificial Intelligence into academic publishing is reshaping traditional workflows, bringing both innovation and ethical complexity. From manuscript preparation to editorial decision-making, AI-driven tools are increasingly being employed to streamline operations and improve consistency. Applications such as grammar correction, reference management, plagiarism detection, and automated typesetting are becoming standard components of the publishing process. These technologies can save time, reduce human error, and elevate the baseline quality of submissions. However, their growing influence raises significant concerns that demand critical scrutiny.

One of the most transformative changes lies in the use of AI-based triaging systems that evaluate submitted manuscripts before they reach human editors. These algorithms assess factors such as linguistic clarity, structural coherence, topical relevance, and even novelty. While such automation enhances efficiency and helps editors manage increasing submission volumes, it also risks embedding algorithmic bias into editorial judgment. The criteria used in such AI screening are often proprietary and non-transparent, potentially disadvantaging interdisciplinary, unconventional, or regionally diverse scholarship that does not conform to mainstream patterns.[11] The emergence of AI-generated content introduces further complexities. With the advent of advanced language models, entire sections or in some cases, entire manuscripts can be drafted with minimal human intervention. This evolution blurs the line between human and machine authorship. Questions arise about who deserves credit when a paper has been significantly shaped or generated by AI. Traditional norms of

[10] Heaven, Douglas, "AI Peer Reviewers Raise Concerns Over Fairness and Transparency," *Nature*, Vol. 601, 2022, pp. 298-299.

[11] Floridi, Luciano & Cowls, Josh. "A Unified Framework of Five Principles for AI in Society," *Harvard Data Science Review*, 2021.

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intellectual ownership struggle to accommodate this new reality. Moreover, citation practices become ambiguous. Should AI tools be cited as co-authors, acknowledged as aids, or omitted entirely? These issues call for fresh ethical standards and editorial policies. Peer review, too, is undergoing transformation. Some publishers are experimenting with AI-supported peer review systems that provide preliminary assessments or assist in matching manuscripts with appropriate reviewers. While this may improve turnaround times and reviewer accuracy, it also risks reducing the nuanced human judgment that characterises scholarly evaluation. Relying too heavily on algorithmic validation may compromise the depth and diversity of academic critique. Given these developments, academic publishers and governing bodies must take the lead in formulating robust policies. Clear protocols should specify the permissible scope of AI use in manuscript preparation, authorship attribution, and editorial decision-making. Guidelines must be transparent, inclusive, and adaptable to emerging technologies. Most importantly, they should reaffirm the core values of academic publishing such as rigour, fairness, and intellectual integrity, even in an increasingly automated ecosystem.[12]

V. Conclusion and Recommendations

The trajectory of Artificial Intelligence in academia is undeniably accelerating, redefining how knowledge is produced, disseminated, and consumed. However, embracing AI must extend beyond technological enthusiasm to encompass a measured, human-centric approach that respects the foundational values of education such as critical thinking, academic freedom, and intellectual integrity. As AI systems increasingly permeate teaching, learning, research, and publishing, academic institutions must recognise that technological integration, if left unchecked, may reinforce existing inequalities, undermine ethical standards, and compromise scholarly autonomy. To ensure that AI serves as a tool for enrichment rather than disruption, institutions must adopt a framework rooted in ethical foresight and participatory governance. This involves embedding AI literacy within curricula to cultivate an informed academic community capable of interrogating, using, and critiquing AI technologies responsibly. Students and faculty should be trained not only in the functionalities of AI tools but also in understanding their limitations, biases, and societal implications. Ethical training modules should accompany technical instruction to promote awareness around data privacy, algorithmic bias, and responsible authorship.

Further, the development of clear institutional policies is critical. These policies should delineate permissible uses of AI, outline procedures for addressing misuse, and define roles and responsibilities for stakeholders. Such guidelines must be periodically reviewed and revised in

[12] Anderson, Kevin. "AI in Peer Review: Revolution or Risk?" *Nature Publishing Insights*, 2023.

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response to evolving technologies and emerging challenges. Importantly, policy-making should involve a diverse range of voices including technologists, educators, ethicists, students, and marginalised groups to ensure that AI adoption is equitable and context-sensitive.

Another key recommendation is the establishment of interdisciplinary AI ethics committees within academic institutions. These bodies can evaluate new AI tools, assess their pedagogical value, and provide guidance on ethical dilemmas as they arise. Moreover, universities should promote open dialogue by creating forums, workshops, and research centres dedicated to exploring AI's impact on academia. This will facilitate continuous learning and collaborative reflection on how AI aligns with academic missions. Lastly, academic leadership must actively advocate for the responsible design of AI tools by engaging with developers and policymakers. By participating in the co-creation of AI technologies, academia can influence design principles that prioritise transparency, accountability, and inclusivity.

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THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021: BALANCING REPRODUCTIVE AUTONOMY AND STATE REGULATION

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ABSTRACT

With the rapid growth of science and technology, the field of assisted reproduction techniques has seen a quantum leap not only in the scientific aspect but also as a business model with rapidly mushrooming growth of ART clinics all over India and nearly complete regulatory vacuum. It thus created a situation where everyone was at risk of being exploited from the donor to the receiver and even the child born with the help of ART. This necessitated the creation of a law to regulate these ART clinics and safeguard the rights of all the parties involved . This situation led the parliament to pass the Assisted Reproductive Technology (Regulation) Act, 2021. The Act brings in the much-needed Standardisation, regularisation, and legal protection for the parties involved. But it also raises questions on the aspects on individual autonomy, privacy and the definition of family. The article discusses the provisions of the Act and the pertinent questions related to it.

I. Introduction

Background and Evolution of ART Services in India

The range of assisted reproduction techniques (ART) has grown with the establishment and growth of such techniques in the country. Initially occurring in a few urban settings, ART in India blossomed into a national ecosystem over the years, capable of providing IVF, ICSI, banking, and donation of gametes. These same dynamics prevailed then in the early Indian ART market as anywhere else in the world: rapid centralisation around a few commercial clinics-universally fast expanding number of ART cycles due to the domestic and international demand among part of the couple-marked the demonstration of a highly ambiguous form of market very little monitored. With time, ethical dilemmas on exploitation, medical risks involved, donor anonymity, and parentage began to be actively engaged widely, pushing policymakers to work on formulating guidelines to address the requirement for a strong regulated ART practice. This expansion, combined with significant socio-economic disparities

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in access to infertility services, forms the backdrop against which India began contemplating statutory regulation of ART.

Need for Statutory Regulation Leading to the ART Act, 2021

Since there were no clear-cut statutory regulations, inconsistent norms in medical practices evolved along with variable pricing and unmonitored donor practices-the safety of the patients and the welfare of the donors and the children born through ART[1]. these voluntary guidelines deficient enough, especially since increasingly ART comes into contact with such sensitive topics as cross-border reproductive care, trafficking in gametes, and medical malpractices. India's rise to being a worldwide centre for fertility services, along with no regulation in place saw increasing opportunities for exposure to risks amongst vulnerable women who were repeatedly subjected to hormonal stimulation and invasive procedures. These developments led to comprehensive legislative framework to ensure transparency and ethical practice, as well as accountability among clinics and ART banks.

Research Problem: Tension Between Reproductive Autonomy and State Oversight

This significant advance in the protection of reproductive rights requires not just understanding the very essence of ART but also brings with it significant political and human constitutional claims. Made law in 2021, the ART (Regulation) Act seeks to "regulate the procedures and practices of ART for the prevention of misuse in the fields of pre- and postnatal sex determination in place of selected practices"[2]. It is also argued that the Act has ample potential for inclusively protecting personal rights if the restrictions do not go on to foreclose pre-existing practice, if it is properly interpreted. The central research problem therefore arises from examining whether the Act genuinely protects women, donors, and children, or whether it reinforces state-driven moral and social norms that limit individual reproductive autonomy.

Objectives of the Study

The main aim of this article is to assess the applicability of the ART Act with respect to the reproductive technology regulation and the need for regulations for protecting women, children and donors from being exposed or hurt with improper medical practices[3] And to

[1] Soumya Kashyap**,** "Assisted Reproductive Technology (Regulation) Act 2021: Critique and Contestations" ,16(2), *Asian Bioethics Review***,** 149-164. (2023)

[2] Assisted Reproductive Technology (Regulation) Act, 2021

[3] Amanda Mackay, "Inequity of Access: Scoping the Barriers to Assisted Reproductive Technologies," 11,*Pharmacy MPDI,*17, 2023**.**

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determine whether the Act complies with the principles of equality and non-discrimination under Article 14 and the right to personal liberty held in Article 21, which upholds reproductive autonomy. Lastly, it will highlight the voids, ambiguity, and areas that need improvement at the present regulatory framework.

Scope and Limitations

The focus of the investigation is with the Assisted Reproductive Technology (Regulation) Act, 2021, pinpointing sections within this particular law covering the issues characterizing the access, eligibility, safety standards, donor protocols, and parentage related safeguards (Kaur, 2022). It has some overlap with the Surrogacy (Regulation) Act, 2021, yet as such does not delve into the intricate details of surrogacy-specific laws. Material for this study includes statutory provisions, policy reports, judicial developments, and secondary literature, meaning that the status of empirical knowledge concerning clinic-based implementations could be affected. Because of state-level implementation variations and reduced access to reliable ART industries data, generalizing findings is limited.

Methodology

It involves primarilv doctrinal legal research analyzing the statutory provisions. The parliamentary debates and judicial pronouncements that have interpreted reproductive rights and regulatory limits.

II. Overview of the ART Act, 2021

Legislative Intent and Policy Rationale

One of the most burning issues the ART (Regulation) Act, 2021 addresses is the governance vacuum in the fertility sector, which has grown rapidly in India. This legislation is intended to provide a standard for ethical and safe Assisted Reproductive Technologies (ART), avoiding malpractices such as "a risk of using unethical practices, misuse of gametic cells in ART practice and misuse of women, children, and/or communities through gamete trade into the gamete economy"[4] This is evidenced by the existing vulnerability of the woman receptionists and donors because of the unregulated medical clinics, varying medical standards, and the commercialising of gamete exchange, whilst biomaterials, gametes, and reproductive

[4] Roopa Surya Sri Gullepalli, "Emergence Of Surrogacy And Assisted Reproductive Technology (Art) Laws In India- Recent Changes And Way Forward", 2(6), *INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS,* 5-18, 2022.

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tissues assume commercial value. Therefore, legislation against these activities has become necessary to bring uniformity, conformity, and transparency across all ART centres. It is the broader idea of public health and human rights principles that necessitate it.

Key Definitions: ART Clinics, Banks, Commissioning Couple, Donors

The law has established specific definitions in the Act to delineate the institutional roles for different stakeholders that are involved in the in vitro fertilization ecosystem. ART clinics are seen as authorized medical facilities, providing ART services such as IVF, ICSI, oocyte retrieval, embryo transfer, and associated services. It is comprised of ART banks, which deal with gamete collecting, processing, testing, freezing, and distribution and acts as a regulated bank for reproductional material.[5] "Commissioning couple[6]" refers to those who are married opposite-sex partnerships with a view toward seeking ART services, in which LGBTQ+ as well as single men do not have a place. Donor—an individual who, with regulated terms and conditions, is giving a donation of sperm or an oocyte, assures the former be properly screened, guarantees his anonymity, and states rules that are shaped based on health precautions and to prevent exploitation [7]

Institutional Mechanisms: National Board, State Boards, Registration Authorities

The law has had provided a 3 tier regulatory framework : the central National Assisted Reproductive Technology and Surrogacy Board, corresponding State Boards, and the designated Registration Authorities. The task of the National Board is to advise the central government and oversee policy formulation as well as monitor national compliance[8]. State Boards supervise guidelines for clinics of ART within their region, audit performance of clinics, and ascertain whether ART banks are operating properly within their area[9]. The Registration Authorities act as licensed regulators handling applications for licensing, periodically inspecting clinics, and maintaining digital registers of authorized ART units.

[5] Sonu C Thomas, "Dispelling hope and leaving couples in a state of "in betweenness": Moral dilemmas in infertility research"6 *Indian Journal of Medical Ethics*,229, 2021

[6] Assisted Reproductive Technology (Regulation) Act, 2021. s 2 (e).

[7] Assisted Reproductive Technology (Regulation) Act, 2021. S 2 (h).

[8] Jaydeep Tank, "Voices From Healthcare Providers Assessing The Impact of The Indian Assisted Reproductive Technology (Regulation) Act 2021, On the Practice of IVF In India, 73 *The Journal Of Obstetrics And Gynaecology of India,* 301-308, (2023).

[9] D. Roy, "Harmonising ART and Surrogacy Regulations in India: Legal and Policy Challenges", *Indian Journal of Law and Society*,119–145.(2023)

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Altogether, these three provide themselves a structured regulatory ecosystem that ideally ensures uniformity as well as accountability.

Mandatory Registration, Licensing, and Compliance Requirements

Before starting work, an Assisted Reproductive Technology (ART) clinic or ART bank must comply with the Act. For example, detailed guidelines on minimum infrastructure, technical and minimum personnel requirements should be complied with to guarantee patient safety and high procedural quality[10] Records need to be kept in every procedure ,and donations are limited, whether consents are well-informed or detailed, and tests for donor screening and recipient screening before receiving gametes. The Registration Authority conducts regular audits or looks into whether the requirements laid down in the law are indeed being met. Compliance mechanisms like these, therefore, can help ensure that the newly regulated market will be cleansed of unscrupulous and malpracticing activities or fraudulent practices prevalent in the earlier unregulated market.

Penalties and Offences

The Act has very stringent penal framework. As the legislature wanted to safeguard reproductive governance . Some of the offenses would be in situations where ART procedures are conducted but there is no filing, exploiting rather than aiding the donor or the woman involved in an ART procedure, trafficking of gametes or embryos, or sharing any such information sating high success rates in achieving pregnancy. There are fines go up to jail terms[11] a provision with higher punishment to the repeating offenders. Few misdeeds, for example, promotional deals concerning selling of sperm, ovum, and zygote, have been classified as offences. Such legal sanctions have been included to deter the practice of malpractice and further ingrain ethical grounds to the use of ART procedures in India.

III. Access to ART Services under the Act

Eligibility Criteria for Commissioning Parties

The ART Act, which specific criteria for those individuals who want to avail assisted reproductive procedures. The concentration is on the medical suitability, briefing the patient psychologically, and to implement the statutory conditions consisting of age limits, marital

[10] P. Gupta, "Medicalisation of Infertility and ART Standards in India", *Journal of Medical Law & Ethics*, 39–58. (2022).
[11] Assisted Reproductive Technology (Regulation) Act, 2021. s. 33.

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status, and documentation criteria respectively. That the goals for safe and responsible use of ART services are necessary, but these criteria like strict door-keeping rules are likely to stifle legitimate reproductive aspirations. In particular, mandatory cycles of medical certification of infertility raise concerns about the medicalization of reproductive choice and the possible exclusion of people who do not fit traditional definitions of infertility.

Age Conditions for Men and Women

The Act specifies the age within which children can normally be given birth: women from 21 to 50 and men from 21 to 55 age[12] . They are deemed necessary in acknowledgment of the risks arising out of these advanced parental age situations and safety of interest to the unborn child. These age limits can be strictly maintained, but a female may fail to conceive until fifty, or a male up to completion of fifty-five years of age due to some economic or social issue [13] The constraint may exclude older couples seeking ART services who are likely to be highly affected, strengthening age-based disparities in accessing reproductive aid.

Marital Status Requirements and Exclusion of LGBTQ+ Individuals and Single Men

Probably the most discussed part of the new Act is its eligibility requirement- people who want to be a commissioning parent should be married to the opposite sex. No sooner had the Act been signed than its clash with heterosexist norms suddenly attained lime light, particularly in India, where it prohibited LGBTQ+ couples, unmarried couples, and single men[14] from accessing ART services. This has been perceived as reinforcing heteronormative assumptions about the structure of a family and failing to mirror contemporary constitutional principles, which enshrine an inalienable right to equality and personal liberty. There is an exception--single women are allowed access to ART if and only if. This differential treatment of genders throws up more discrimination concerns.

Financial Barriers Created by Compulsory Insurance and Medical Screening

The Act mandates couples to arrange for insurance coverage for oocyte donors and insists on complying with rigid medical screening tests[15] which, thereby, enhance the cost of all forms of ART procedures Though meant to protect donors from possible health risks, this

[12] Assisted Reproductive Technology (Regulation) Act, 2021. s. 21 (g)

[13] P. Gupta, Medicalisation of Infertility and ART Standards in India, *Journal of Medical Law & Ethics*, 39–58. (2022)

[14] Assisted Reproductive Technology (Regulation) Act, 2021

[15] Assisted Reproductive Technology (Regulation) Act, 2021,S 23

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rule can actually increase costs-pushing ART services further away from low- and middle-earning families. In addition, having obligatory insurance costs, mandatory diagnostic testing, multiple trips to the clinic, and mandatory compliance with procedural protocols are all factors that increase the financial burden. When implemented, these measures will further the cumulative effect of widening socio-economic gaps to access reproductive technology, leaving only well-endowed sections to use ART[16]

Impact on Equitable Access to ART in India

ART accessibility in India may decrease due to age restrictions, marital requirements and financial obstacles, and the total effect of the narrowness of other eligibility criteria. People who are more vulnerable by these regulations, namely, LGBTQ+ members, aged or single men, people from lower-income families, and people living farther away in remote rural populations where clinics should be located, all of which will reduce the quota. The supposed standardisation of ethical practice, as framed in the Assisted Reproductive Technology Act, ironically also creates structural barriers that hinder accessibility to care for those with infertility. Without reforms addressing inclusivity and affordability, the regulatory framework risks widening existing health inequities and undermining the broader reproductive justice agenda.

IV. Protection of Women, Donors, and Children

Safeguards for Women Undergoing ART Procedures

Informed Consent and Counselling

The law considers informed consent among the fundamentals of protection, requiring that women be given a clear, comprehensive description of medical risks, procedural steps, the expected outcome of the procedure, and the potential complications involved in the procedure. Counseling that is both medical and psychological is required to comprehend the implications of ART, such as hormonal stimulation, oocyte retrieval, and the physical and emotional requirements that a treatment would require. on the one hand, the informed consent does safeguard personal autonomy and holds the measures against coercion or uninformed decision making.

Medical Risk Mitigation

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The Act also stipulates that specific risk-mitigation protocols need to be laid down to safeguard the health of women[17], including from complications that arise in ART such as ovarian hyperstimulation syndrome (OHSS), infections, or injury. Standard clinical standards must be maintained in the ART clinics together with sufficiently practical medical personnel in ART clinics; every patient must be cared for by a specific specialist. Evidence-based protocols need to be followed in order to minimise harm. Every ART clinic should strive to provide at least minimum standards of care, and women's health is at the core of the procedure for reproduction.

Donor Protection

Prohibition on Sale of Gametes

Buying or selling human gametes has been forbidden everywhere by the act so as to discourage commercialisation. The purpose of this prohibiting regulation lies, in that context, in the protection of individuals of lower financial starta from exploitation in the assisted reproductive arena. A stringent curtailment of creating a transaction of a direct financial nature retains the actual essence of voluntary donation of human gametes, hence ensuring ethical thresholds are consolidated.

Anonymity, Screening, and Limits on Donations

The Act makes it obligatory medical examination of the donors who are providing sperm or oocytes as healthy and free from any transmissible disease. Donor anonymity is made compulsory by the legal enforcement, which prevents disclosure of identity, except under a few limited circumstances specified by law[18]. Moreover, the number of donations allowed per individual is restricted[19] to ensure protection of donors from too many hormonal interventions-to which women submitting might be subjected-and also to guard against the risk of genetic clustering. These compliance provisions reflect an attempt to balance donor welfare, ethical considerations, and public health considerations.

Child Protection

Legal Parentage

[17] Assisted Reproductive Technology (Regulation) Act, 2021.s 24.
[18] Assisted Reproductive Technology (Regulation) Act, 2021.s 21(e)
[19] Assisted Reproductive Technology (Regulation) Act, 2021.s 27

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Children born of ART have a great degree of protection ie the protection of clear legal parentage[20]. As per the Act, such commissioning parents can be declared to be the lawful parents from the time of birth. This measure has been designed to make certain that the child will not face any confusion about custody, guardianship, or inheritance issues after birth.

Prohibition of Child Trafficking or Commercial Misuse

To prevent exploitation, the Act explicitly prohibits any form of commercial trade, sale, or trafficking of embryos or children[21]. This prohibition addresses past concerns regarding unregulated fertility markets and ensures that ART procedures are not misused for illicit purposes . Strict monitoring and reporting obligations placed on clinics further reinforce safeguards against commercial malpractice involving children

Debate on Whether the Act Is Overly Paternalistic

Despite its protective intent, it can be argue that the ART Act's approach may be excessively paternalistic. One can say that the Act imposes state-driven moral and social norms under the guise of protection, particularly through restrictive eligibility rules, rigid screening requirements, and limitations on who may access ART services[22] While the Act seeks to shield women, donors, and children from exploitation, its stringent provisions risk undermining individual reproductive autonomy by prioritising state oversight over personal choice. This ongoing debate highlights the tension between protection and autonomy within reproductive governance frameworks.

V. Reproductive Autonomy vs. State Regulation

Concept of Reproductive Autonomy in Indian Jurisprudence

Reproductive autonomy has gained judicial recognition in India as an integral component of personal liberty and bodily integrity. The Supreme Court has consistently affirmed that decisions relating to reproduction, fertility choices, and family formation fall within the protected domain of individual autonomy under Article 21[23] One can interpret reproductive autonomy as encompassing the freedom to decide whether and how to have

[20] Assisted Reproductive Technology (Regulation) Act, 2021.s 2

[21] Constitution of India, Article 21.

[22] Assisted Reproductive Technology (Regulation) Act, 2021

[23] A. Chandrachud, The Right to Privacy and Personal Autonomy in India,9 *Indian Journal of Constitutional Law*, 23–56. (2018)

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children, free from coercion or unreasonable state interference[24] Within this jurisprudential framework, reproductive autonomy is understood not merely as a negative right—freedom from state intrusion—but also as a positive right requiring the state to facilitate access to safe and equitable reproductive healthcare.

Concerns Regarding Excessive State Control

Although the ART Act aims to promote safety and ethical practice, several of its provisions raise concerns about disproportionate state intervention in personal reproductive decisions.

Restrictions on Eligibility and Mandatory Medical Conditions

The state has established restrictive provisions which allow married heterosexual couples to access ART services as well as some single women...some categories of individuals affected include LGBTQ+ individuals and single men who are not eligible.

The requirement for medical certification of infertility imposes an additional barrier, as it forces individuals to conform to medicalised definitions of reproductive need.

Information Disclosure Requirements

The Act also require compliance with the documentation and disclosure provisions relating to personal information up to the regulator for scrutiny and oversight. This certainly goes to some extent in ensuring oversight; it raises the concern about privacy and information. Autonomy more so in the tabloid culture of our age. Constitutional protection is for decisional privacy. A chilling effect may be by the obligation to disclose something to a certain third party, especially those who are seeking ART services.

Whether the Act Aligns with Global ART Rights Frameworks

With respect to global frameworks, Indian ART legislation, indeed, reveals some strong and weak aspects. The reinforcement of ART access within a set of norms that emphasize inclusivity, non-discrimination, and autonomy[25] The use of cloud storage, facilitation of donor data exchange, utilization of tele-services, and provisions that promote direct contact between

[24] *Cynthia Soohoo*, "Reproductive Justice and Transformative Constitutionalism"42 (3) *Cardozo Law Review*,(2021).

[25] Aniruddh Saraswat and Oindrala Mondal, The Assisted Reproductive Technology (Regulation) Act, 2021: A Step Forward, Two Steps Back?, *The Contemporary Law Forum*, Available at : https://tclf.in/2022/04/21/the-assisted-reproductive-technology-regulation-act-2021-a-step-forward-two-steps-back-2/ (Visited on 20 May 2022.)

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donors and intending parents in global best practice for ART all find a near equivalent in the provisions of the Indian ART Act.

Comparative Perspective: ART Regulation in the UK, Australia, and the US

United Kingdom [26]

The UK's Human Fertilisation and Embryology Authority (HFEA) framework promotes a rights-based approach by allowing access to ART for married couples, unmarried partners, single women, and LGBTQ+ individuals. The regulatory focus is on procedural safety rather than moralistic restrictions, making the UK model comparatively more inclusive.

Australia

Australia[27] has adopted a different approach where ART is subject to the state's control but with significant emphasis on individual rights. Under state regulations, access to ART must be granted, while the legality of one's marital status or sexual orientation should not have any bearing. Ethical guidelines also prioritise counseling and informed consent, as well as child welfare, without relying on black-and-white rules of access. The autonomy standards adopted by Australia under this broader conceptualisation are closer to what continues to evolve in terms of autonomy worldwide.

United States

The US operates predominantly on a market-driven model, with minimal interference from the federal government and high levels of autonomy for both individuals and clinics. Whereas in the United States the principal factor governing access is affordability rather than legality, high costs of treatment and cost of insurance seem less stringent from an eligibility or reproductive decision-making perspective.

On the other hand, regulations of these jurisdictions tend towards respect for autonomy, inclusiveness, and antidiscrimination.

VI. Constitutional Dimensions: Articles 14 and 21

Article 14 – Equality and Reasonable Classification

[26] Human Fertilisation and Embryology Authority (HFEA)

[27] ASSISTED REPRODUCTIVE TECHNOLOGY BILL 2023, Available at : https://classic.austlii.edu.au/au/legis/act/bill/artb2023377/ (last visited on 20 February 2023)

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Exclusion of Unmarried Men, LGBTQ+ Persons – Discriminatory Classification?

Article 14 of the Constitution is to ensure that any law made in the country has a sufficiently clear and rational basis to classify the persons or actions the legislation regulates (intelligible differentia). The ART Act reserves the right to access technologies to husbands and wives by virtue of their marriage and some categories of single females which implies that it leaves out single males, persons who are any how connected to LGBTQ persons and other members of non-convectional families. Critically speaking these exclusions are too uncalled for and should not be treated as simply that but being part of the unconstitutional acts of discrimination. Classification of this kind, as a result, can be termed as discriminatory for no medical or scientific grounds can be cited as necessitating such obligations, instead they are shaped by the moral compass of the state.

Moralistic vs. Rational Basis Classification Debate

The constitutional debate surrounding Article 14 hinges on whether the Act's classifications are rationally connected to legitimate state objectives such as child welfare and safety or whether they are merely moralistic exclusions lacking empirical justification. The restrictions based on marital status or sexual orientation do not advance the stated aim of regulating ART practices; rather, they reinforce a narrow conception of the family. As a result, the Act's classification scheme arguably fails the test of reasonable classification and could be viewed as constitutionally suspect.

Article 21 – Personal Liberty and Reproductive Choice

Privacy and Autonomy After Puttaswamy case[28]

The Indian Supreme Court's decision on the Puttaswamy case challenged the current concept of privacy by including reproductive autonomy in decisional privacy, which is protected under Article 21 . Such a wider understanding of privacy concentrates more on individual's right to take personal decisions, which involve inter alia, reproductive rights, without excessive state intervention. The ART Act, with its strict requirements in terms of

[28] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors. AIR 2017 SC 4161

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eligibility criteria and elaborate paper work, comes under scrutiny whether it aims to serve such reformed notion of privacy.

Right to Create A Family as A Part of Dignity

Dignity includes the right to create a family too. Indian constitutional law has expanded lately, allowing the right to marriage, comprising the concept of dignity. This view of the right to family emphasizes the right of such couples to use ART to become parents, as this offers an avenue to exercise substantive freedom for the individual. Exclusionary eligibility rules may therefore infringe upon constitutionally protected dignity interests by denying individuals the freedom to form families based on their own life choices.

Compulsory Medical Restrictions and Autonomy Concerns

Restriction of medical reproductive rights and privacy, contributes to the infringement of rights and of ability to justice concerns. Imposing constraints as mandatory medical check-ups, restrictive screening and age requirements can be considered overly controlling, when it comes to reproductive rights. Though justified as protection, these limits threaten personal liberty . This type of restrictions would undermine rights of body integrity and autonomy to make choices as allowed in the constitution.

Proportionality Analysis of ART Restrictions

A proportionality asseseent tests whether the limitations imposed by the statute are in line with the objectives pursued in the public interest. Among the public's legitimate concerns are the safety of the beneficiaries and intervention of humanitarian organizations. Unfortunately, simply isolating this standard from single and LGBTQ+ people, in such circumstances, may be considered as unfair.

Compatibility with Expanding Constitutional Morality Doctrine

Constitutional morality is the principle that maintains that laws must uphold the equality, dignity, and non-discrimination elements of society and its people and not the standards and values of the day. For this reason the approach towards family under the ART Act might fail to hold ground.

VII. Ethical Dimensions

Bodily Integrity and Autonomy in Reproductive Technologies

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The ethical debate surrounding ART underscores the importance of bodily autonomy and freedom in the context of health matters. Women receiving ART treatment are present in a clear and immediate physical operational field, suffer due to over medicalization and technology every day, as new technologies change everyday medical practices, and it needs to be ensured that their decision making process in informed , free and is respected. Ethics demands that people be able to decide what to do with their bodies, so that they are not forced, unduly encouraged or otherwise jeopardized. A dilemma and a controversial subject that has continued to surface in ART practices is the conflict between medical care and personal freedom especially concerning reproductive services.

Ethical Concerns Regarding Gamete Commodification

The sale of sperm or ovarian tissues cannot be practiced since it devalues human dignity to a huge degree . The practice of treating gametes as commodities becomes worse in societies that are characterised by unequal Classes, where individuals who need money can sell eggs or sperm to earn their living. Despite the clear line drawn by the ART Act on the prohibition of practice of selling gametes, the presence of a web of businesses which focus on ART encourages the purchase and sale of gametes among main players in the ART field, hence the distinction between donation and exploitation can easily blur.

Women's Labour and Exploitation Risks

ART treatments usually require hard physical and emotional work from women including, but not limited to, oocyte aspiration, multiple courses of hormonal treatment, and exposure to certain health risks that may even be classified as serious.

Interests of the Future Child—Welfare Principle

A key ethical consideration in ART is the welfare of the child who will be born as a result of reproductive technologies. The welfare principle emphasises that decisions about ART must prioritise the child's best interests, including stable parentage, physical safety, and psychosocial well-being. Ethical frameworks argue that safeguarding the child's welfare requires careful screening of commissioning parents, clear legal recognition of parentage, and prevention of commercial or exploitative practices. While the ART Act incorporates some of these protections, concerns remain regarding whether restrictive eligibility norms genuinely reflect child-welfare considerations or whether they serve broader moralistic objectives.

Ethics of Donor Anonymity and Informational Rights of the Child

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Concerns about the ethics of donor anonymity revolve around protecting the privacy of the do nor and in the same sense, the right of the donor conceived children.

Though the law provides for donor anonymity to ensure privacy and promote volunteering, th ere may exist needs for children in accessing genetic and medical information regarding their biologicalparent.[29] Research in other countries has shown that the prevailing opinion is in fav our of donor identity disclosure when the child in question comes of age, as it is considered a component of individual's personal image and identity. The challenge lies in balancing in these two interests.

VIII. Critical Analysis

Strengths of the Act

Standardisation, Safety, and Accountability

A lot of the ART Act's success is derived from its steps towards standardizing the fertility sector in India which had previously been known for its fairly uncontrolled and loosely monitored practice of in vitro fertilization (IVF). The ACT also ensures the safety by taking such measures as making ART clinics and banks are registered, licensed, and audits are conducted, which enhances facilities in the clinics and therefore the services . These steps help keep the procedures in line especially in cases of emergencies and also help maintain the correct professional conduct in using ART procedures.

Protection Against Exploitation

The Act takes into account long-standing concerns that involve the abuse of donors and women who undergo ART procedures. By prohibiting the sale of gametes and making informed consent mandatory , medical screening, and insurance for donors, the law seeks to mitigate coercive practices and protect vulnerable people. These shielding provisions are an attempt to place ethical boundaries around commercial reproductive services

Weaknesses of the Act

Restrictive Eligibility and Lack of Recognition of Diverse Families

One major limitation is the strict boundaries of the eligibility criteria that restrict ART access mainly to married, heterosexual couples and few select categories of single women.

[29] Geeta Narayan, "Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements",22 *Journal of NHRC*, 65-82.(2023)

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The Act's precise description of a family does not provide any scope for inclusion of certain individuals, unwedded spouses or any other form of family types. The period of time attached to this aspect is limited and cannot coexist with the present social status and the essence of inherent freedom with absolute fairness to society at large and also with the constitution. In simpler words, the absence of inclusivity in family recognition shows that there is a sort of disconnect between the legal regime and the surrounding societal character.

Heavy Regulatory Burdens on Clinics

Even though some would argue that regulations are necessary, getting in as many checks and balances in the clinic's health care provisions , it may not be possible for small clinics to implement .To deal with this problem a lesser burden may be imposed on smaller clinics that are located in the more rural parts of India with basic safeguards in place. .

Furthermore, because of the fear of disadvantages associated with the heavy ART regulation, some clinics with license to operate ART, may opt not to go forward.

Whether the Act Strikes a Constitutionally Permissible Balance

The main constitutional issue requires one to see whether the Act achieves a proper equilibrium between state interests in controlling ART and individual rights to reproductive freedom. The Act achieves legitimate purposes through its donor protection measures and its prohibition of illegal activities, but its eligibility criteria and required medical conditions and extensive procedural rules create constitutional boundaries that go may beyond acceptable limits. The proportionality analysis shows that protective objectives can be achieved through less restrictive methods which include increased counselling and risk-based screening and non-discriminatory eligibility criteria.

IX. Recommendations

Amend Eligibility Criteria to Ensure Gender-Neutral and Orientation-Neutral Access

Amending eligibility conditions is important to ensure that ART services comply with constitutional guarantees of equality and non-discrimination. Gender-neutral and orientation-neutral access that includes, single men, LGBTQ+ and diverse family structures should be allowed access under the ART Act. Present restrictions lack medical justification and reinforce old social norms. Changing the eligibility criteria would align the Act with evolving jurisprudence on personal liberty and dignity.

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Adopt Rights-Based Safeguards Over Paternalistic Restrictions

It is increasingly difficult to ensure true autonomy and reproductive rights without switching from Paternalistic to rights-based controls. In May (2008) the Ministry of Health for the first time released Guidelines with treatment standards and requirements for infertility treatment that all favorable, unfertile women and couples could identify their family. Reproductive decision-making ought to be based on the concept of informed consent or counselling or practice standards rather than strict limitations imposed by the state. Frameworks based on rights assume that individuals are capable of making free choices and exercise safeguards even as they protect them from harm and exploitation[30].

Introduce Clear Guidelines on Pricing, Insurance, and Counselling

It is difficult to access the compulsory insurance, medical examination, and ART procedures because of their high cost. This is because people who are less privileged financially, are hardly able to afford these services. There is a need to enhance the guidelines related to the setting of quotas rather than limit them to pricing structures only. There should be clear stipulations on the costs of infertility investigation and treatment thus minimizing the exploitative nature of these services. Moreover, its provisions should encourage the provision of standardized ART services to all and in so doing address the problem of disparities among service providers.

Align India's ART Laws with International Human Rights Norms

Aligning the ART Act with international human rights instruments is essential in order to make sure that India's reproductive governance is consistent with the global standards and has values worth upholding. ART rules that are inclusive and autonomy-based such as those found in the United Kingdom or Australia fosters more rights and benefits to the public. These approaches to regulation are finally the building blocks that supplement national laws concerning reproductive rights and the ideals to which a state like India, which is known to uphold human rights in principle should aspire to.

Strengthen Data Protection and Privacy Mechanisms for ART Clinics

In the context of treatment involving artificial reproductive technologies, it is widely agreed that the information gathered about patients and disorders in genes should be kept

[30] Andrew Heard, "HUMAN RIGHTS: CHIMERAS IN SHEEP'S CLOTHING**?"**, available at : https://www.sfu.ca/~aheard/intro.html (Last visited on 23 April 2023)

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confidential. Protections should include express informed consent, determination of safekeeping mechanisms as well as enabling suppression of data in certain circumstances to prevent abuse and respect individuals' informational self-determination.

X. Conclusion

The Assisted Reproductive Technology (Regulation) Act of India 2021 is in place to check the unbridled expansion of fertility clinics in the country without any regulations. It cannot be denied that there exists a need for ART clinics due to various reasons. The Act enforces higher clinical standards, it emphasises on responsible behaviour, it protects third-party donors and patients, and it creates an appropriate government structure. On the other hand, the main concern that the people who meet the eligibility conditions are able to take advantage of the ART technology, restrictive eligibility criteria, costs and said procedures impede their access to services. The Act attempts to address exploitation and unethical practices, yet in doing so, it creates structural and constitutional tensions relating to equality, autonomy, and reproductive justice.

The Act aims to curb abuses that may interfere with individual reproductive rights, while also recognising the societal need to protect potential children. The checks and balances that the Act introduced in what was hitherto unchecked brought much-needed supervision. However, there are some excessive paternalism characteristics one can point at in some of the sections of the Act. The limitations which are due the marital status based, sexual orientation based, age-based discrepancies etc. The rationality that is based on traditional family understanding and does not take int consideration the changing social structure and constitutionalism.

Though the Act is a welcome change and attempts to protect the interests of the parties,In order to maintain compliance with overall constitutional standards developing in India, there is a need to look at the ART Act in a new light. Rules under the Act governing Reproductive technologies and that ART should bring all under its umbrella, irrespective of gender, marital, or sexual orientation. Incorporating such egalitarian values would not only authenticate its constitutionality but would also lay the foundation for a reproductive governance regime in the emerging India that is rights-based and morally just as well as sensitive to the interests of society.

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IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND OF DIVORCE: A CRITICAL ANALYSIS

Pradyumna Tiwari[*]

ABSTRACT

The marriage in the Indian society is considered as a sacrament and the spouses are required to maintain this marital knot during their life. However, sometimes the marriage between the parties does not sustain. In these circumstances, Hindu Marriage Act provides for ground of divorce, however, the grounds are majorly based on the fault of one of the parties. Sometimes, there may be situations where the marriage is not workable at all and that is not due to fault of either party. Such situation is described as Irretrievable Breakdown of Marriage and it has not been statutorily recognised as ground of divorce by the legislature till now. However, the Hon'ble SC has in catena of judgements has granted divorce to the parties on the ground of irretrievable ground of marriage in order to complete justice and to mitigate the sufferings of the parties. However, at the international level the prevailing situation is somewhat different as it has been recognised by various countries as a ground of divorce. In view of peculiar socio-cultural factors prevailing in Indian society, this work discusses whether irretrievable breakdown of marriage should be statutorily recognised as a ground of dissolution of marriage between the parties. It also discusses the reasoning behind the supreme court judgements granting divorce on this ground and what is the stance of the government in this regard. It also discusses the challenges and the way forward in recognising such a ground for dissolution of marriage between the parties.

I. Introduction

"When two people decide to get a divorce, it isn't a sign that they 'don't understand' one another, but a sign that they have, at least, begun to."

\- *Helen Rowland*[1]

The concept of marriage under Hindu Law is considered as a sacrament and a holy union among two individuals. Under the traditional Hindu Law, divorce was not recognized as the marriage was considered as union of two individuals for life long term. The practice of divorce was deprecated by the society. However, with the passage of the time and advancement of the society, divorce came to be accepted among the people in society. The legislature codified the law relating to the marriages among Hindus in the form of The Hindu Marriage Act, 1955. It provided for the grounds of divorce under section 13 of the Act.

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[1] Irretrievable Breakdown of Marriage in India, India, *available at:* https://www.lexology.com/library/detail.aspx?g=e4a294ac-cbf3-491e-bcf7-8e13c6034465 (last visited on 28th August, 2025).

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Originally, the Act provided for the grounds of divorce on the basis of fault of one of the parties which are known as fault-based grounds (proceeded on the fault- based theory of divorce). The parliament by inserting Section 13(1A) of the Hindu Marriage Act, vide Act no. 44 of 1964, has introduced a glimpse of theory of breakdown of marriage. It provides that where there has been no resumption of cohabitation between the parties within one year of passing of decree of Judicial Separation or restitution of conjugal rights then the either party can present petition for divorce[2].

Thus, for an elaborate discussion, it would be appropriate to discuss the various theories of divorce. The discussion of the various theories would facilitate in understanding the significance of irretrievable breakdown of marriage.

Even as of date, the irretrievable breakdown of marriage has not been recognized as ground of divorce by the legislature. Thus, the courts can not statutorily grant the decree of divorce on the ground that the marriage between the parties has been broken down irretrievably. Therefore, this work will discuss as under which provision and procedure the courts can grant the divorce under Irretrievable breakdown of marriage.

II. Theories Of Divorce and Their Statutory Recognition

Theories of divorce provides for the different reasons which are attributable to the divorce among husband- wife. Primarily there are three theories of divorce:

a. Fault Theory of Divorce
b. Consent Theory of Divorce
c. Irretrievable Breakdown Theory

However, initially during vedic ages marriage was considered as indissoluble and an unbreakable bond between husband and wife. According to the Hindu Dharmashastras, marriage was considered as a holy and indissoluble union for the performance of religious duties[3]. With the passage of time, due to evolving societal landscape and other changes such

[2] (1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground— (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

[3] Harsimran Kaur Bedi, "The Concept of Marriage under Hindu law and its changing dimensions" Winter Issue *ILI Law Review* 110 (2022).

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as industrialisation, urbanisation etc. the concept that marriage being sacred and indissoluble has changed. It has led to evolution of above said theories of divorce.

Fault Theory of Divorce

As the name of the theory suggests, it focuses on the fault of one of the parties to the marriage. As per fault theory, if one of the spouses is at fault then the other party become entitled to apply to the court seeking decree of divorce. The Hindu Marriage Act primarily recognises fault-based theory as a ground of divorce. It provides for various grounds for applying to the court for decree of divorce. These grounds are as follows:

Voluntary Sexual Intercourse with person other than spouse during continuance of marriage

This ground of divorce was not available when the Act was originally enacted. It was added in 1976 by way of Marriage Laws (Amendment) Act, 1976. Earlier adultery was an offence under section 497 of Indian Penal Code. However, the same has been struck down and declared unconstitutional in the case of Joseph Shine vs Union of India[4]. However, the effect of that judgement is that the offence has been decriminalized but it is still available as a ground of divorce of marriage. The roots of this provision can be traced back to the thought that spouse(s) must be loyal to each other and that spouses must maintain the dignity and sanctity of the marriage.

Cruelty

Cruelty as a ground for divorce encompasses within its ambit both mental and physical cruelty. What constitutes cruelty can not be defined as it depends upon totality of facts and circumstances involved. In the cases pertaining to cruelty as ground of divorce, it is the fault of one party who subjects the other party to cruelty, which entitles the other party to approach the court and to seek the decree of divorce.

Desertion

It means that one of the spouse(s) has left the conjugal society of the other which affords the aggrieved spouse to approach the court. In the cases of desertion, it is the fault of one spouse who deserts the other and leaves the conjugal society of the other and this desertion becomes ground for the deserted spouse to approach the court for decree of divorce. However, to prove

[4] AIR 2018 SC 4898

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the ground of desertion other requirements are also required to be fulfilled, which are not discussed here for sake of brevity.

Conversion

Conversion as a ground for divorce implies that one party converts his/ her religion to another religion then the other spouse can approach the court for dissolution of divorce.

Insanity

As a ground of divorce, it provides that when one party has been incurably of unsound mind or has been suffering either continuously or intermittently from a mental disorder to such an extent that petitioner cannot be expected reasonably to live with respondent.

Suffering from Venereal Disease

If one of the spouse is suffering from venereal disease with communicable form then the other spouse can apply to the court for decree of divorce.

Renunciation

If the spouse has completely renounced the world by becoming a hermit or sanyasi (i.e. by entering into religious order), then the other party can approach the court seeking divorce. The renunciation of world by a spouse is taken as a ground of divorce by the other party.

When one of the spouse has not been heard alive for 7 years

The petitioner can file a petition for divorce when the other spouse has not been heard alive for 7 years or more by those who would have naturally heard of him as alive. Though it is a ground of divorce, but in such cases, the party who seeks divorce has the burden to prove the fact that the other spouse has not been heard alive.

Apart from the above- mentioned grounds of divorce, the wife is entitled to divorce on following additional grounds as provided in Section 13(2) of the Hindu Marriage Act viz, Pre-Act Polygamous marriage, Husband being guilty of rape, sodomy or bestiality, non-resumption of cohabitation for one year after passing of award of maintenance in favour of wife and repudiation of marriage. These grounds are exclusively available to wife.

Consent Theory/ No Fault Theory

This theory is based on the idea that when two consenting adults marry each other and they are of the view that the marriage is not working between them and are mutually of the

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view that both the spouses should seek dissolution of marriage then it is in the interest of the spouses and the society that the marital ties between the parties should be dissolved. It is based on the view that when the parties to the marriage, being sane, adult and having understanding of the consequences of their actions have mutually decided to sever their marital ties then it is not in interest of the society/ parties themselves to pursue series of litigation and to make their marital ties averse. Thus, the legislature has in consonance with the mutual consent theory has inserted Section 13B of The Hindu Marriage Act vide amendment act of 1976.

Irretrievable Breakdown of Marriage

According to this theory of dissolution of marriage, the marriage between the parties can be dissolved if the marital tie between the parties have been broken down irretrievably and there is nothing remaining in the marriage. It is considered that poorly fitted marriages are the major human and institutional challenge. Therefore, it is in the interest of the society that such marriages which is not effective between the parties should not be forced to be continued with that relationship as it will assuage the sufferings of the parties. It is not discussed here as it will be discussed hereinafter in this work.

III. Irretrievable Breakdown Of Marriage As Ground Of Divorce

Irretrievable Breakdown of Marriage as a ground of divorce is not statutorily recognised as a ground of divorce by the parliament under HMA/ SMA. However, the courts have recognised it through precedents and have dissolved the marriage. Through this research work, the author would like to examine the jurisprudential reasoning behind the grant of divorce by the courts.

The Law Commission in its 71st Report titled as "The Hindu Marriage Act 1955- Irretrievable Breakdown of Marriage As A Ground of Divorce" has observed that once the parties have separated and the separation continues for a longer period of time then the marriage can be presumed to have been broken down and that it would not be proper to preserve the unworkable marriage as it would be source of misery between the parties.

In the said report the law commission while supporting for irretrievable breakdown of marriage as a ground for divorce, has stated that the since the nature of family is changing and the family is becoming more egalitarian and more democratic, this has led to more cogent reason for introducing irretrievable breakdown as a ground for divorce.

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The traces of Irretrievable breakdown of marriage can be found in Section 13(1A) of The Hindu Marriage Act which provides that if the party does not comply with decree of restitution of conjugal rights for a period of one year, then it affords a ground for seeking divorce. Similarly, if the parties have suffered a decree of judicial separation and they have not resumed the cohabitation for a period of one year then also party can seek divorce on this ground.

The law commission in its report has also dealt with one argument that no one shall be allowed to take advantage of one's own wrong. The law commission has compared this argument with Section 13(1A)(ii) of HMA wherein the party not complying with the decree of restitution of conjugal rights for one year can approach the court seeking divorce on the same ground. Thus, it was stated that the party which was at wrong can have advantage of its own fault.

The law commission in its report has stated that the parties have not to be merely averring irretrievable breakdown of marriage rather it has to be substantiated by it. It was observed as follows:

"Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage -"breakdown"-and if it continues for a fairly long period, it would indicate destruction of the essence of marriage- "irretrievable breakdown."

The law commission has also suggested amendments in the Hindu Marriage Act for incorporating Irretrievable breakdown of marriage as a ground of divorce. However, these recommendations have not been accepted by the legislature till now.

Thus, it becomes pertinent for us to examine as to how courts are granting the divorce when the marriage has been broken down irretrievably and under what circumstances the court can dissolve the marriage under irretrievable breakdown of marriage. For proper understanding of the issue, it is necessary to examine various judicial precedents.

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The reference of the Hon'ble SC to irretrievable breakdown of marriage can be traced to case of *V Bhagat vs Mrs. D Bhagat*[5]. In this case, the husband has filed a petition of divorce against wife alleging that the wife is living an adulterous life. On the other hand, wife in her written statement has made several allegations including lack of mental equilibrium. Pursuant to this, the husband amended the plaint and sought decree of divorce on the basis of mental cruelty in response to the allegations put forth by the wife in her written statement. It was observed by the court that despite of such allegations between the parties, the wife wants to live with the husband and thus, the SC observed that she has resolved to live in agony and want to make life of husband a miserable hell as well and therefore, the Hon'ble SC was of the opinion that the marriage between the parties is broken down irretrievably and there are no chances of reconciliation and, therefore, the marriage of the parties was dissolved under article 142 of Constitution of India. However, it was categorically observed that irretrievable breakdown of marriage is not a ground per se but it has to be kept in mind while deciding a matrimonial dispute and whether the ground as alleged is made out or not. The relevant observation of the supreme court is re-produced as follows:

"Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor is mere delay in. disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable break-down of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the Court finds it in the interest of both the parties."

Thus, the court held that there is no purpose in keeping two discordant people together as it will not only increase their mental agony and pain rather it will also be against the public interest at large.

The Hon'ble SC again in *Ashok Hurra vs Rupa Bipin Zaveri*[6] observed that in totality of facts and circumstances of the case, the marriage between the parties was effectively dead and that there is no chance of revival of the emotional relationship between the parties and

[5] (1993) SUPP. 3 S.C.R.
[6] [1997] 2 S.C.R 875

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years have been lapsed since the litigation was started. Thus, the Hon'ble SC in the exercise of powers under article 142 of Constitution of India granted a conditional decree of divorce conditional upon the fact that husband complies to the condition set forth by the court towards the safeguard of the wife. At this stage, it is pertinent to note that in this case, the ld. Single judge of high court has granted a decree of divorce but that was set aside by a division bench on the ground that there is no power akin to Article 142 available with the HC and thus, the decree proceeded on irretrievable breakdown of marriage was set aside.

A brief reference can be made to the case of *Chandrakala Menon vs Vipin Menon*[7] for understanding the approach in cases where the marriage has been broken down irretrievably and justice would be served only by deciding all the disputes between the parties. In this case, the father had custody of the daughter and was ordered to handover the custody of the child to the Mr. Nambiar (maternal grandfather). However, he did not do so rather sought for an adjournment. Therefore, the ld. Magistrate order that custody be given to Mr. Nambiar and if he does not do so, he will be proceeded to declare as proclaimed offender. This order was challenged before the HC and the said order was quashed and the present appeal was against the order of the high court. Meanwhile a mutual petition for divorce was filed by the parties and the same was pending. The Hon'ble SC was of the opinion that since the marriage between the parties have been broken down irretrievably and the parties have been living separately since more than one year therefore, the court exercised the power and dissolved their marriage as the marriage was broken down irretrievably.

Now coming to one of the celebrated judgement on this issue, *Naveen Kohli vs Neelu Kohli*[8]. In this case, there was a series of litigation between the parties including criminal litigation and that the parties were living separately for a long period of time. The Hon'ble SC has very elaboratively discussed about the irretrievable breakdown of marriage. It has been observed by the Hon'ble SC that though Irretrievable breakdown of marriage has not been made a ground of divorce under HMA but with the passage of time there are large number of cases involving marriage which are virtually non existent and until and unless irretrievable breakdown of marriage is introduced divorce can not be granted. The relevant observation of the Hon'ble SC is as follows:

[7] (1993) 2 SCC 6
[8] (2006) 3 SCR 53

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"We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction; though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties."

The Hon'ble SC observed that looking into the peculiar features of the case that the marriage has been broken down irretrievably and there is no possibility of the reconciliation. The Hon'ble SC has granted divorce to the parties due to peculiarity of facts and circumstances of case. While granting divorce, the SC has recommended the insertion of irretrievable breakdown of marriage as a ground of divorce. The emphasis of the Hon'ble Supreme court on the introduction of the irretrievable breakdown of marriage is a welcome step in recognising the agony which the party suffers and the bittering consequences which will be faced by the individuals as well as society at large. However, the Hon'ble SC has while granting the divorce to the parties has ensured that no injustice is caused to the wife and has directed husband to pay a permanent alimony. Thus, the divorce if granted under irretrievable breakdown of marriage is granted with enough safeguard.

At this juncture, it is pertinent to refer to case of *Vishnu Dutt Sharma vs Manju Sharma*[9] wherein a 2 judge bench of the Hon'ble SC was faced with the situation whether the courts can grant a divorce on the ground of irretrievable breakdown of marriage. The Hon'ble SC observed that since there is no express ground of irretrievable breakdown of marriage u/s 13 of HMA, therefore, granting a divorce on the ground of irretrievable ground of divorce would amount to amending of the act which is a function of legislature. The relevant observation of the Hon'ble SC is as follows:

"12. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

9 (2009) 3 SCR 891

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13. Learned counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned counsel for the appellant"

However, in this case, the Hon'ble SC has however, not considered the pragmatic conditions which can occur in the discordant married life of two individuals. Moreover, the Hon'ble SC has not considered the exercise of discretionary power under article 142 of The Constitution of India. If seen from a strict interpretation then such an interpretation is correct as judiciary can not be said to add a new ground under the Act. However, if seen from the perspective of doing complete justice between the parties, the Hon'ble SC overlooked the consequences of keeping two discordant individuals together. Be that as it may, the perplexity has now been solved by Hon'ble SC in judgement in *Shilpa Shailesh vs Varun Sreenivasan* which is discussed in the latter part of this work.

It is worthwhile to mention here that despite the recommendation of the Law Commission in 1978 and 2009, irretrievable breakdown of marriage has not been statutorily recognised by the parliament. It is also pertinent to mention here that the Marriage Laws (Amendment) Bill of 2013 which seeks to introduce Irretrievable breakdown of marriage as ground of divorce has never seen the light of day despite being passed by the Rajya Sabha[10].

It has also been held that the Hon'ble SC in exercise of powers under article 142 of Constitution of India can dissolve the marriage between the parties even if no ground for divorce is made out as contemplated by the Act. However, this power can be exercised when the marriage between the parties is completely dead, unworkable and beyond salvage and has broken down irretrievably. The relevant part of the observation is as follows:

[10] K. Srinivas vs K. Sunita [2014] 11 S.C.R. 298

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"6. Now so far as submission on behalf of the respondent-wife that unless there is a consent by both the parties, even in exercise of powers under Article 142 of the Constitution of India the marriage cannot be dissolved on the ground of irretrievable breakdown of marriage is concerned, the aforesaid has no substance. If both the parties to the marriage agree for separation permanently and/or consent for divorce, in that case, certainly both the parties can move the competent court for a decree of divorce by mutual consent. Only in a case where one of the parties do not agree and give consent, only then the powers under Article 142 of the Constitution of India are required to be invoked to do the substantial Justice between the parties, considering the facts and circumstances of the case. However, at the same time, the interest of the wife is also required to be protected financially so that she may not have to suffer financially in future and she may not have to depend upon others.

7. This Court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution of India for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted. In the present case, admittedly, the appellant-husband and the respondent-wife have been living separately for more than 22 years and it will not be possible for the parties to live together. Therefore, we are of the opinion that while protecting the interest of the respondent-wife to compensate her by way of lump sum permanent alimony, this is a fit case to exercise the powers under Article 142 of the Constitution of India and to dissolve the marriage between the parties.[11]*"*

The Hon'ble SC has also observed that since the institution of marriage is a pious one and it is governed not only by the legislations but also by the societal norms as so may new relationships stem from the marriage, thus, irretrievable breakdown of marriage can not be accepted as a straight jacket formula for relief of divorce under article 142 of Constitution of India. The relevant observation of the supreme court in the case of *Dr. Nirmal Singh Panesar vs Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar*[12] is as follows:

"18. However, in our opinion, one should not be oblivious to the fact that the institution of marriage occupies an important place and plays an important role in the society. Despite the increasing trend of fi ling the Divorce proceedings in the courts of law, the institution of

[11] *R. Srinivas Kumar* v. *R. Shametha* (2019) 12 SCR 873; *Munish Kakkar* v. *Nidhi Kakkar* (2019) 15 SCR 169

[12] (2023) 14 SCR 871

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marriage is still considered to be a pious, spiritual, and invaluable emotional life-net between the husband and the wife in the Indian society. It is governed not only by the letters of law but by the social norms as well. So many other relationships stem from and thrive on the matrimonial relationships in the society. Therefore, it would not be desirable to accept the formula of "irretrievable break down of marriage" as a strait-jacket formula for the grant of relief of divorce under Article 142 of the Constitution of India."

Whether the marriage has been irretrievably broken down is a matter of facts and circumstances of the case and there are several factors which are to be considered while examining it includes, period of cohabitation, last resided together, nature and gravity of allegations made etc. The relevant part of the observation of the Hon'ble SC in *Kiran Jyot Maini vs Anish Pramod Patel*[13] is as follows:

"The factors to be considered in such examination are such as, period of cohabitation after marriage, when they had last cohabited, nature and gravity of allegations made by the parties, orders passed in previous or pending legal proceedings, attempts at reconciliation or settlement and their outcomes, period of separation and such other similar considerations."

On the basis of the above cases, it can be clearly said that though irretrievable breakdown of marriage is not a ground which is statutorily recognised under the HMA, however, the supreme court has granted divorce on this ground between the parties under article 142 of The Constitution of India in doing complete justice between the parties. However, this debate whether the divorce can be granted under Irretrievable ground of divorce or not has been settled by the judgement of Hon'ble SC in the case of *Shilpa Sailesh vs Varun Sreenivasan*[14]**.**

Shilpa Sailesh vs Varun Sreenivasan: Clearing the clouds over the Irretrievable Breakdown of marriage as ground of divorce

A five judge bench of the Hon'ble SC in this case was hearing a reference made in different cases and had formulated questions upon the following aspects:

a. What is scope and ambit of power and jurisdiction of this court under Article 142(1) of The Constitution of India;

b. Whether this court while hearing a transfer petition under Article 142 of Constitution of India in view of settlement between the parties grant a decree of divorce by

[13] (2024) 7 SCR 942

[14] (2023) 5 SCR 165

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mutual consent dispensing waiving off period of 6 months and can quash and dispose off the cases pending under DV Act, Section 125 CrPC, or under 498-A IPC. If the answer to this question is in affirmative then in which cases and under what circumstances this court can exercise under article 142 of constitution.

c. Thirdly and most importantly, is whether this court can in exercise of power under article 142 of constitution of India grant a decree of divorce when there is irretrievable breakdown of marriage in spite of spouse opposing the prayer of divorce.

As far as the first issue is related, the Hon'ble SC has observed that the power is discretionary and is not a matter of right. It finds its origin in the old age concept of 'justice, equity and good conscience'. The SC observed that while exercising the jurisdiction under Article 142 of Constitution of India can not supplant the law but it acts as a *problem solver in the nebulous areas*. However, this power has to be used with due *restraint and circumspection*.

Since the second issue is not relevant to present work, it is not discussed in great details. However, for purposes of reference, the Hon'ble SC held that it can quash other proceedings in view of settlement between the parties.

Now addressing the important aspect of the suit i.e. whether courts can grant decree of divorce if there is irretrievable breakdown of marriage between the parties. In this regard, the court examined various legal precedents to hold that the grant of divorce on the ground of Irretrievable breakdown of marriage is a discretionary relief and can only be granted after considering facts and circumstances of each case and ensuring that 'complete justice' is done between the parties. However, the court laid down a caveat that for dissolving the marriage between the parties on ground of irretrievable breakdown of marriage, the court has to be satisfied and convinced that marriage between the parties is totally unworkable, emotionally dead and beyond salvage and there is no hope for reconciliation.

The Hon'ble SC also laid down some factors which the courts can consider while granting the divorce on ground of Irretrievably Breakdown of Marriage:

i. Period of cohabitation between the parties and when the parties have last resided together i.e. period of separation

ii. Nature and gravity of allegations made by the parties against each other.

iii. Orders passed in different legal proceedings

iv. Cumulative effect of same on the personal relationship of the parties.

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v. Attempts towards reconciliation made by the parties; if so then how many and when was the last effort made etc.

The Hon'ble SC has not laid down an exhaustive list of factors as it is merely illustrative. However, the court said that the factors determining whether the marriage has been broken down irretrievably has to be seen in light of socio-economic conditions of the parties, educational qualifications of the parties, whether there has been any child out of wedlock; if yes how the parties wish to resolves the issues as to the child/ children's custody, maintenance and economic matters of the children. Thus, the fact whether divorce can be granted on the ground of irretrievable breakdown of marriage is a matter of facts and circumstances involved in each case and there can not be any straight jacket formula for deciding it.

After discussing various precedents, the Hon'ble SC held that the power under Article 142 of Constitution of India can be exercised to grant divorce on the ground of irretrievable breakdown of marriage to do 'complete justice' and this power is not fettered by the doctrine of fault and blame as applicable to the petitions for divorce under section 13(i)(i-a) of Hindu Marriage Act.

However, the Supreme Court has also expressed its view on the issue whether decree of divorce can be passed under exercise of jurisdiction under article 32/ 226 of the constitution. The Hon'ble SC held that the parties can not be allowed to bypass the statutory provisions and the correct remedy is to approach superior forum for its redressal. Moreover, the Hon'ble SC has held that judicial orders are not amenable to jurisdiction under writ jurisdiction, thus, a party can not file a writ petition and seek divorce directly from this court as it would amount to circumvent the established procedure.

In the context, it would be appropriate to discuss whether the power to dissolve the marriage on the ground of irretrievable breakdown of marriage is available to other courts i.e. High Court or family courts. The answer to this question lies in the fact that the Hon'ble SC is exercising such power in order to do 'complete justice' and to prevent parties from prolonged suffering and to put quietus to series of litigation between the parties. Such a power is one of extraordinary nature and its corresponding or analogous provision could not be found in other statutes. Thus, even the high court or the family court could not exercise this power to dissolve the marriage on the ground that marriage has been broken down irretrievably. In this regard,

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reference can be made to *Deepti vs Anil Kumar*[15] wherein Hon'ble Delhi HC has categorically held that the power to dissolve the marriage is exercisable by Hon'ble Supreme Court and is not available to High court and Family courts. The relevant observation is as follows:

"25. In terms of the Judgment of the Constitution Bench of the Supreme Court in Shilpa Sailesh (supra), the power to grant divorce on the ground of irretrievable breakdown of marriage is exercised by the Supreme Court under Article 142 of the Constitution of India to do complete justice to both the parties. Such a power is not vested in the High Courts leave alone the Family Courts."

The Hon'ble Telangana HC has in the case of X vs X[16] has also reiterated that irretrievable breakdown of marriage is not a ground for divorce under section 13 of HMA and therefore, divorce could not be granted solely on this basis. The relevant observation of the Hon'ble HC is as follows:

"29. As discussed supra, Sri J. Prabhakar, learned Senior Counsel for the appellant contended that the appellant and the respondent are staying separately since last 17 years and their marriage is it retrievably breakdown, there is no possibility of living together. But the said ground of irretrievable breakdown of marriage is not a ground to seek divorce. Neither, the Family Court nor this Court can grant divorce on the said ground. The said aspect can be considered while coming to a conclusion with regard to alleged cruelty."

Interestingly, the Hon'ble SC in case of *Shri Rakesh Raman vs Smt. Kavita*[17] has observed that if the facts and circumstances so indicate, the court can consider irretrievable breakdown of marriage as cruelty under Section 13(i)(i-a) HMA. The Supreme court while recognising as such observed as follows:

"Irretrievable breakdown of a marriage may not be a ground for dissolution of marriage, under the Hindu Marriage Act, but cruelty is. A marriage can be dissolved by a decree of divorce, inter alia, on the ground when the other party "has, after the solemnization of the marriage treated the petitioner with cruelty". In our considered opinion, a marital relationship which has only become more bitter and acrimonious over the years, does nothing but inflicts cruelty on both the sides. To keep the façade of this broken marriage alive would be doing injustice to both the parties. A marriage which has broken down irretrievably, in our

[15] 2023:DHC:6803-DB
[16] 2024 LiveLaw (TS) 102
[17] 2023 LiveLaw (SC) 353

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opinion spells cruelty to both the parties, as in such a relationship each party is treating the other with cruelty. It is therefore a ground for dissolution of marriage under Section 13 (1) (i-a) of the Act."

Thus, even when the family courts can not grant divorce on the ground of irretrievable breakdown of marriage, if the marriage has been broken down irretrievably then the court can consider it as a cruelty upon both the parties and dissolve it under Section 13(i)(i-a) HMA. However, this has to be considered in the light of facts and circumstances of each case.

IV. Position Of the Government: The Marriage Laws (Amendment) Bill, 2010 And Report of the Law Commission

The Marriage Laws (Amendment) Bill, 2010 was introduced by the government on 04.08.2010 in Rajya Sabha which seeks to introduce irretrievable breakdown of marriage as a ground of divorce. It moreover seeks to address the issues pertaining to the rights of the spouses and children. The bill was introduced with following statement of objects and reasons:

"The Hindu Marriage Act, 1955 was enacted on the 18th May, 1955 to amend and codify the law relating to marriage among Hindus. Similarly, the Special Marriage Act, 1954 was enacted on the 9th October, 1954 to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce. The provisions of the said Acts have proved to be inadequate to deal with the issue where there has been irretrievable breakdown of marriage and therefore a need has been felt for certain amendments therein.

Having regard to the recommendations of the Law Commission of India and the observations of the Hon'ble Supreme Court as aforesaid and the demand from various quarters, it is proposed to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 so as to provide for irretrievable breakdown of marriage as a ground of divorce thereunder subject to certain safeguards to the wife and affected children."

The bill proposed to make following changes in The Hindu Marriage Act:

a. Insertion of Section 13C to provide for the ground of irretrievable breakdown of marriage as a ground of divorce.

b. Insertion of Section 13D to provide for right of the wife to oppose the petition of divorce on the ground of irretrievable breakdown of marriage as a ground of divorce on account of grave financial hardship.

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c. Insertion of Section 13E to provide for provision for adequate maintenance to children born out of marriage in consonance with the financial status of the party.

d. Amendment in Section 13B (2) to do away with the requirement of six months of cooling off period[18].

The bill was referred to the standing committee on the personnel, public grievances, law and justice which in its 45Th report on THE MARRIAGE LAWS (AMENDMENT) BILL, 2010 has agreed with the objective of the bill to introduce irretrievable breakdown of marriage but has suggested some changes to the bill qua the doing away of cooling off period and also recommended that the government may define the term 'irretrievable breakdown of marriage'. Lastly, the committee was of the view that though it is in agreement with the object of the bill but the has shown apprehension that such provision my be with safeguard as otherwise they are capable of being misused against the women.

The Law Commission has also on two occasions recommended the inclusion of irretrievable breakdown of marriage but the same has not been acted upon by the government. 71st Law Commission Report has already been discussed above and is not repeated here. However, for the purpose of comprehensive discussion the 217th Law Commission Report is discussed here.

217th Law Commission Report

The law commission headed by Dr. Justice AR. Lakshmanan submitted its report titled "Irretrievable Breakdown of Marriage – Another Ground for Divorce" wherein the inclusion of Irretrievable ground of marriage was supported by the Law Commission of India.

While approving of the inclusion of irretrievable breakdown of marriage, the law commission recommended that the courts before granting decree of divorce should examine whether adequate financial arrangements have been made for the parties and children.

At present, when an unstarred question was asked to the Union Minister of state of Law and Justice about the stand of the government's stand on making law for granting of divorce on the ground of 'irretrievable ground of divorce' to which it was responded that currently there was no such proposal being considered[19].

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18 Parliament of India Rajya Sabha, "Forty Fifth Report on the Marriage Laws (Amendment) Bill" (2010)

19 Ramji Kumar P, "Exploring the imperative and Implementation challenges for Irretrievable Breakdown of Marriage as a Ground for Divorce in India- A comparative Study with Other Jurisdictions", 6 International Journal of Law Management & Humanities 1860 (2023)

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V. Challenges and Way Forward in Recognising the Irretrievable Breakdown Of Marriage

Now as the Irretrievable Breakdown of Marriage has been considered as a situation where the courts can grant divorce, though under its extra-ordinary powers (under Article 142 of Constitution of India), it is considered as a welcome step and recognition of the fact that there is no use in sustaining a marriage between the parties which is already beyond salvage. But recognising such a ground of divorce is not a easy option, it comes with various challenges regarding its enforcement in view of marriage being an institution and the socio-cultural factors.

Since Irretrievable breakdown of marriage has not been recognised as one of the statutory grounds for dissolving marriage, it is only a way out of the unworkable marriage. As observed by the Hon'ble Supreme Court that marriage is based on trust, mutual respect, companionship and shared experiences[20] and when these elements are missing for a long period of time, the marriage merely remains a formality and which is not in societal interest to keep it intact by way of legal force.

One of the main challenges in recognising it as a ground of divorce is that it may be considered as an easy way of shedding their responsibility. In socio-cultural landscape like India, where the marriage is considered as sacrament and divorce is still not acceptable recognising irretrievable breakdown of marriage must be with some proper safeguards and it should be allowed only after parties have been in separation for longer period of time and efforts have been made to reconcile the differences and same have been failed.

While recognising it as a ground of divorce, it should be kept in mind that the women often face greater economic vulnerability and therefore, the recognition must be with some proper safeguards securing their economic well-being.

Moreover, the recognition of Irretrievable breakdown of marriage poses another problem of determining whether marriage has been broken or not. Thus, the legislature must lay down some guideline and standard to be followed while determining irretrievable breakdown of marriage as the it should not be misused by the parties.

[20] Amutha vs A R Subramanium 2024 INSC 1033

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Another substantial challenge is regarding the welfare of the children. In cases where the marriage between the parents have been broken down irretrievably, the worst sufferers are the children as their welfare is at stake. Thus, the courts while granting divorce under this ground must remain cautious of the fact that the welfare of the children is also required to be taken into consideration.

Though recognition of irretrievable breakdown of marriage as a ground of divorce may come with several challenges. However, such challenges can be tackled by means of public awareness. The government along with various NGOs should create public awareness campaign informing about the rights and liabilities of the parties so that further complications can be avoided. The challenges can further overcome by introduction of relevant standard guidelines and through removal of stigmatisation of divorce in the society through blend of legal, social and educational approaches.

Moreover, as stated earlier that The Marriage Laws (Amendment) Bill, 2010 which seeks to introduce irretrievable breakdown of marriage has not seen the light of the day, the government must re-introduce it or may present a fresh bill in accordance with the societal conditions as of today.

VI. Conclusion

There is a growing need for the parliament to recognise irretrievable breakdown of marriage as a ground of divorce. It becomes moreso important when the Hon'ble SC has recognised it as a ground of divorce to reduce their agony. However, such a power can be exercised only by supreme court. Thus, in the opinion of the author, the legislature should recognise it as ground of divorce and the family court should also be empowered to grant a decree of divorce on the said ground. When the Hon'ble SC is granting the divorce to reduce the mental agony then there is no question why the parties must be compelled to face such a situation for number of years while litigating before district court and high court. The introduction of irretrievable ground of marriage would be a less contentious and quicker way of resolving disputes and would be beneficial of all the parties. However, it should be with proper safeguards, safeguarding the interest of wife and children while granting divorce.

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