MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

MNLU MUMBAI LAW JOURNAL

ISSUE 1 VOLUME 1

27th JUNE 2026

Published by
Maharashtra National Law University Mumbai

EDITOR-IN-CHIEF

PROF. (DR.) DILIP UKEY

Vice-Chancellor

Maharashtra National Law University Mumbai

ABOUT MNLU MUMBAI LAW JOURNAL

Maharashtra National Law University Mumbai, established under the Maharashtra National Law University Act 2014 on 20th March 2014, is one of the premier national law universities in India. An institution for higher learning must promote scholarship that engages with practical questions as well as the moral and philosophical dilemmas that arise in contemporary life. Research in law addresses these problems of society in this dynamic sense.

The MNLU Law Journal is a premier open-access, annual online/offline publication dedicated to democratizing legal scholarship. Our mission is to provide an inclusive global platform where academicians, practitioners, and students can contribute rigorous research to foster a collective repository of legal expertise.

The journal adopts a broad, non-restrictive approach to legal studies, focusing on socio-legal themes that address the complexities of the modern world. The journal will promote interdisciplinary research, encouraging a critical dialogue between law and other academic disciplines to better understand the role of legal systems in the contemporary era.

The MNLU Mumbai Law Journal invites original, unpublished manuscripts from academicians, research scholars, legal professionals, and law students.

DISCLAIMER

The views and opinions expressed in the MNLU Mumbai Law Journal are solely those of the respective contributors and do not necessarily reflect the views of the Editors, the Institution, the Publisher.

While every effort has been made to ensure the accuracy and completeness of the material published, the Editors and the Institution disclaim any liability for errors, omissions, or inaccuracies contained herein.

In the event of any binding defects, misprints, missing pages, or similar production-related issues, the Publisher's liability shall be limited solely to the replacement of the defective copy.

All correspondence, inquiries, and communications relating to the Journal should be addressed to:

MNLU Mumbai Law Journal
Maharashtra National Law University Mumbai
Email: journal@mnlumumbai.edu.in

ADVISORY BOARD MEMBERS

PROF. THOMAS POGGE

Leitner Professor of Philosophy and Professor of Political Science

Department of Philosophy, Yale University

PROF. SIMON CHESTERMAN

Dean and Provost' s Chair Professor, Faculty of Law

National University of Singapore

Senior Director of AI Governance, AI Singapore

PROF. M. SORNARAJAH

Emeritus Professor of Law

Faculty of Law, National University of Singapore, Singapore

PROF. AMRITA NARLIKAR

President, German Institute for Global and Area Studies (GIGA)

Professor, Universität Hamburg

Honorary Fellow, Darwin College, University of Cambridge

PROF. RICHARD ALBERT

William Stamps Farish Professor in Law, Professor of Government

and Director of Constitutional Studies

The University of Texas at Austin, USA

PROF. TIM LINDSEY AO

Malcolm Smith Chair of Asian Law & Redmond Barry

Distinguished Professor, Melbourne Law School,

The University of Melbourne, Australia

PROF. PHILIPPE CULLET

Professor of International and Environmental Law

SOAS University of London, UK

PROF. SITAL KALANTRY

Clinical Professor of Law, Cornell Law School

Faculty Director, Cornell India Law Center Cornell University, USA

PROF. HARSH V PANT

Director, Studies and Head of the Strategic Studies Programme,

Observer Research Foundation

Professor of International Relations, King' s College London, UK

PROF. JAYANTH KRISHNAN

Milt and Judi Stewart Professor of Law,

Indiana University Maurer School of Law

Director, Milt and Judi Stewart Center on the Global Legal Profession, USA

PROF. MOHAMMAD SHAHABUDDIN

Chair in International Law & Human Rights

Birmingham Law School, University of Birmingham, UK

PROF. DEV GANGJEE

Professor of Intellectual Property Law, St. Hilda' s College, University of Oxford, Oxford, UK

DR. CARL LANDAUER

International, E-Commerce, and Financial Services Lawyer.

Formerly, History, Yale, Stanford, and McGill Universities, USA

EDITOR-IN-CHIEF

PROF. (DR.) DILIP UKEY

Vice Chancellor, Maharashtra National Law University Mumbai

HONORARY EDITORIAL BOARD

DR. SAUMYA UMA

Professor of Law, Jindal Global Law School, O. P. Jindal Global University

DR. UMAKANTH VAROTTIL

Associate Professor of Law & Director, NUS Law Academy

Faculty of Law, National University of Singapore, Singapore

PROF.V.C. VIVEKANANDAN

Vice Chancellor, Hidayatullah National Law University, Raipur

DR. STELLINA JOLLY

Associate Professor, South Asian University, Visiting Senior Research Associate, University of Johannesburg | Fulbright Fellow: University of San Francisco, USA

DR. RAJDEEP PAKANATI

Associate Professor and Assistant Director, Centre for Global Governance and Policy Jindal School of International Affairs, O. P. Jindal Global University

DR. KOKILA KONASINGHE

Senior Lecturer, Department of Public & International Law, University of Colombo, Sri Lanka

PROF.DIPTI DUBE

Assistant Professor, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology Kharagpur

DR. NUPUR CHOWDHURY

Assistant Professor of Law, Centre for the Study of Law and Governance, Jawaharlal Nehru University

SENIOR ASSOCIATE MEMBERS

Prof. (Dr.) Amol Deo Chavhan

Professor of Law

Dean of Academics, MNLU Mumbai

Prof. (Dr.) Ragini P. Khubalkar

Professor of Law

MNLU Mumbai

Dr. Pratapsinh B. Salunke

Associate Professor of Law

OSD – Vice-Chancellor's Office & Associate Dean, MNLU Mumbai

Dr. Jagdish Wamanrao Khobragade

Associate Professor of Law &Assistant Registrar [Academic (I/c)]

MNLU Mumbai

ASSOCIATE MEMBERS

Dr. Nanda Pardhey
Associate Professor of Law,
MNLU Mumbai

Dr. Abhijit Rohi
Assistant Professor of Law
Head, UG & PG Departments,
MNLU Mumbai

Dr. Amit Kumar
Assistant Professor of Law,
MNLU Mumbai

Mr. Milind B. Gawai
Assistant Professor of Law,
MNLU Mumbai

Ms. Aastha Tiwari
Assistant Professor of Law,
MNLU Mumbai

TABLE OF CONTENTS

Editorial Note 11
Prof. (Dr.) Dilip Ukey

The Limits of Blended Sentencing: A Midway Approach to Juvenile Reform 12
Prof. Shivani Goswami & Ms. Chinki Verma

Human and Animal Conflict in the Reserve Forests of Jalpaiguri: Legal and Regulatory Perspective 44
Dr. Jayati Kharga & Mr.Rohi Tamang

THE GRAMMAR OF TOLERATION: GST's Clause 5(e), the Tata Sons Decision, and the Unfinished Project of Tax Justice in Post-Colonial India :A Critical, Post-Modern, and Feminist Reading 84
Dr. Priyanka Anand

Conscience, Common Good, and Civilisational Constitutionalism: A Critical Appraisal of India's Contested Transformation through the Lens of Common Good Constitutionalism 106
Chiou Tzu-Yu

Artificial Intelligence as Product or Service? Reconstructing Legal Classification and Liability Under Contemporary Legal Frameworks 125
Dr. Shailendra Kumar & Saksham Patiyar

An Experimental Analysis of AI Capital Sentencing in Terrorism Cases: Humanising the Threshold? 144
Kartik Chamadia

Women Entrepreneurs in Small Businesses: Strengthening Resilience through Innovation and Institutional Support 168
Dr. Shraddha Oberoi

Analysing the existing regulatory mechanism for GM Crops in India: The needed discussion on the journey of GEAC from Bt Cotton to DMH-11 Mustard 183
Oishika Banerji

Anticipatory Military Action on Nuclear Facilities and the Transformation of Article 51: Iran, Venezuela And The Crisis of Anticipatory Self-Defence In Contemporary International Law 210
Pranav Kushwaha & Ms. Anchal Jaiswal

From Trade Discipline to Development Justice: Reinterpreting TRIPS Through Constitutional Morality and Public Welfare in India and the Global South 237
Pawan Kumar & Amit Vikram Pandey

Towards understanding nuances of legal research 282
Dr.Mohammed Aamir Khan & Dr. Teesta Hans

Trade Unions and Labour Code Reforms in India:An Analysis Under Industrial Relations Code,2020 295
Vishakha Bagdey

Rethinking the legal Fiction of Irrevocable Consent in India from the Lens of Marital Rape 311
Esha Ukey

EDITORIAL NOTE

It is with immense pride, gratitude, and a deep sense of responsibility that we present the Maharashtra National Law University Mumbai Law Journal (MNLUMLJ), Volume 1, Issue 1, June 2026. The publication of this first volume marks a significant milestone in the academic journey of Maharashtra National Law University Mumbai and reflects our collective commitment to fostering rigorous legal scholarship, critical inquiry, and meaningful engagement with contemporary legal issues.

The study and practice of law are constantly evolving in response to changing social realities, technological advancements, economic transformations, and global challenges. In such a dynamic environment, legal scholarship plays a vital role in shaping informed discourse, influencing policy development, and strengthening the foundations of justice. It is with this vision that the MNLU Mumbai Law Journal has been established as a platform for the exchange of ideas, research, and perspectives among academicians, researchers, legal practitioners, policymakers, and students.

This issue brings together a diverse collection of scholarly contributions that address pressing legal, social, and policy concerns. The articles contained herein reflect the richness of contemporary legal thought and demonstrate the relevance of interdisciplinary approaches in understanding and resolving complex legal questions. We hope that the discussions initiated through these contributions will inspire further research, dialogue, and innovation within the legal community.

The successful publication of this issue has been possible only through the collective efforts of many individuals. We extend our sincere appreciation to all the authors who entrusted us with their valuable scholarly work and contributed to making this volume a reality. Their research, dedication, and intellectual engagement form the foundation of this publication.

We are equally indebted to our Editorial Board and peer reviewers, whose commitment to academic excellence, meticulous review, and constructive feedback has ensured the quality, integrity, and credibility of the journal. Their efforts have been instrumental in establishing the high standards that we aspire to maintain in all future editions.

We also express our heartfelt gratitude to the faculty members, mentors, and administrative staff of Maharashtra National Law University Mumbai for their unwavering support, guidance, and encouragement throughout the process of conceptualizing and establishing this journal. Their contributions have been invaluable in transforming this vision into reality.

As we celebrate the publication of this inaugural issue, we recognize that it is not merely the beginning of a journal but the beginning of an enduring academic endeavor. We envision the MNLU Mumbai Law Journal as a forum that promotes thoughtful scholarship, encourages diverse perspectives, and contributes meaningfully to legal education and public discourse. We hope that, this journal will serve as a valuable resource for scholars, practitioners, policymakers, and students alike, while fostering informed discussions on the legal challenges of our time.

We invite continued support, engagement, and scholarly contributions from the academic and legal community in the years ahead. Together, we can build a vibrant platform that advances legal knowledge and contributes to the development of a just, equitable, and progressive society.

On behalf of the Editorial Board, I am pleased to present the first issue of the Maharashtra National Law University Mumbai Law Journal and look forward to its continued growth and success.

Patron In Chief & Chief Editor
Prof. (Dr.) Dilip Ukey
Vice-Chancellor, MNLU Mumbai

THE LIMITS OF BLENDED SENTENCING: A MIDWAY APPROACH TO JUVENILE REFORM

Prof Shivani Goswami, USLLS, GGSIPU
& Chinki Verma, PhD Scholar, USLLS, GGSIPU

Abstract

Recidivism among juveniles remains a critical challenge in the Indian juvenile justice system, raising concerns about the effectiveness of current rehabilitation strategies. The Juvenile Justice (Care and Protection of Children) Act, 2015, introduced a blended sentencing model aimed at balancing deterrence and rehabilitation. However, empirical evidence suggests that the act has not successfully curbed juvenile recidivism, with data indicating higher rates post-2015 than before. This paper critically examines the shortcomings of the preliminary assessment mechanism under Section 15 of the Act, highlighting its arbitrary standards, lack of mandatory psychological evaluation, and potential constitutional inconsistencies.

The study argues that the deterrence-centric approach of the 2015 Act contradicts the core rehabilitative philosophy of juvenile justice. The practice of transferring juveniles to adult courts and correctional facilities often exacerbates criminal tendencies instead of reforming offenders. Through an analysis of global best practices, particularly the risk assessment model used in the U.S., this paper advocates for a shift from a rigid sentencing framework to an indeterminate sentencing system. Such a model, tailored to individual rehabilitation needs, allows for periodic review and ensures juveniles are released only when they have demonstrated sufficient reformative progress.

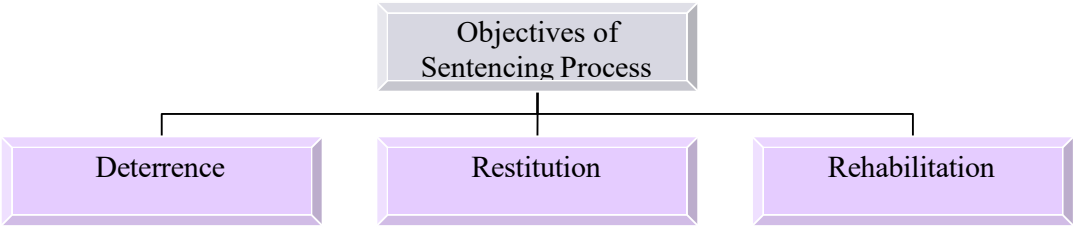
Additionally, the paper underscores the importance of diversion and

early intervention strategies, including community-based rehabilitation, probation, and individualized care plans, as alternatives to institutional confinement. By adopting a restorative model that balances both deterrence and rehabilitation, this study proposes a "midway approach" that can enhance reintegration outcomes while reducing recidivism rates among juveniles. The findings emphasize the necessity of policy reforms that align with the constitutional principles of fairness, equality, and child welfare.

Key words: Juvenile Recidivism, Juvenile Justice System, Blended Sentencing, Rehabilitation and Reform, Restorative Justice.

I. INTRODUCTION

Sentencing of the offender is the ultimate test as to whether justice has been done or not. Justice here signifies justice not only for the victim but justice for the offender, society as well as the offender and victim's family. The philosophy behind sentencing is based on the fulfillment of triple objective, that are: deterrence, restitution and rehabilitation. The deterrence objective is that, the sentence must be deterrent enough to serve as a sufficient fear. This fears incapacities reoffending. Restitution objective is to make good to the loss or harm suffered by the victim.[1] In Indian Juvenile Justice System, rehabilitation is the primary objective. The aim is to rehabilitate and reintegrate the juvenile offender as a law abiding citizen.



[1] N. V. Paranjape, *Criminology and Penology* 143 (Central Law Publications, 2017).

The philosophy behind sentencing has experienced a great shift since the ancient time. In ancient time, the focus was on the offence and not the offender. Each offence had a set of prescribed punishment and that punishment was awarded to whosoever committed that particular offence. There was no reference to the age, gender, or the rehabilitative motive. However, now the situation has changed. Now the focus has shifted, especially in cases of juvenile offender, from offence to the offender. Now rehabilitative motive is the primary consideration. The selection of the nature and the quantum of the sentence is based on objective of rehabilitation.[2]

Recidivism is one of the greatest challenge to the juvenile justice system as the instance of recidivism signify the failure of the Juvenile justice system to rehabilitate the juvenile. The 2015 JJ act follow a blended sentencing model. But, the crime statistics of last 5 years shows that the act has greatly failed to addressed the problem of juvenile recidivism. The rate of recidivism after the passing of the 2015 act is much higher than it was before it. Though the recidivism rates were lower before 2015, the 2000 JJ act sentencing policy where a maximum that could be given was only 3 years sentence is also problematic and lacks deterrence as evidentiated by the 2012 Nirbhaya case. Thus, a midway approach is required to be incorporated. The present study first analyse the concept of preliminary assessment and blended sentencing policy as followed by the Juvenile Justice (care and protection of children) act , 2015 and its drawbacks before proceeding to explore the alternates.

[2] Harry Willbach, What Constitutes Recidivism, *Nw. U. Sch. L. J. Crim. L. & Criminology*, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3120&context=jclc.

II. UNDERSTANDING THE CONCEPT OF PRELIMINARY ASSESSMENT

A fundamental change in the Indian juvenile justice jurisprudence is brought in by the Juvenile Justice (care and protection of children) Act,2015 which has by dividing offences into three categories i.e. petty, serious and heinous crime depending on the amount of punishment, has introduced the possibility of trying children between the age group of 16-18 alleged of committing heinous crime as an adult. The main provision dealing with it is section 15.

This section allow trial of a child falling under the age group of 16-18 as an adult if he is alleged of commenting a heinous crime. The power to make such decision is entrusted on Juvenile justice board, who while conducing such assessment "may" take assistance of "*experienced psychologists or psycho-social workers or other experts*[3]"

A. THE PROCEDURE TO BE FOLLOWED

The board which determine the age of the child according to the determination procedure as mentioned in section 94 and such inquiry shall be conducted within 15 days from the days of first production of the child before the board. If the result indicate that the child doesn't fall under the said age group than the procedure ends and there is no next to proceed to the next step but if result indicate that the child does fall under the said age group of 16-8 years that the board will proceed towards the second step i.e. determining the category of offence alleged. Only if the dual pre-requirements as to age and the category of offence are satisfied, the broad will proceed to conduct the preliminary assessment.

[3] Juvenile Justice (Care and Protection of Children) Act, 2015, § 15, No. 2, Acts of Parliament, 2016 (India).

The assessment is extensive character and psychological to determine the maturity of the child. For determining it, the board analyses 4 things. That are;

- Mental capacity;
- Physical capacity;
- Ability to understand the consequences of the offence and;
- Circumstance in which alleged crime was committed

For the assessment the board 'may' also take the assistance of "*experienced psychologists or psycho-social workers or other experts*". On the analysis of these 4 criteria, the Board make a final decision as to whether the said child should or shouldn't be given the benefit of beneficial treatment of being tried as an child under the juvenile justice system.

If the decision of the board is that the child should be tried as adult then u/s 18(3) Board "*may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences* [4] ". This decision is appealable under section 101(2), and appeal lies before the court of sessions. Court of session 'may' also take the assistance of "*experienced psychologists and medical specialist"*[5] while determining the appeal.

B. TRIAL BY CHILDREN COURT/SESSION COURT

The role of the Juvenile Justice Board is limited up-to only this determination, once the decision that the child should be tried as adult is made and the child is transferred to the children court than the further

[4] Juvenile Justice (Care and Protection of Children) Act, 2015, § 18(3), No. 2, Acts of Parliament, 2016 (India).
[5] Juvenile Justice (Care and Protection of Children) Act, 2015, § 101(2), No. 2, Acts of Parliament, 2016 (India)

power to make decisions regarding that child is assumed by the children court. Section 19 dealing with the power of children court.

After the receipt of the child in conflict with law from the Board, the Children court have two options. It could either decide that the such children should be tried as an adult or it could decide the he/she should not be tried as an adult. If the children court decide that there is no requirement of trying the child as an adult then than the court doesn't have to transfer back the child to the JJB rather it itself may hold the inquiry and decision in accordance to section 18.

But if the Children court decide that the case is such that the child should be tried as an adult that the court is required to conduct the trial in according to the provisions of CrPC and while conducting such trial the court should ensure the special needs of the child is addressed and a child friendly environment is maintained. The court can pass any order it deem fit, however this power is subject to the provision of section 21 which provide that even when the child is tried as an adult, still death penalty and life imprisonment without the possibility of release could not be imposed plus the final order shall also include an individual care plan for the child.

After the decision of the children court the child is send to place of safety where he remain will the age of 21 years, after which he may be sent to jail. Section 19(3) requires that during the stay at the place of safety the child should be subjected to reformative services. After completion of 21 years, the children court prepares a follow up report "*to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society*[6]", and decide whether to release the child or transfer him to jail.

[6] Juvenile Justice (Care and Protection of Children) Act, 2015, § 20, No. 2, Acts of Parliament, 2016 (India).

C. CRITICAL ANALYSIS OF THE CONCEPT

The main justification extended for introducing the possibility of trying 16-18 group juvenile as adults that its "strike a balance" between the rights of the child and the rights of the victim. But in reality such a practice is instead increasing the imbalance rather than reducing it. The concept of preliminary assessment is depended on various arbitrary standards and full of loopholes and contradictions, thus, doing more harm than it prevents. Various loopholes and short comings in the concept are examined below

1. NO MANDATORY PRESENCE OF PSYCHOLOGIST

Section 15(1) proviso provides that while conducting the preliminary assessment the Juvenile Justice Board(JJB) "*may take the assistance of experienced psychologists or psycho-social workers or other experts*[7]". As the word used is "may", the JJB is not mandatorily required to take the assistance of these experts and is fully empowered under the act to make the assessment by itself even without such expert assistance. But are the JJB member really qualified to make such assessment without any expert assistance? A look at the composition of the JJB could answer this question. Section 4 deals with the composition of the JJB. It provides that the Board should be consisted of 3 members; one magistrate[should be either a metropolitan magistrate or judicial magistrate of first class with atleast 3 year experience[8]] and two social workers. One of the 3 members must be women. Section 4(3) lay down the qualification of social workers and provide that "*No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education,*

[7] Juvenile Justice (Care and Protection of Children) Act, 2015, § 15(1) proviso, No. 2, Acts of Parliament, 2016 (India).
[8] Juvenile Justice (Care and Protection of Children) Act, 2015, § 4(2), No. 2, Acts of Parliament, 2016 (India).

or welfare activities pertaining to children for atleast seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law[9]". Thus a degree in psychology or psychiatry is one of the various options of the degree that the social worker could posses, as "The operative word used in subsection (3) of section 4 is 'or'. This means that the social workers in the board need not compulsorily be a practicing professional with a degree in child psychology or psychiatry"[10]And it's perfectly valid that in JJB bench, neither of the 3 member possess a degree in psychology or psychiatry. Now if such a JJB bench is making an preliminary assessment without the assistance of any expert than could the result reached be said to be reliable enough to make the future of a child depended on it?

Mind of a person is the most complicated thing. Even psychologist or psychiatrist could not be said to make an error free assessment of it. Thus, "*Evaluation of mental capacity is a complex process which cannot be done accurately by the JJB even with the help of experienced psychologists*"[11]. Then could the member of the Board who are not even professionally qualified for the same be said to be in a position to reach a correct assessment having credible results. Would it be fair to make the future of a child depended on such assessment?

2. ARBITRARY STANDARDS

Under the JJ act 2015 the age group 16-18 could be subject to trial as an adult but provides no reasonable basis for making just determination. If

[9] Juvenile Justice (Care and Protection of Children) Act, 2015, § 4(3), No. 2, Acts of Parliament, 2016 (India)..

[10] Abhinav Benjamin & Ananth Kamath, *Juvenile Injustice: A Critique on the Constitutionality of Deeming 16-18 Year Old Juveniles as Adults under the Juvenile Justice (Care and Protection of Children) Act, 2015*, 8 CNLU L.J. 182 (2018-19).

[11] Shreya Mahajan, How Do Juvenile Justice Boards Decide The Fate Of 16-18 Year Olds? Preliminary Assessment Under Section 15 Of The Juvenile Justice (Care And Protection) Of Children Act, 2015, ILI Law Review Summer Issue 2020.

one argue that the age of person should not be used as a blanket defence when the person is otherwise 'fully mature' as an adult then why is the lower limit for such liability set as 16. There are many children below even below the age of 16 years that could have the same or even more level of maturity then a person in age group of 16-18, then why are they allowed to use their age as a blanket defence against prosecution as an adult. Thus such classification lacks "rational nexus". In *State Of West Bengal v. Anwar Ali Sarkar*[12], it was held that classification lacking a 'rational nexus' is a violative of Article 14.

Also as discussed above the act gives the board arbitrary powers to JJB to conduct preliminary assessment without the assistance of a psychologist or psychiatrist. And even if assistance of psychologist or psychiatrist taken, the opinion is not binding on the board. Also neither the JJ act nor the JJ rules clarify the required qualification for them. The section just use the word "experienced" and not explain who would constituted as a experienced psychologist or psychiatrist. It doesn't prescribe the required qualification and year of experienced that need to be qualified. Furthermore, "maturity" is itself an arbitrary notion. 2015 act or the 2016 model rules doesn't define what exactly does maturity mean and what are its indicators, etc. thus this make it vulnerable to corruption by biased interpretation by bringing in the elements of subjectivity.

If a child tried as adult is found guilty and is send to place of safety till completion of age of 21 years. U/s 20 the children court is empowered to conduct a "second evaluation" after completion of 21 years, "*to evaluate if such child has undergone reformative changes and if the child can be a*

[12] State of W. Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 (India)

contributing member of the society[13]". The JJ act or rules nowhere provide the criteria for making such determination and provide wide discretion to the court. Thus, "*This inquiry is highly subjective, and prone to arbitrariness, thereby falling foul of Article 14.60 Further, it could lead to involuntary targeting of children from weaker socio-economic backgrounds, who may not be deemed contributing members of society*[14]".

3. ADULTS FOR LIABILITY BUT NOT FOR RIGHTS

A person below the age of 18 years can't vote or get a driving licence in any case but he could be tried as an adult and be subjected to any punishment that could be given to an adult offender[except death sentence and life imprisonment without possibility of release[15]]. Is this actually fair that a person falling in the age group of 16-18 will always be an minor when socio-political rights are to be given but he/she will assume the role of an adult when liability is to be imposed. When "political maturity" of a person is not considered when decision as to his access to right to vote is made then why maturity is judged when deciding criminal liability.

4. IOLATION OF ARTICLE 14,15(3), PRINCIPLE F FAIR TRIAL, PRESUMPTION OF INNOCENCE, FRESH STAR

Section 15 violated Article 14 as the differentiation of child in age group of 16-18 could not be said to be based on "intelligible differentia", rather the classification is arbitrary and discriminating as discussed above. It creates a situation where two juveniles charged with same offence could be dealt differently and be given different punishment. For example in the

[13] Juvenile Justice (Care and Protection of Children) Act, 2015, § 20, No. 2, Acts of Parliament, 2016 (India).
[14] Gauri Pillai & Shrikrishna Upadhyay, *Juvenile Maturity and Heinous Crimes: A Re-Look at Juvenile Justice Policy in India*, 10(1) *Nat'l L. Sch. India Rev.* (2017).
[15] Juvenile Justice (Care and Protection of Children) Act, 2015, § 21, No. 2, Acts of Parliament, 2016 (India).

case ***Mumtaz Ahmed Nasir Khan v/s. The State of Maharashtra***[16], two boys [one aged 17 and half and other aged 16 and half] jointly committed murder of a child. The JJB subjected both the juveniles to preliminary assessment and decided that juvenile aged 17 and half would be tried as an adult and juvenile aged 16 and half one will be dealt as child. Can subjecting one juvenile to beneficial measure and denying the other such benefit when both committed the same crime together be said to be equality?

Article 15(3) allows the legislature to make special provisions for the benefit of children. The JJ act based on this article, provides separate special provisions for trial of children, thus save them from being prosecuted under adult criminal justice system. Section 15 of JJ act 2015 dealing with preliminary assessment is in conflict with the whole purpose of the act as *"The purpose of the Act of 2015 is to ensure that children who come in conflict with law are dealt with separately and not like adults"* [17].

Section 19(1)(i) require that the children court while conducting trial should consider "the special needs of the child" and "maintain a child friendly atmosphere". But in most distort there is no children court set up. Thus such inquiry are conducted by the court of session in place of the children court. The session court, who are already burdened, couldn't be expected to go extra miles to ensure child friendly atmosphere. And neither are the officials of such court specially trained to understand and address the special needs of the children. The 2015 act has transformed the juvenile court "*from a general rehabilitative social welfare institution into a second*

[16] Mumtaz Ahmed Nasir Khan v. State of Maharashtra, Crim. App. No. 1153 of 2018 (Bombay HC).
[17] Shilpa Mittal v. State of NCT of Delhi, (2020) 2 SCC 787 (India)..

class criminal court for the juveniles[18]".

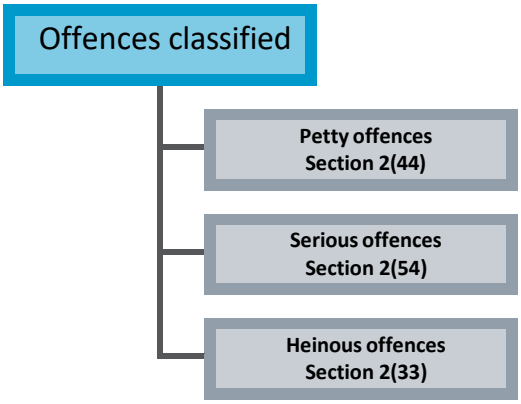
Also section 15 is against the principle of innocence which is one of the most cardinal principle of fair trial. Preliminary assessment is conducted even before determination of guilt and innocence. Thus a decision that the maturity of the child is such he should be tried as an adult, somewhat indicate or point towards the guilt of the child even before actual determination on the merits of the case is done. Also as according to section 15 preliminary assessment is not a trial "therefore is not a detailed, careful and in-depth analysis of the case[19]." Thus, "*preliminary assessment of the Board proceeds on the assumption that the alleged offence has been committed, and is thus a sentencing decision before guilt is established*[20]".

Trial of children as an adult is also against the principle of fresh start and "*violate the principle of right to privacy and confidentiality* [21] ". The principle of fresh start as mentioned u/s 3 of the JJ act 2015 provides that all the past records of the child under juvenile justice system should be deleted except in special circumstance to ensure that the child could leave his criminal past behind and make a fresh start in life. A child tried as adult and later transferred to jail u/s 20, moves out of the juvenile justice system thus he will carry his criminal past all though his life and this stigma attached will always be a hindrance in his reintegration back to the society.

5. CLASSIFICATION OF THE OFFENCE ITSELF FAULTY

One innovative feature of the 2015 JJ act is the classification of offences. The act classifies offences into three categories based upon the punishment

[18] Shreya Mahajan, supra note 11.
[19] Ibid.
[20] Juvenile Justice (Care and Protection of Children) Act, 2015, § 20, No. 2, Acts of Parliament, 2016 (India).
[21] Abhinav Benjamin & Ananth Kamath, supra note 10.



of the crime. Offences punishable with maximum 3 year of punishment are petty offences, offences punishable with a minimum 3 year and a maximum of 7 year are serious offences and the offences that are punishable with minimum sentence of 7 years are heinous offences. But the act fails to classify a 4th category of offences for those there is no minimum sentence or the minimum sentence is less than 7 year but the maximum sentence is more than 7 year. Thus, these offence are falling somewhere between the serious and heinous offences and not totally in any of the 3 category. Thus, a void was created and the act itself was leading to a lot of confusions. Which were resolve only recently by the supreme court in the case ***Shilpa Mittal v. State of NCT of New Delhi*** [22]**,** where the court recognised that a gap has been left by the legislature. The bench held that the void should be filled an interpretation in favour of the children as *"the purpose of the Act of 2015 is to ensure that children who come in conflict with law are dealt with separately and not like adults"* [23] thus such 4th category of offences should be deal as serious offences rather than heinous one. Same view was given legislative approval by implementation of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021.

Thus, apart from other loopholes in the concept, the categorization on which the preliminary assessment is depended is itself faulty. Even if the new clarified position is followed, the results generated couldn't be said to be fully satisfactory. As now a child charged u/s 109 BNS[earlier 307 IPC] i.e attempt to murder could not be tried as adult as sec 109 BNS having no

[22] Shilpa Mittal v. State of NCT of Delhi, supra note 17.
[23] Shilpa Mittal v. State of NCT of Delhi, supra note 17, para 30.

minimum punishment but only a maximum punishment of 10 years would be a serious offence thus outside the scope of section 15 of JJ act 2015. But, offences like purchase/production of commercial quantity of NDPS that is punishable with minimum 10 year rigorous imprisonment under NDPS act will be dealt as a heinous crime thus having the possibility of trying the child as an adult. Is dealing in narcotic substances actually a graver offence than attempt to murder?

Thus, trying a child as an adult based upon the result of preliminary assessment which is, as discussed above in detail, a concept full of various loopholes and errors must be avoided. As faulty assessment could adversely effect the future of a child and increase the rate of recidivism. Instead other alternate should be searched as trial of a child as adult could never be said to yield positive results. As correctly noted by Bombay High Court in ***Mohamed Huzaifa Javed Ahmed vs. The State Of Maharashtra*** [24] by trying children as adult "*merely on the premise that the offence is heinous and that it lends to the societal volatility of indignation, we are bracing for juvenile recidivism*."

III.. "GET TOUGH" APPROACH: BLENDED SENTENCING

The 2015 JJ act provides a "blended sentencing" model for juvenile in 16-18 age groups who are found to have committed heinous crime and after conducting preliminary assessment, a decision has been taken to try them as an adult. Such juveniles are detained in the place of safety till they attain the age of 21 years and after that decision regarding their transfer to adult jails is made. After juvenile tried as an adult completes the age of 21 years, children court u/s 20 evaluate whether he has undergone sufficient reformative changes so as to become a "contributing member of the

[24] Mohamed Huzaifa Javed Ahmed vs. The State Of Maharashtra (CRIMINAL APPEAL NO. 1153 of 2018, Bombay High Court)

society". If the results are positive, he/she is released otherwise he is sent to the adult prison for completing the remaining period of the sentence. Thus a juvenile in such a setup spends certain part of his sentence in place of safety [that comes under Juvenile justice system] and remaining part of the sentence in jail[that comes under criminal justice system]. Thus, a kind of blend of two justice system is made.

This blended sentencing model was introduced by the 2015 Act for discarding the 2000 Act sentencing model. Under 2000 Act sentencing model, the maximum sentence that could be given is just for 3 years. Such sentencing model was criticised for being too lenient, especially after 2012 Nirbhaya case which caused a public outcry for demanding stricter measures. To satisfy this demand, 2015 act incorporated blended sentencing model u/s 20 with the objective of increasing deterrence. To establish that though the act follow an deterrent approach, it has not yet abandoned its rehabilitative objective, the act don't make transfer to adult jails, after the expiry of 21 year age, suo moto applicable rather gave the juvenile another chance to redeem himself by giving children court power to make evaluation of child to see whether he has become a contributing member to a society or not. But this was rather a haste and not properly analysed decision as, in the absence of prescription the JJ act or rules of any criteria or parameter to make the determination, such evaluations are highly subjective and arbitrary. Making the decision, as to transfer of juvenile to jail, depended on such a subjective and arbitrary standard is not only unjustified and discriminatory but also against the rehabilitative motive of the juvenile justice system. Also empirical studies conducted by various researchers have provided evidence that the transfer of juvenile to jails have negative influence on the rehabilitation of the juvenile and increase the rates of recidivism. Thus defeat the whole purpose of the act.

The rehabilitative changes achieved in the juvenile during his period of stay in the place of safety, slowly erode once he is transferred to jails and some in contact with hardened criminals.

A 1996 study by Podkopacz and Feld[25], found that the recidivism rate of adolescents transferred to adult courts was higher than that of adolescents who remained in the juvenile Justice system. Similarly another 1997 study titled "*The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*" by Lawrence Winner found that juvenile transferred to criminal justice system were rearrested more quickly and more times for other crimes after release than the average.

If the blended model is so defective, should be move back to the sentencing model that was provided in the JJ act of 2000? No, 2000 act sentencing model is also not the correct solution as it lacks deterrence. As evidentiated by 2012 Nirbhaya rape case, maximum sentence of 3 years could not be said to be adequate for all cases. In certain cases the crimes are so grave and the rehabilitative needs of the juvenile are so vast and varied that they could not be met in span of 3 year and a detention beyond such period is required. But, the 2000 act provides no provision for such extended detention. Under it the juvenile had to be released after 3 year, whether he has under gone sufficient reformation or not.

Now if both the models have drawbacks than which other alternative model to be followed?

IV. THE MIDWAY APPROACH

The 2000 JJ act followed a rehabilitative approach where the maximum punishment in any case could only be 3 years. The 2015 JJ act, considering

[25] Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86(2) J. Crim. L. & Criminology 449 (1996).

the increasing rate of heinous crimes by the juveniles, abandoned the traditional rehabilitative approach in favour of a deterrent "get tough" approach towards the juveniles to increase "offender accountability and deterrence". But the crime statistics of last 5 years show that such approach is not yielding any positive results. Rather it is leading to more problems than it solves. So if both the two extremes are not cultivating positive results, there is need find a middle ground that could better address the issue. Thus a midway approach could be the restorative model that balance the deterrence and rehabilitative needs and work towards restoring and reintegrating the juveniles back to the society as a law abiding citizen.

What changes are required to be done to shift to the restorative model from the current deterrent model?

A. INDETERMINATE SENTENCING IN PLACE OF DETERMINATE SENTENCING

In both, 2000 Act and 2015 act, determinate sentencing framework is followed. That is, the sentence is predetermined by the JJB/Children court as the case may be and is not depended on the amount of rehabilitative change achieved in the juvenile. Under 2000 act, once a sentence is passed the juvenile is not released before its completion and can't be detained further after its completion. For example, If a sentence of 2 years is passed then the juvenile has to complete 2 years in the observation homes and couldn't be released before it, even though he has been rehabilitated before such completion. Similarly, he could not be detained further 2 years even if progress of the juvenile is negative and more time in detention is required for his rehabilitation. Thus, the term of the sentence is "mandatory" and "predetermined". Similarly under 2015 act if a child is tried as an adult and then committed to the place of safety then he is supposed to stay in there only still the age of 21 and could not be released before it. only after the

completion of 21 year age , is the evaluation of the progress of the juvenile is made by the children court and as disused in previous chapter, such evolutions are "highly subjective" and "arbitrary".

Instead of this predetermined blended sentencing model for children commenting heinous crime, indeterminate sentencing model should be applied. Under the indeterminate sentencing model, the children committing heinous crime would be subjected to an "open ended" sentence without any fixed term. Here the juvenile would be subjected to continuous assessment to ascertain his progress. On such periodic assessment, changes could be made to the Individual care plan of the child according to the changed rehabilitative needs of the child. Here the Individual care plan will also be periodically revised to correspond to the special needs of the juveniles, thus improving the scope of rehabilitation and reducing the potential recidivism. The sole focus in such model will be on achieving rehabilitation. Under such model the juvenile will be released only when he is rehabilitated and shows the required positive changes. Hence, "*an indeterminate sentence seeks to release the juvenile offender only when he is rehabilitated, in contrast to a determinate sentence which prescribes a mandatory fixed period for a crime, irrespective of reformation*[26]". In 1977 itself, in ***Hiralal Mallick v. State of Bihar***[27],Supreme court has said that it's high time that the reformatory nature of the sentencing be emphasised on. The sentencing should have features like "*flexibly, humanity, restoration and periodic review*[28]."

Indeterminate sentencing model emphasise on "treatment" rather than on punishment. The stay of the juvenile in the juvenile home is seen as a

[26] Gerald R. Wheeler, *Juvenile Sentencing and Public Policy: Beyond Counterdeterrence*, 4(1) Policy Analysis 35 (1978).
[27] Hiralal Mallick v. State of Bihar, (1977) 4 SCC 44 (India).
[28] Ibid, para 26.

treatment. As soon as the treatment [of criminal tendencies] is complete and the juvenile is cured [of potential criminality and recidivism] he is released. Unlike determinate sentencing that look at the past crime, the determinate sentencing looks at the future potential of the juvenile and "*emphasises on the mental health and future welfare of an individual, rather than on the act committed* [29] ". Here there is no "time-bound program" of reformation, rather flexibility is provided so that each child could reform at his one pace. Indeterminate sentencing "*not only minimises the chances of excessive confinement, but also ensures public safety by protecting the society from the release of offenders with recidivistic tendencies before such tendencies have been modified* [30] ".In ***Graham* v. *Florida***[31] , US court has recognised that children have "*a unique potential for rehabilitation*". Thus indeterminate sentencing could prove to be a positive step towards it.

In determinate sentencing model, the juveniles are not very eager to work for their own reformation as they know that positive changes or not, they are bound to stay in the facility for the decided period. But Indeterminate sentencing work as an incentive for the juvenile to reform. Here the juvenile himself actively contribute for his reformation knowing the same could help his release earlier. Thus, now juvenile play an active role in his reformation "*motivated by the knowledge that alterations in behaviour and reduction in recidivist tendencies would prompt faster release*[32]."

It should be noted here that under the indeterminate sentencing model the whole sentence is to be completed in the place of safety itself without any

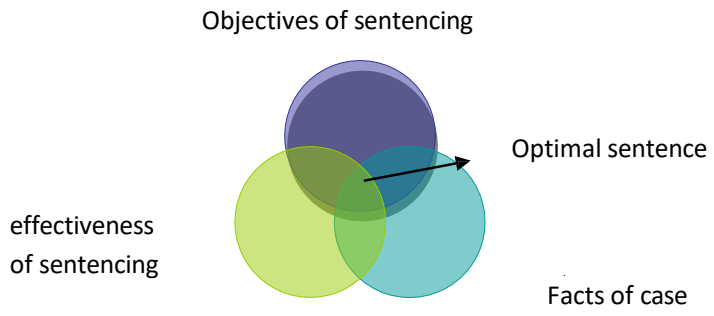
[29] Abhinav Benjamin & Ananth Kamath, supra note 10.
[30] Use of the Indeterminate Sentence in Crime Prevention and Rehabilitation, 7(2) Duke L.J. 65 (1958)
[31] Graham v. Florida, 560 U.S. 48 (2010).
[32] Jeffrey E. Butler, *A Study on the Issue of Indeterminate Sentencing Versus Determinate Sentencing*, 30 Juv. & Fam. Ct. J. 43 (1979).

transfer to the adult jails. As discussed above, sending transferring juvenile to jails have criminogenic effects. Thus, the restorative model works on the principle of total separation of juveniles from adults, whether it be for trial or for housing. A juveniles is no case is to be mingled with the adults offenders. If the situation is so the juvenile has completed the age of 21 years and the progress of the juvenile under the indeterminate sentencing model is such that still he could not be released then in such a case he should be continued to be detained in the place of safety itself though in a separate part.

Under determinate sentencing model, the staff of the juvenile homes assume a very important role. They are supposed to monitor the progress of the juvenile and report it to the JJB, who would conduct the periodic assessment to decide about the release of the child. Staff should received proper training to prepare such progress reports. The juvenile should be given regular counselling by a qualified psychologist or physiatrist with atleast 5 year prior experience of dealing with children. If possible, the same psychologist or physiatrist shall evaluate the child all through the process of his reformation. The reports of such counselling along with the progress reports submitted by the juvenile home staff shall be considered by the JJB while making the determination.

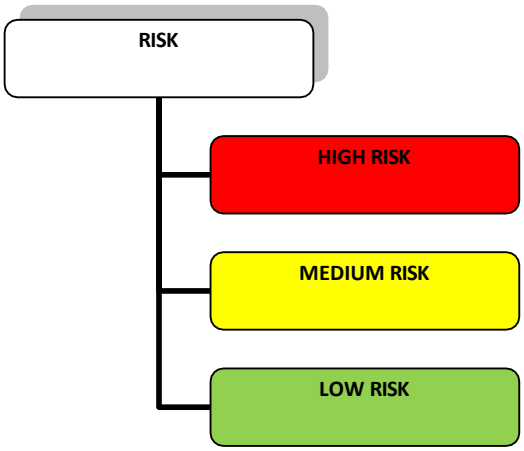
Indeterminate sentencing is better suited for dealing with child in conflict with law /juveniles committing serious or heinous crime. The child in conflict with law committing petty crime should be diverted to probation or admonition instead of detention. Only rarely, when the same is in the best interest of the juvenile, should juvenile committing petty crime should be detained in any institutional facility. In such a cases some initial sentence could be imposed though the same could be later reduced and increased according to the rehabilitative requirements and the progress of

the juvenile. How to decide this initial sentence? For this a reference could be made to Wisconsin Sentencing model. This model provides that judges are supposed to follow a three point analysis to find the "optimal sentence". The three element to be analysed are: first is the 'objective of sentencing', second is 'facts of case' and last is the 'effectiveness of sentencing options'. The at the point of intersection of all these element we get, what is called "the optimal sentence"[33]



Wisconsin Sentencing model

B. RISK ASSESSMENT AS AN ALTERNATIVE TO PRELIMINARY ASSESSMENT



As discussed earlier, the preliminary assessment method provided u/s 15 of JJ act 2015 is arbitrary, subjective, full of loopholes and constitutionally ultravirus, thus should be discarded. Now if not this method, then what other method could be alternatively employed?

[33] Sentencing Commission Findings Underscore the Need to Work Toward Equal Treatment of All Wisconsin Residents, *Wisconsin Lawyer*, https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=80&Issue=9&ArticleID=1359.

Risk assessment tool as used by the US juvenile justice system seems a much better option than the preliminary assessment method. Risk assessment method as the name suggests, estimated the risk.

Risk of what? It estimates Risk of continued delinquency in the juvenile if no intervention is made. Based on this risk of reoffending or recidivism, it classifies the juveniles into three categories that are: juvenile at high risk of reoffending, juvenile at moderate risk of reoffending and juvenile at low risk of reoffending. Risk assessment guide the intervention plan by pointing out which areas may be the prime targets for intervention to reduce the likelihood that adolescents will commit crimes again.

Based on what factors such assessment is made? Risk assessment tool make assessment based on factors like age of juvenile when first offense committed, history of violence, history of supervision failure, parental involvement, substance abuse, deviant peer relations, neighbourhood criminality etc.

Based on these factors the risk assessment tool make an assessment two things: the likelihood of the juvenile reoffending if no intervention in introduced and second is the seriousness of the harm that would occur if the juvenile reoffend. Seriousness of the harm is understood in relation to the type of crime committed, for example murder cause more serious harm to the society than forgery of a document. Based on assessment these two things, juvenile are

Severity/Consequence

Likelihood	Slightly harmful (1)	Harmful (2)	Extremely harmful (3)
Highly unlikely (1)	Trivial risk (Score 1)	Tolerable risk (Score 2)	Moderate risk (Score 3)
Unlikely (2)	Tolerable risk (Score 2)	Moderate risk (Score 4)	Substantial risk (Score 6)
Likely (3)	Moderate risk (Score 3)	Substantial risk (Score 6)	Intolerable risk (Score 9)

categorised into three categories, such could be sub-dived into further subcategories, for example law risk could be further divided in trivial risk and tolerable risk. Based on this a scale of risk could be made. This position of the juvenile in such scale of risk could guide the intervention plan by pointing out which areas may be the prime targets for intervention. Juvenile at low risk are very less likelihood to reoffend, thus instead of detention, probation or admonition is a better option. Similarity the juvenile at high risk of reoffending require high level of intervention though comprehensive plan for institutional care, counselling, etc.

Why is risk assessment a better option than preliminary assessment? Risk assessment is a better alternative than preliminary assessment as

- Risk assessment unlike preliminary assessment is objective and not subjective. Preliminary assessment evaluates criteria like physical capacity, mental capacity, etc, which are vulnerable to corruption by subjective interpretation. Risk assessment on the other hand evaluates criteria like past criminal record, seriousness of crime committed etc. Such criteria, unlike physical or mental maturity of a person, are very objective. Thus risk assessment is objective and free for arbitrariness
- The result of preliminary assessment is that it creates a possibility of a juvenile being tried as an adult. If the decision of the preliminary assessment is such that the juveniles should be tried as an adult, this somewhat put a negative connotation regarding his potential of being reformed. In risk assessment on the other hand, even if the juvenile is found to be at high risk, no negative connotation regarding his potential of reformation is placed. Risk assessment recognised that juveniles are “not not

> chronic offenders, most youths' behaviours can be changed, and most youths' risk levels can be reduced".

Thus, Risk assessment is a better alternative than preliminary assessment. It should be noted that as risk assessment involves an "comprehensive in-depth evaluation", it requires specialized training for staff and other personnel.

V. EARLY INTERVENTION AND DIVERSION

Sometimes processing a juvenile through Juvenile Justice System could do more harm to the him then good. Thus, the better solution would be to use a range of intervention and diversion techniques as alternatives to trial/inquiry to treat a juvenile, especially in cases when the juvenile is accused of a minor violation/crime and is a first time offender. This diversion could be pre-adjudication [when diversion at any stage of proceeding before final adjudication] or post-adjudication[when diversion is made after the conclusion of the trial/inquiry]. Admonition and probation are the best example of post adjudication diversion. Here though the juvenile is held guilty, no sentence is imposed on him or even if imposed its enforcement is suspended. Such diversion prove to be a better incentive for the juvenile to discard his criminal ways and live as a law abiding citizen. By diversion or intervention, the juvenile is saved from stigmatization. Here, instead of being placed in a institutional setup where the child could came in negative association of the other juveniles, he is place in the safe environment of his own house and made to undergo reformation there only. Many studies shows that diversion in place of incarceration greatly reduce recidivism rate. Mark R. Pogrebin and Paul B. Stretesky in their article "*Rejection, Humiliation, and Parole: A Study of*

Parolees' Perspectives [34] " has discussed the negative effects of incarnation/detention with the help of empirical data that shows a reduced rate in recidivism in the offenders that are subjected to diversion or intervention.

It should be noted that diversion doesn't mean non reformation even though a diverted juvenile is not placed in a institutional placement, he still could be subjected to reformative facilities and processes like de-addiction program, counselling etc. thus, a diverted juvenile is subjected a "family and community based treatment". Scott W Henggeler in his study "*Multisystemic Therapy: Clinical Foundations and Research Outcomes*" found that institutional placement of juvenile increases recidivism rates. He instead adverted for a home based model where juvenile is subjected to Multisystemic Therapy that is an "intensive family and community based treatment". According to him, Multisystemic therapy "*address known risk factors (i.e., at individual, family, peer, school, and community levels) strategically and comprehensively*[35]" and in a better way than incarceration and detention in institutional facilities.

In India, if a child is found to be in conflict with law then u/s 18 JJ act 2015, JJB is empowered to order the child to participate in group counselling, perform community services, attend school, undergo de-addiction program, attend school, vocation training , therapeutic centre, etc, instead of ordering institutional placement. Though the act provides various diversion options, the experience past the years has been that the JJB are

[34] Mark R. Pogrebin & Paul B. Stretesky, *Rejection, Humiliation, and Parole: A Study of Parolees' Perspectives*, *Symbolic Interaction* (June 30, 2015), https://doi.org/10.1002/symb.164.

[35] Scott W. Henggeler, *Multisystemic Therapy: Clinical Foundations and Research Outcomes*, 21(2) *Psychosocial Intervention* 181 (2012), https://doi.org/10.5093/in2012a12.

more inclined towards putting the juvenile in detention/institutional placement rather than utilising diversion options. Perhaps, this is one of many reasons why juvenile recidivism rate in India is increasing every year

VI. CONCLUSION AND SUGGESTIONS

The prime objective of the juvenile justice system is reformation and rehabilitation of the young offender as a law abiding citizen. Instance of recidivism in child in conflict with law points towards the failure of the juvenile justice system to achieve this objective. One of the main reason of passing the JJ Act 2015, overruling the earlier 2000 act was to check the rate of recidivism. But NRCB data of the past some years shows that the 2015 act has greatly failed to achieve this objective, the recidivism rates after the passing of the 2015 act are much higher than that they were before it.

For instance, if the NCRB data of the state of Delhi is seen, in 2015 the number of juveniles apprehended in Delhi under IPC & SLL crime was 3039, out of which 243 juveniles had past record of conviction. That is, the rate of recidivism among juveniles in Delhi in the year 2015 was 7.99%. In 2019, the total number of juveniles apprehended under IPC & SLL crime was 3256, out of which 697 were convicted in past as well. That is, the rate of recidivism among juveniles in Delhi increased to 21.4% in 2019. Similar is the status in the recent 2020 and 2021 NCRB reports. This drastic rise in the rate brings to light the issue of increasing instances of recidivism among juveniles.

Recidivism contributes to a significant portion of these ever-rising crime rate. These recidivists points towards the inefficiency of the justice system and indicate the need for fundamental changes.

There are different philosophies extended to deal with the issue of recidivism. One such philosophy is the approach of incapacitation. It provides that the recidivists should be cut out from the society so that they doesn't have any chance to commit any criminality. The best measure to do is to lock them in jails for a long period of time. But as discussed earlier these lengthy sentence has damaging effect on the mental as well as physical health of the juvenile offender. Instead of being a solution, they become a cause of recidivism. And also lengthy sentences raise human rights concerns. Lengthy sentences decreases the chances of rehabilitation and results in the institulisation of the juvenile. The word "institulisation" is used in the negative connotation, that is, here it signify the over dependence of a juvenile on the institutional facilities that he becomes unfit to survive in the world outside thus, act as an impediment in the social reintegration of the juvenile.

The 2000 JJ act followed a rehabilitative approach where the maximum punishment in any case could only be 3 years. The 2015 JJ act, considering the increasing rate of heinous crimes by the juveniles, abandoned the traditional rehabilitative approach in favour of a deterrent "get tough" approach towards the juveniles to increase "offender accountability and deterrence". But the crime statistics show that such approach is not yielding any positive results. Rather it is leading to more problems than it solves. So if both the two extremes are not cultivating positive results, there is need to find a middle ground that could better address the issue. Thus, a midway approach could be the restorative model that balance the deterrence and rehabilitative needs and work towards restoring and reintegrating the juveniles back to the society as a law abiding citizen. Under restorative model, following the rehabilitative objective, transfer of the juvenile to adult criminal justice is not allowed

neither for trial nor for completing the detention sentence. At the same time, to satisfy the deterrence objective, indeterminate sentencing system is followed.

Punishment is selected Based upon the individual care plan and social investigation report that not only contain background of the offender but suggestions for best reformation plan for offender. For example, in case of some juveniles there is not requirement of infliction of physical punishment but only causing some humiliation will do. For such juveniles instead of awarding imprisonment, awarding community service as punishment is better. Community service increases the sense of responsibility towards the society. Thus, detention/Imprisonment should only be used as a measure of last resort. For first time offenders, imprisonment instead of reforming further corrupts the him, detention centres act as a breeding ground for hardened criminals. Studies show that those who were given sentence for lesser period of detention show better chances of reformation than those with longer sentences. Thus, alternatives to detention like probation, admonition, community services, monetary punishment etc should be awarded.

Under restorative model, sentencing is based on the theory of individualisation. That is the juvenile is assessed based on his own individual qualities and requirements. Selection of punishment is according to what is best for his reformation. Punishment should be such that the offender himself plays a part in his own reformation. There is a need for self reflection, increasing self respect and willingness to improve. Willingness to change his ways to become a law abiding citizen. Indeterminate sentencing work as an incentive for the juvenile to reform. Here the juvenile himself actively contribute for his reformation knowing the same could help his release earlier. Thus, now juvenile play an active

role in his reformation "*motivated by the knowledge that alterations in behaviour and reduction in recidivist tendencies would prompt faster release*[36]."

Thus, the study could be concluded by saying that recidivism is result of failure of JJB to correctly asses the child to give him the most appropriate punishment and of the society to provide to the needs of a juvenile that he has to resort to criminality again and again. Thus, what is required is combined group effort to deal with the issue efficiently. Community participation should be encouraged.

On the basis of the study it could be concluded that hypothesis that Recidivism is the consequence of multiple factors seems proved. Without addressing these factors no juvenile legislation could be successfully implemented. The problem of recidivism in child in conflict with law could be resolved only if juvenile legislations are implemented having an individualistic approach that adequately deals with socio-economic, family, institutional and other factors associated to recidivism. The present juvenile justice system lacks this individualistic approach. Hence, changes are required

On the basis of the stud, following suggestions are forwarded:

I. The division of crimes into the 3 categories solely on the basis of amount of prescribed punishment should be avoided. Along with the prescribed punishment, parameters like the nature, the targeted victim of the crime, etc should also be taken into account for such categorisation.

II. Blended sentencing model that includes a possibility of transfer of the juvenile to the jail/prison, where he could come he the

[36] Jeffrey E. Butler , supra note 32.

association with hardened criminals, is criminogenic and decreases the possibility if rehabilitation and reformation of the juvenile. Thus, increases the rate of recidivism. Hence, blended sentencing model should be discarded and replaced for indeterminate sentencing model that balances both the interests of rehabilitation and deterrence.

III. In indeterminate sentencing model too, whatever the length of the sentence is according to the rehabilitative needs of the child in conflict with law, the whole sentence must the completed under the setup of the juvenile justice system only. No transfer to the criminal justice system shall be allowed. If after the child in conflict with law completes the age of 21 years but further detention is still required for his proper rehabilitation. Than such child in conflict with law could be detained in a separate part of the place of safety itself.

IV. As discussed in Chapter 3 and 4, children court/session courts are not properly trained to deal and address the special needs of the children, trial by such court could go against the best interest of the child in conflict with law. Thus, in all cases trail should be conducted by JJB only, as its specially trained to cater to the varied needs of the children. However, recognising that certain cases require strict sanctions, the sentencing power of the JJB could be increased accordingly to deal with such cases.

V. Section 15 JJ Act 2015, preliminary assessment is arbitrary, subjective and discriminatory. Such method shall be discarded for an alternative like risk assessment method that is comparatively

objective. Parameters for such risk assessment tool shall be decided accordingly to maintain objectivity.

VI. As risk assessment method entrust the juvenile home staff and personnel with a significant task of monitoring and preparing progress report of the juvenile, staff should be provided with special training for it. counselling session with psychologist/psychiatrist with a prescribed experience and qualification shall be mandatory. Similarly unlike preliminary assessment method, where raking assistance of the psychologist/psychiatrist by JJB while conducting the assessment is optional, in risk assessment method taking such expert assistance shall be mandatory. Also though section 4 of the *Juvenile Justice (care and protection of children) Act,* 2015 require that member of JJb should be specially trained to understand and address the needs of children and to deal with them within 60 days of their appointment, but the act doesn't prescribes as to what minimum training must be mandatorily provided. Thus, the JJ act or the JJ model rules must also provide what minimum standard training is compulsory.

VII. The concept of Individual care plan as provided under JJ act 2015 is an important rehabilitative tool/device. Such plans should not be made in a routine manner, but shall be made comprehensive enough to address the unique and varied needs of a particular child in conflict with law so that all factors[as discussed in Chapter 2] that influence or encourage recidivism are sufficiently intervened and countered. Expert assistance should be taken while preparing such plans. Such plans must be periodically

revised to ensure that they are in line with the changing rehabilitative needs of the juvenile

VIII. Various diversion and intervention option given to the JJB u/s 18 should be creatively employed in place of detention/incarceration. Sometimes processing a juvenile through Juvenile Justice System could do more harm to the him then good. Thus, following the principle of diversion and the principle of institutionalisation as a measure of last resort, the endeavours should be made to divert the juvenile pre or post the proceedings.

HUMAN AND ANIMAL CONFLICT IN THE RESERVE FORESTS OF JALPAIGURI: LEGAL AND REGULATORY PERSPECTIVES

Dr. Jayati Kharga, Principal, IILS Cooch Behar &

Mr. Rohit Tamang, Assistant Professor of Law, IILS Cooch Behar

Abstract

Human and animal conflict in the reserve forests of Jalpaiguri represents a significant ecological and legal concern in North Bengal. Situated within the Eastern Himalayan biodiversity hotspot, the region faces frequent encounters between humans and elephants, leopards, and other wildlife, leading to crop loss, property damage, injuries, and fatalities. These conflicts are rooted in habitat fragmentation, deforestation, monoculture plantations, and expanding human activity that increasingly overlaps with traditional wildlife corridors.

Within this context, the legal framework becomes crucial for balancing conservation with community protection. The Wildlife Protection Act, 1972, the Indian Forest Act, 1927, and state-level forest policies provide mechanisms for conservation, but they also create obligations towards affected communities. Judicial interventions and administrative schemes on ex-gratia relief and rehabilitation highlight both the progress and shortcomings in addressing compensation and accountability. Delays, inadequate relief, and lack of participatory mechanisms often leave forest-dependent households vulnerable despite statutory protections.

Sustainable solutions lie in combining ecological management with rights-based governance. Strengthening compensation systems, ensuring timely relief, promoting community participation in forest management, and protecting elephant corridors through scientific habitat planning can reduce conflict and

promote coexistence. A framework that integrates environmental justice with human dignity is therefore essential to reimagine forest governance in Jalpaiguri.

Keywords: Human–Animal Conflict; Reserve Forests; Jalpaiguri; Wildlife Law; Environmental Justice; Forest Governance; Compensation; North Bengal.

1.Introduction

Straddling Bhutan, Bangladesh, and the Indian state of West Bengal, Jalpaiguri district, including the newly created Alipurduar division, is the core of the Eastern Dooars. It is the terminal Himalayan piedmont plain prior to the unrolling of the Brahmaputra valley to the east, the altitude of which varies from 60 m to 175 m above mean sea level. The area sees an annual rainfall of more than 3,500 mm, giving rise to a moist-deciduous forest mosaic interspersed with tall riverine grasslands, which is graded as 3C/C2a "Himalayan Moist Sal" and 4A/RS1 "Eastern Alluvial Savannah."[1] This grading has also been supported by the Forest Survey of India.[2] The entire landscape is cut through by rivers Jaldhaka, Torsa, Raidak, Sankosh, and Teesta, creating fertile alluvial fans, which are served by a dense wildlife population as well as an agrarian population of more than 1,080 people per km².[3] Since the district falls in seismic Zone V and two major elephant migratory corridors (Chilla–Motigarh and Mechi–Teesta) pass through it, the coherence of habitats is physiologically as well as legally vulnerable.[4]

1.1 The Reserve-Forest Complex and Conservation Significance

[1] Champion, H. G., & Seth, S. K. (1968). *A revised survey of the forest types of India*. Government of India Press.
[2] Forest Survey of India. (2021). *India state of forest report: Chapter 13, West Bengal*
[3]Census of India. (2011). *District census handbook: Jalpaiguri, Series-20, Part-XII A*
[4] West Bengal Forest Department. (2017–2027). *Management plan of Gorumara National Park* (p. 6)

Five ecologically related protected areas in this biogeographic corridor constitute the nucleus of the Terai–Dooars conservation complex:

- Gorumara National Park, covering an area of 79.45 km², was elevated to national park status from a Reserve Forest in 1994. It is famous for having the one-horned rhinoceros (Rhinoceros unicornis) and is a breeding ground for the Asian elephant (Elephas maximus).[5]
- Chapramari Wildlife Sanctuary, measuring 9.60 km², was notified in 1976. It is an important dry-season elephant range and one of the last remaining savannah grasslands of North Bengal.[6]
- Jaldapara National Park, measuring 216.51 km², was initially declared as a game sanctuary in 1941. It is home today to the second-largest contiguous population in the world of the one-horned rhinoceros, after Kaziranga.[7]
- Buxa Tiger Reserve, covering 753 km², was identified under Project Tiger in 1983. The reserve is home to tigers, clouded leopards, Asian elephants, and the endemic hispid hare (Caprolagus hispidus).[8]
- Mahananda Wildlife Sanctuary, covering 158 km², is situated northwest of the district and acts as a route for the seasonal movement of elephants towards the Nepal Terai.[9]

Together, these form 1,483 km² of reserved forest, 217 km² of protected forest, and 90 km² of unclassified state forest, making a total of 1,790 km², or 43% of

[5] West Bengal Forest Department. (1994, January 31). *Notification No. 3013-For/11M-78/94*
[6] Wildlife Institute of India. (2023). *Elephant corridors of India* (Corridor #39, "Chapramari–Batabari," p. 112)
[7] Jaldapara Management Plan (2021–31), W.B. Forest Dep't, at 9; W.B. Forest Dep't, Rhino Census Summary (2022), cited in Ministry of Env't, Forest & Climate Change, Elephant Corridors of India 108 (2023).
[8] Buxa Tiger Reserve Management Plan (2018–28), at 1; A.K. Sanyal et al., Faunal Diversity of Buxa Tiger Reserve, 113 Rec. Zool. Surv. India 1, § 4.3 (2013).
[9] Mahananda Wildlife Sanctuary Management Plan (2015–25), at 4; Ministry of Env't, Forest & Climate Change, Elephant Corridors of India 102–03 (2023) (Corridor #36, "Mahananda–Kurseong").

the geographical area of the district.[10]The legal status is important: "reserved forest" has the highest protection under sections 16–20 of the Indian Forest Act, 1927, forbidding any acquisition of rights without express State Government sanction, while "protected forest" is regulated by sections 29–34, permitting concessions subject to restrictions unless expressly prohibited.[11]

1.2. Human Dependence and Resource Utilization

Even with their reserved status, all five forests are scattered with forest villages, tea-garden labor lines, and riverine hamlets whose residents were originally settled by the colonial Forest Department for wood extraction. The 2011 census identifies 103 revenue villages within or on the immediate borders of these reserves; Gorumara has 19 fringe villages alone, Jaldapara 42, and Buxa 33.[12] A 2020 socio-economic survey by the West Bengal Forest Department indicates that 78% of these families earn ₹5,000 or less per month; 61% continue to use fuelwood gathered from the forest, 46% graze their cattle within the protected area, and 34% gain cash income from non-timber forest products collected illegally.[13] Since the average family landholding is 0.62 ha and paddy produces only 2.2 t/ha, the opportunity cost of living next to a global biodiversity hotspot remains high, inducing what Agrawal calls "adverse incorporation" into conservation landscapes.[14]

1.3. Escalation of Human–Animal Conflict: Magnitude and Trends

[10] West Bengal Forest Department. (2012). *State forest report 2011–12*. Government of West Bengal.
[11] Indian Forest Act, 1927, No. 16 of 1927, INDIA CODE (1927).
[12] Mukherjee, supra note 4, at 132.
[13] Chakraborty, S., & Biswas, U. (2020). Socio-economic drivers of forest dependence around Jaldapara National Park. *Journal of Hill Forestry, 33*(1), 37–38.
[14] Arun Agrawal, Environmentality: Technologies of Government and the Making of Subjects (Duke Univ. Press 2005).

The convergence of adjacent habitats, high wildlife populations, and subsistence farming has made Jalpaiguri a focal point of human–animal conflict in India. In 2013, official compensation records indicate that the state spent ₹13.83 million on 29 human deaths, 149 injuries, 328 losses of livestock, 11 hut blowdowns, and damage to 2,620 hectares of crops.[15] In the period from 2009 to 2019, elephants caused 62% of human deaths, with leopards (23%), gaur (9%), rhino (4%), and sloth bears (2%) causing the rest.[16] The timing of these encounters closely correlates with the monsoon season: paddy and maize crops mature between October and January, coinciding with the post-harvest treks of elephants from Bhutan to the Torsa riverine grasslands. As a result, the frequency of raids is highest in November and once more in March when potatoes and wheat mature.[17] Tea plantations act as ecological traps; close to 90% of leopard attacks between 2001 and 2008 were along labour lines.[18] The upgrade of the New Jalpaiguri–Alipurduar railway track to broad-gauge has also raised mortality levels; elephant killings from trains increased from 2 (before 2003) to 12 (2004–2013) in Buxa and Jaldapara divisions.[19] At least 12 elephant carcasses recovered between 2016 and 2018 had traces of carbofuran, an outlawed pesticide.[20]

1.4. The Role of a "Legal and Regulatory" Infrastructure

Although biological interventions e.g., elephant-proof trenches, solar fencing, immobilization-translocation, and early-warning SMS are regularly debated, the

[15] Mukherjee, supra note 4, at 134.
[16] West Bengal Forest Dep't, Annual Report on Human–Wildlife Conflict Compensation 2019–20 (2020).
[17] S. Bhattacharya, Man–Elephant Conflict in Northern West Bengal, 59 J. Indian Inst. Pub. Admin. 289, 295 (2013).
[18] Chakraborty, S. (2015). Human–leopard interface inside tea gardens of Western Dooars. *International Journal of Pure & Applied Biosciences, 3*(1), 35–41.
[19] Mukherjee, supra note 4, at 133.
[20] Centre for Wildlife Studies, Elephant Mortality and Pesticide Poisoning in North Bengal, 2016–2018 (Tech. Rep. 2019).

legal infrastructures that play a role in these conflicts are not as commonly analysed. Four regulatory elements are of particular importance:

1. Land-use zoning – The Jalpaiguri Master Plan, 2025 makes recommendations for new freight corridors across the Chilla–Motigarh corridor without obtaining wildlife clearance as mandated by section 5 of the Environment (Protection) Act, 1986, and the EIA Notification (2006, amended 2020).[21]

2. Forest-consent regime – Between 2015 and 2021, the MoEFCC gave permission for more than 1,000 hectares of diversion of forests in Buxa and Jaldapara, but the cumulative impact assessment as required by the Forest (Conservation) Rules, 2003 was not carried out.[22]

3. Compensation architecture – While the West Bengal Elephant & Other Wild Animal Depredation Compensation Rules, 2009 make provision for compensation to the victims, field surveys reveal that an average of almost ten months is required from disbursement approval to actual payment, with several substantiated claims pending.[23] This latency erodes confidence and may precipitate retaliatory poisoning.[24]

4. Co-governance vacuum – The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 mandates the formation of Forest Rights Committees, but up to 2022, only a fraction of the qualifying villages close to Buxa have had their rights acknowledged.[25]

---

[21] Environment (Protection) Act, 1986, No. 29 of 1986, INDIA CODE (1986); EIA Notification, Ministry of Env't, Forest & Climate Change (2006, amended 2020).
[22] Forest (Conservation) Rules, 2003, Ministry of Env't & Forests, Gov't of India.
[23] Elephant & Other Wild Animal Depredation Compensation Rules, Forest Dep't, Gov't of West Bengal (2009).
[24] S. Biswas & S. Guha, Compensation Delay and Retaliatory Killing of Elephants, 19 Conservation & Soc'y 105, 112 (2021); Centre for Wildlife Studies, supra note 15.
[25] Status Report on Implementation of FRA, Ministry of Tribal Affairs, Gov't of India (2022) (unpublished, obtained via RTI).

These institutional deficits indicate that human–animal conflict in Jalpaiguri is not an inevitable ecological circumstance but instead the result of historically deep-seated, legally authorized choices about resource use. Future intervention will require a nuanced understanding of legislation, case law, and administrative action, to develop beyond crisis management into sustainable, rights-based conservation planning.

2. Historical, Demographic, and Ecological Trajectories of Human–Wildlife Conflict in Jalpaiguri

2.1. The colonial past, tea estates, and the making of a congested landscape

The genesis of the existing human-wildlife conflict in Jalpaiguri lies in the 19th-century resource management techniques. Between 1865 and 1905, the British Indian Government routinely tagged the Dooars forests as "Reserved" in accordance with the Indian Forest Act of 1865, turning community woodlands into timber estates for railway sleepers and tea-boxes.[26] The production of plantation capital followed the sawmills: by 1910 more than 315 tea gardens, covering 1,680 km², had been leased in what now constitute the Buxa, Gorumara, and Jaldapara reserves .[27] Each garden was allowed to have "labour lines" along the forest edge; in 1901, there were 145,000 immigrant workers, mostly Mundas, Oraons, and Santhals, whose successors now live in the forest-edge villages .[28] Thus, the colonial Forest Department created a permanent human presence in the wildlife habitats an institutional legacy that has continued in independent India.

2.2. Demographic acceleration and land-use change (1951-2011)

[26] Dutta, R. (2020) Colonial Forestry and Ecological Change in the Eastern Himalaya. Delhi: Routledge.
[27] Guha, S. (2021) "Tea capital and forest history of the Dooars", Studies in History 37(2): 103-125.
[28] Chakraborty, S. (2015) "Human–leopard interface inside tea gardens of western Dooars", International Journal of Pure & Applied Bioscience 3(3): 35-44.

Post-colonial times saw Jalpaiguri witness one of the fastest rural population growth rates in eastern India. The population in the district grew from 1.09 million in 1951 to 3.87 million in 2011, which was a 255% growth rate against the state average of 184% (Census of India, 2011). The net population density at the forest edge is presently 1,080 persons km^{-2} and that of the eco-sensitive area of the Buxa Tiger Reserve is 890 persons km^{-2} .[29] As a result of the West Bengal Land Reforms Act of 1955, when individual holdings of land were limited to 7 ha, most forest-edge households work on less than 1 ha; 61% continue to gather fuelwood from the reserve, and 46% bring animals into the protected area .[30] Despite this, the tea industry with its heavy dependence on labour kept growing: in the period 1991 to 2011, another 247 km^2 of forest or grassland was transformed into tea plantations in the Jalpaiguri and Alipurduar sub-divisions .[31] Satellite data show that the district lost 12.3% of closed-canopy forest between 2001 and 2021, and paved road length within 5 km of park boundaries grew by 74% .[32] Demographic pressure and commercial land-use changes combined have created a highly fragmented, human-dominated landscape around the five flagship protected areas.

2.3. Ecological processes: leopard refugia and elephant migration

Jalpaiguri lies at the Terai–Dooars elephant corridor's narrowest 80-km width, where the Bhutan foothills are connected to the Nepal Terai by an essential link. Analysis of data from radio-collars between the years 2008 and 2018 indicates

[29] WB Forest Dept. (2020) Annual Report on Human–Wildlife Conflict Compensation (2019-20), Kolkata: Govt. of West Bengal.
[30] Chakraborty, S. & Biswas, U. (2020) "Socio-economic drivers of forest dependence around Jaldapara National Park", Journal of Hill Forestry 33(1): 37-45.

[31] FSI – Forest Survey of India (2013) India State of Forest Report 2013, Chapter-13: West Bengal.
[32] Ghosh, S. et al. (2022) "Land-cover change and human–elephant conflict risk in Jalpaiguri", Remote Sensing Applications: Society & Environment 25: 100686.

that elephant herds migrate seasonally between Bhutan's Royal Manas National Park and Mahananda Wildlife Sanctuary, moving through two key bottlenecks: Chapramari–Motigarh, which is 1.2 km wide, and Mechi–Teesta, which is 2.1 km wide. These routes are now crossed by National Highway-17 and a broad-gauge rail line .[33] Home-range studies show that adult female elephants in Buxa need about 352 ± 94 km² of seasonal habitat, but the mean area of intact forest patches within a 10-km buffer around the reserve boundary is just 18 km² .[34] Consequently, elephant herds come to feed more in paddy and sugar-cane fields at night, and so there are on average 2.3 conflict incidents per night during the November harvest season .[35] Leopards, on the other hand, exhibit a clear but complementary ecological adaptation. Camera-trap records between 2015 and 2020 suggest a district-wide population of 96–108, with a density of 4.1 ± 0.4 per 100 km², and the westernmost Dooars tea-garden belt had the highest concentration .[36] The tea bushes provide day cover and plenty of stray goats and dogs as prey; most significantly, 90% of the 243 leopard attacks documented between 2001 and 2008 were within labour lines .[37] Therefore, whereas elephants represent the outcome of habitat loss, leopards represent habitat substitution, both increasing human-wildlife interaction rates. Chronology of conflict intensity (pre-1980 → now) Pre-1980: Conflict had a low-level, unorganised depredation aspect. Forests were abutting, guns were kept in check, and compensation was in

[33] Bora, P. & Sharma, A. (2019) "Railway-mediated elephant mortality in Buxa Tiger Reserve", Journal of Threatened Taxa 11(14): 117-123.
[34] Nath, K. et al. (2021) "Habitat patch size predicts elephant crop-raiding intensity", Wildlife Biology 2021(4): 1-10.
[35] Mukherjee, N. (2016) "A brief appraisal of human–wildlife conflict in Jalpaiguri and Alipurduar", International Journal of Scientific Research Publications 6(8): 131-136.
[36] Barui, A. et al. (2021) "Leopard occupancy in tea-garden landscapes of northern West Bengal", Global Ecology & Conservation 28: e01691.
[37] Chakraborty, S. (2015) "Human–leopard interface inside tea gardens of western Dooars", International Journal of Pure & Applied Bioscience 3(3): 35-44.

grain form instead of[38] 1980-2003: Progressive escalation of conflict was seen. Buxa was declared a Tiger Reserve in 1983, Project Elephant was launched in 1992, and gauge conversion of the railway was initiated in 1998. In those years, an average of 14 people were killed each year by elephants and 3 people per year by leopards.[39] 2004-2013: A major increase in conflict took place. Large-gauge goods trains started night runs via Buxa, and between 2004 and 2013, 12 elephants died due to locomotive-related injuries compared to 2 during the earlier decade.[40]Compensation budget of Jalpaiguri division rose to ₹ 45 million in 2013-14 from ₹ 4.2 million in 2004-05.[41]

2014-2020: Conflict levels remained at all-time highs. The annual toll averaged 49 human fatalities, 112 injuries, 2,620 hectares of agricultural loss, and 450 livestock deaths.[42] Electrocution was the top factor in anthropogenic deaths, with 28 elephants killed (41% of total fatalities) between 2016-20.[43] 2021-present: COVID-19 lockdowns temporarily reduced rail traffic and nighttime raids, but the return of labour post-pandemic and a record 2022 monsoon crop have restored conflict incidents to pre-2020 levels .[44]

2.4. Socio-political context: Adivasi rights, state policies and the governance vacuum

The socio-political context of Adivasi rights, state policies, and governance deficits is central in understanding the condition of forest-fringe groups of

[38] WB Tribal Development Dept. (2022) Status Report on Implementation of FRA in North Bengal, Kolkata: GoWB.
[39] Mukherjee, N. (2016) "A brief appraisal of human–wildlife conflict in Jalpaiguri and Alipurduar", International Journal of Scientific Research Publications 6(8): 131-136.
[40] Roy, M. et al. (2014) "Train-elephant collisions in North Bengal", Gajah 41: 51-56.
[41] WB Forest Dept. (2015) State Forest Report 2013-14, Kolkata: Govt. of West Bengal.
[42] WB Forest Dept. (2020) Annual Report on Human–Wildlife Conflict Compensation (2019-20), Kolkata: Govt. of West Bengal.
[43] CWL – Centre for Wildlife Studies (2019) Elephant Mortality in North Bengal 2016-18, unpubl. report submitted to MoEFCC.
[44] Ghosh, S. et al. (2022) "Land-cover change and human–elephant conflict risk in Jalpaiguri", Remote Sensing Applications: Society & Environment 25: 100686.

Jalpaiguri, who are almost entirely Adivasi (52%) Santhal, Oraon, Munda, Toto, and Dukpa communities identified as Scheduled Tribes (ST) in the Constitution .[45] During the period of colonization, these groups were settled in reserved forests as bonded labourers; after independence, they were made "forest villagers," but their land tenure problems persist. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, sought to confer habitat rights and co-management powers. Yet by March 2022, only 7 among 33 qualifying villages close to Buxa had their CFR titles recognized, and none of the decisions enumerated "conflict mitigation" as an indigenous practice worthy of co-management .[46] At the same time, the state's disaster-relief strategy remains mostly response-driven: the West Bengal Elephant & Other Wild Animal Depredation Compensation Rules, 2009, provide ₹ 3 lakh in the event of a human death, but the average disbursement time is 9.4 months, and only 61% of confirmed claims were paid out in 2019-20 .[47] This delay destroys trust, which is followed by retaliatory actions like poisoning at least 12 elephant carcasses discovered between 2016-18 had detectable traces of carbofuran, a banned pesticide under the Insecticides Act, 1968 . [48]Essentially, the existing legal framework treats wildlife as state property and the local population as recipients of charity; until co-governance is enforced, conflict will remain the dominant mode of human–wildlife interaction in Jalpaiguri.

2.5. Causes of Human–Wildlife Conflict in Jalpaiguri District [49]

[45] Census of India (2011) District Census Handbook: Jalpaiguri, Series-20, Part XII-A.

[46] WB Tribal Development Dept. (2022) Status Report on Implementation of FRA in North Bengal, Kolkata: Go, WB.

[47] Biswas, S. & Guha, S. (2021) “Compensation delay and retaliatory killing of elephants”, Conservation & Society 19(2): 105-118.

[48] CWL – Centre for Wildlife Studies (2019) Elephant Mortality in North Bengal 2016-18, unpubl. report submitted to MoEFCC.

[49] All quantitative data refer to Jalpaiguri district (including Alipurduar subdivision after 2014 bifurcation)

1. Habitat Fragmentation: Tea, Urbanization, and Infrastructure Development

Traditionally, the Eastern Dooars area had a continuous spread of Shorea robusta–Terminalia moist forests interspersed with riverine grasslands. Fragmentation started with colonial reservation policies (1865-1947) and was later augmented by the tea boom after 1950, which fragmented these continuous habitats into isolated patches of forests. Between 1991 and 2021, another 247 km² of savannah or forest was replaced by tea plantations within a 5-km radius of the Gorumara, Chapramari, and Jaldapara protected areas.[50] Satellite observations show a dramatic drop in the average size of patches of closed-canopy forest, from 1,340 ha to 290 ha between 2001 and 2021, and an increase in the density of linear clearings (roads, power lines, and irrigation canals) from 0.8 km km^{-2} to 2.3 km km^{-2}.[51] Elephants avoid forest patches with areas of less than 200 ha during the day, using them only as a last resort to escape crop-raiding pressures at night, and these are places where human encounters are more likely by 4.7 times.[52]Leopards, however, have learned to coexist in the newly created "edge-to-edge" tea landscape, and camera-trap records have shown a density of 4.1 ± 0.4 adults per 100 km² of tea gardens, almost double the 2.2 per 100 km² recorded in intact forests.[53]So, the same land-use changes have heightened elephant conflicts by closing off their migration routes and leopards by providing cover around human habitations.

2. Legal land diversion for development and deforestation

Between 2014 and 2022, the Union Ministry of Environment, Forest & Climate Change (MoEFCC) cleared the diversion of 1,047 ha in Buxa and Jaldapara for

[50] Ghosh, S. et al. (2022) "Land-cover change and human–elephant conflict risk", Remote Sensing Applications: Society & Environment 25: 100686, Table-3.
[51] Ibid., p. 5
[52] Nath, K. et al. (2021) "Habitat patch size predicts elephant crop-raiding intensity", Wildlife Biology 2021(4): 1-10, at 7.
[53] Barui, A. et al. (2021) "Leopard occupancy in tea-garden landscapes", Global Ecology & Conservation 28: e01691, Table-2.

road widening, hydel maintenance, and border fencing purposes; none of these projects were subject to cumulative impact assessments since each parcel was less than 40 ha.[54] Furthermore, the district suffered 1,120 ha of forest loss due to illegal felling between 2016 and 2020, as detected by high-resolution Sentinel imagery.[55] Deforestation has disproportionately hit riverine Saccharum grasslands, which provide dry-season foraging grounds for elephants, leading to a 34% reduction in grass biomass between 2011 and 2021.[56]Nutrient analysis suggests a decrease in the crude-protein content of the surviving grass stands from 9.8% to 6.2%, compelling elephants to seek protein-rich crops like maize and mustard.[57]Therefore, habitat loss is a "push" factor, pushing elephants towards agricultural landscapes and representing a quintessential case of resource-based conflict.[58]

3. Scarcity of Resources in Conservation Areas

Climate change has exacerbated resource scarcity in the region. North Bengal had two back-to-back drought years (2016, 2018) with monsoon rain deficiency above 28%, and NDVI records suggest a 19% drop in foliage cover within Gorumara and Chapramari during this time.[59] Surface-water availability has decreased even more starkly: of the 48 perennial water-holes surveyed within Buxa in 2000, just 27 had water by May 2022.[60] Simulation of elephant movements indicates that crop raiding becomes more likely by 1.8% for each 1%

[54] RTI Reply 22-37/2020-FC, MoEFCC, 17 Mar 2021, on file with author.
[55] Forest Survey of India (2021) Assessment of Forest Cover inside Recorded Forests, State brief: West Bengal, p. 4.
[56] Mukherjee, N. (2016) “Human–wildlife conflict in Jalpaiguri”, IJSRP 6(8): 131-136, at 133.
[57] WB Forest Dept. (2020) Annual Report on Human–Wildlife Conflict Compensation (2019-20), Kolkata, p. 22.
[58] Classic formulation in Dickman, A. (2010) “Complexities of conflict”, Proc. Natl. Acad. Sci. 107: 11871-11875.
[59] Indian Meteorological Dept. (2022) District Rainfall Statistics: Jalpaiguri (1980-2020), Pune, p. 18.
[60] Buxa Tiger Reserve Management Plan (2018-28), p. 63.

reduction in dry-season surface-water availability within the reserve.[61] The same hydrological stress is responsible for the significant surge in gaur (Bos gaurus) raiding during 2019-20, with 42% of crop-damage claims due to gaur compared to 18% during 2012-13.[62] Essentially, scarcity of resources within the forest converts neighbouring agricultural fields into enticing sources of water, carbohydrates, and protein.

4. Livestock predation and crop raiding Paddy, maize, and mustard are the major crops subject to raiding, accounting for 78% of the 2,620 hectares paid each year.[63]There are two peak periods of raiding: (i) October-November, which overlaps with paddy and maize maturity, and (ii) March, which occurs with mustard and wheat maturity. These intervals align with the post-monsoon and pre-monsoon movement patterns of elephants.[64] The annual average economic loss per household is ₹ 18,400, which accounts for 42% of the average cash income of smallholders.[65] Predation by leopards (50%), jackals (28%), and hyenas (22%) is mainly responsible for livestock depredation, and goats and dogs are the most common targets.[66] Since 82% of these encounters occur at night and on labor lines, tea-garden workers view leopards as a "domestic" danger instead of a "forest" danger, a perception that heightens retaliatory poisoning.[67]

5. Railway and Road Accidents

The upgrade of the New Jalpaiguri–Alipurduar line to broad-gauge, completed on 20 November 2003, raised the average speed of freight trains from 35 km/h to

[61] Bora, P. & Sharma, A. (2019) “Railway-mediated elephant mortality”, J. Threatened Taxa 11(14): 117-123, at 120.
[62] WB Forest Dept. (2020), supra note 9, p. 25.
[63] Ibid., p. 22.
[64] Mukherjee (2016), supra note 8, p. 134.
[65] Biswas, S. & Guha, S. (2021) “Compensation delay and retaliatory killing”, Conservation & Society 19(2): 105-118, at 112.
[66] Chakraborty, S. (2015) “Human–leopard interface inside tea gardens”, IJPAB 3(3): 35-44, at 39.
[67] Ibid., p. 41.

75 km/h. The introduction of this change resulted in an increase in elephant killings due to train crashes, from 2 (before 2003) to 12 (2004-2013), which has now stabilized at 1-3 per annum.[68] The most critical stretch (km 68-74) is in the Chilla–Motigarh corridor, where the railway line is flanked by tea gardens and presents a 1.2-km bottleneck. therefore,ons show that elephants cross between 22:00 and 04:00, when freight traffic is at its highest; no elephant-alert system, however, is installed in drivers' vehicles.[69] Mortality along roads is a developing issue: National Highway-17 (Siliguri–Jaigaon) reported 18 leopards and 32 civets killed from 2015 to 2021, a quadrupling associated with a 74% increase in vehicle density.[70] Linear infrastructure is therefore both a mortality sink and a behavioral barrier, adding further pressure to wildlife populations.

6. Climate Change Impacts on Migration and Habitat

The average annual temperature in Jalpaiguri has risen by 1.1 °C since 1980, and the number of rainy days with rainfall greater than 50 mm has fallen from 14 to 9 per year.[71] Phenological changes are now evident: Shorea flowering has shifted 11 days earlier between 1990 and 2020, creating a temporal mismatch with the historic April–May elephant passage through sal patches for seed forage.[72] Climate models project that by 2050, climatic suitability of the Dooars for Asian elephants will reduce by 27% under RCP 4.5 and by 43% under RCP 8.5, forcing herds to migrate upslope into Bhutan or eastwards further into Assam.[73] Since the intervening Brahmaputra valley is already high-density populated, such range shifts will inevitably increase conflict in transitional areas. On the micro-habitat

[68] Roy, M. et al. (2014) "Train-elephant collisions in North Bengal", Gajah 41: 51-56, at 54.
[69] Bora & Sharma (2019), supra note 13, p. 121.
[70] Roadkill data compiled from WII-NBRC (2022) National Roadkill Database, entry IDs WB-2020-035 to WB-2021-112.
[71] IMD (2022), supra note 11, p. 21.
[72] Phenology data in Barui, A. & Dasgupta, R. (2021) "Flowering phenology shift in Shorea robusta", Curr. Sci. 120: 912-918.
[73] Model outputs in Nayak, R. et al. (2022) "Climate change and Asian elephant range", Global Change Biology 28: 2145-2159, Fig-4.

level, warmer dry seasons have already decreased the wild figs' (Ficus spp.) fruiting by 22%, a keystone resource for birds and primates, thereby increasing mango and lychee orchard raiding.[74] In turn, climate change is a "threat multiplier" that combines with habitat loss, water scarcity, and agricultural expansion to magnify the frequency and severity of conflict.

3. Impacts of Human–Wildlife Conflict in Jalpaiguri District

A. Human Impacts: Death, Injuries, and Livelihood Uncertainty

Official records of compensation between 2009 to 2022 show 633 human deaths and 1,487 injuries inflicted by wildlife within the Jalpaiguri and Alipurduar districts, averaging 48 deaths per year.[75] 62% of all these deaths were caused by elephants, followed by leopards at 23%, gaur at 9%, rhinos at 4%, and sloth bears at 2%.[76] The patterns of injury vary: leopard attacks tend to involve head and neck lacerations (72% of cases), where victims are often children who were manning goats in tea-garden labour lines.[77] Elephant encounters, on the other hand, tend to involve multiple fractures and internal trauma and have an associated 43% case-fatality rate.[78] Apart from the direct physical damage, affected families experience diminishing labour power; 38% of hurt persons could not carry out heavy farm activities for six months or more, bringing 27% of the families below district poverty levels.[79] Fear also impacts behaviour, as indicated by a 14% fall in school attendance in 19 outlying villages during the peak raid period of November to January, mainly among those girls who were tasked with midday livestock

[74] Fig-count survey in Ghosh, S. et al. (2022), supra note 2, p. 8.
[75] West Bengal Forest Dept. (2022) Annual Report on Human–Wildlife Conflict Compensation (2021-22), Kolkata, p. 7.
[76] Ibid., p. 8.
[77] Chakraborty, S. (2015) "Human–leopard interface inside tea gardens", Int. J. Pure App. Biosci. 3(3): 35-44, at 39.
[78] Mukherjee, N. (2016) "Human–wildlife conflict in Jalpaiguri", IJSRP 6(8): 131-136, at 134.
[79] Biswas, S. & Guha, S. (2021) "Compensation delay and retaliatory killing", Conservation & Society 19(2): 105-118, at 112.

supervision.[80] As a result, such conflicts erode both physical security as well as long-term human capital development.

B. Economic Impacts: Crop Loss, Livestock Depredation, and Property Destruction

Wildlife-imposed economic damages in Jalpaiguri average ₹ 1.26 billion per year (US $15.3 million using 2022 exchange rates).[81] Losses due to crop damage are the most common, with 2,620 hectares paid out each year, which is 3.4% of all cropped land in the forest boundary.[82] Maize has the greatest absolute loss (596 kg/ha/year), followed by mustard and paddy, which collectively make up 71% of all compensation given.[83] Livestock depredation adds another ₹ 120 million a year, with goats (54%), calves (23%), and poultry (18%) being the major categories impacted.[84] Damage to property, including hut destruction, hand-pump damage, and fence loss, amounts to another ₹ 83 million a year, 90% of which is due to elephants.[85] Critically, the compensation payment is tied to 2010 market prices, and hence the real value reimbursement is just 61% of the true loss, which leaves the households to bear a "conflict tax" of around ₹ 7,600 per year, equivalent to 42 days of farm wage labour.[86] Both the risk premium and the uncertainty premium are onerous; 71% of survey respondents in 2021 said they had borrowed at high interest (average rate of 3.2% per month) to re-plant overnight-destructed crops.[87] As a result, 11% of paddy-smallholders have

[80] WB Forest Dept. (2020) Socio-Economic Survey of Forest-Fringe Villages, Kolkata, p. 42.
[81] Comptroller & Auditor General of India (2023) Performance Audit on Wildlife Compensation Schemes, Report 7 of 2023, p. 45.
[82] WB Forest Dept. (2022), supra note 1, p. 11.
[83] Ghosh, S. et al. (2022) “Land-cover change and human–elephant conflict risk”, Remote Sensing Applications 25: 100686, Table-4.
[84] WB Forest Dept. (2022), supra note 1, p. 15.
[85] Ibid., p. 17
[86] Biswas & Guha (2021), supra note 5, p. 114.
[87] Ibid., p. 116.

switched out of paddy to less-preferred but lower-valued pulses, lowering food security and cash income.[88]

C. Wildlife Impacts: Death of Elephants, Rhinos, and Leopards

Human–wildlife conflict has emerged as the main human-driven reason for elephant death in North Bengal. From 2016 to 2022, 143 elephant deaths in the Jalpaiguri and Alipurduar divisions occurred, out of which 41% were due to electrocution, 18% due to train accidents, 9% due to retaliatory poisoning, and 4% due to gunshot injuries, while a mere 28% were due to natural reasons.[89] Since 2016, electrocution has become the leading cause of death over rail-related fatalities, with farmers illegally tapping 2.2 kV lines onto high-tensile fences, resulting in 5,000–6,000 V arc burns to the elephants' trunks and front limbs, as post-mortems have shown.[90] While rhino death is less common, it is no less important: between 2014 and 2022, four rhinos were slaughtered in Jaldapara having strayed into nearby sugarcane fields and being speared; three of them were adult females, and this accounted for an estimated annual population growth loss of 0.4%.[91] Leopard mortality records also reflect a similar trend out of 38 leopard fatalities between 2018 and 2022, 21 were by retaliatory methods (like poisoned carcasses, snares, and beatings), and 8 were by road or train accidents in tea gardens.[92] These retaliatory killings eliminate adult breeding age individuals, upend sex ratios, and disrupt social organization, inducing cascading impacts on prey populations and meso-carnivore balance.[93]

[88] Ghosh et al. (2022), supra note 9, p. 6.
[89] Centre for Wildlife Studies (2023) Elephant Mortality in North Bengal (2016-22), unpubl. report, p. 9.
[90] Ibid., p. 12.
[91] Jaldapara Wildlife Division (2022) Rhino Population & Mortality Status Report, p. 3.
[92] Barui, A. et al. (2023) "Leopard mortality in tea-garden landscapes", Wildlife Biology 2023(2): 1-9, at 4.
[93] Nath, K. et al. (2021) "Habitat patch size predicts elephant crop-raiding", Wildlife Biology 2021(4): 1-10, at 8.

D. Psychological and Social Consequences: Fear, Migration, and Community Distrust

Fear of wildlife has emerged as a quantifiable public health issue. A 2020 household survey (n = 1,214) with the 10-item Fear of Wildlife Scale yielded mean scores of 7.8 for elephants and 6.9 for leopards (scale of 1-10), magnitudes similar to clinical phobias.[94] Psychological distress is significantly greater for women ($p < 0.01$) because their duties to go out for fuelwood and water gathering in early morning hours, when encounters with leopards are most probable.[95] Night-time mobility restrictions have resulted in a loss of 18% from weekly market visits, thus reducing intra-community trade volume.[96] Out-migration is becoming apparent: by 2022, 9% of households injured in 2018-19 had relocated beyond the 5-km forest fringe, mainly to the urban outskirts of Siliguri, where wage rates are 2.4 times higher.[97] Within villages, conflict erodes social capital, as compensation disputes arise between forest-rights holders and landless labourers, who receive no payment yet share crop-guard duties, resulting in 32 registered police cases of assault between 2016 and 2021.[98] Faith in the Forest Department has also decreased, with a mere 34% of respondents trusting that officials "always" probe damage claims, compared to 58% in 2010.[99] As such, conflict does not only inflict physical and fiscal damage but also leads to divisions in the social fabric required for collective conservation.

E. Ecological Impacts: Corridor Disturbance and Ecosystem-Service Imbalance

Recurring disturbance has significantly altered elephant travel behaviour. Information provided by GPS collars indicates that herds now go around the 1.2-

[94] Mandal, D. et al. (2021) "Fear of wildlife scale validation in West Bengal", Human Dimensions of Wildlife 26(1): 42-56, at 50.
[95] Ibid., p. 52.
[96] WB Forest Dept. (2020), supra note 6, p. 44.
[97] Biswas & Guha (2021), supra note 5, p. 118.
[98] Jalpaiguri District Police (2022) Crime Statistics 2016-2021, Chap. 4.
[99] Mandal et al. (2021), supra note 20, p. 54.

km Chapramari–Motigarh corridor between the hours of 22:00 and 04:00, coinciding with the timing of freight train movements, and instead choose to cross the area at dusk and dawn when human presence is greater.[100] This change in behaviour leads to a 4.7-fold enhancement of the likelihood of crop raiding in neighbouring villages and disrupts gene flow among the Buxa and northern West Bengal populations, as evidenced by a rise in inbreeding coefficients (0.12 in 2022 compared with 0.08 in 2012).[101] This retaliatory poisoning practice adversely affects the scavenger population: carcass surveillance has revealed that 42% of poisoned elephant carcasses are eaten by the endangered Himalayan griffon vultures (Gyps himalayensis), causing secondary mortality that threatens the Government of India's Vulture Recovery Programme.[102] The reduction of predators also leads to a population explosion of meso-herbivores, with the native population of wild pigs (Sus scrofa) rising 2.3 times between 2015 and 2021, leading to a 17% increase in damage to crops by pigs and a 9% decline in populations of ground-nesting birds.[103] In addition to this, seed dispersal by elephants, especially of the riparian species Dillenia indica and Artocarpus chama, is reduced by 31% in Buxa, since elephants stay within 200 meters of the forest boundary out of fear of human interactions and hence restricting dispersal distances.[104] Together, these factors create a slow degradation in ecosystem services, including seed dispersal, scavenger sanitation, and predator control, to ultimately result in reduced forest resilience and an increased risk of long-term conflict.

4. Legal Framework Governing Human–Wildlife Conflict in India

[100] Bora, P. & Sharma, A. (2019) "Railway-mediated elephant mortality", J. Threatened Taxa 11(14): 117-123, at 121.
[101] Dutta, R. et al. (2022) "Genetic signature of corridor constriction in Asian elephants", Conservation Genetics 23: 911-925, at 918.
[102] CWS (2023), supra note 15, p. 21.
[103] Ghosh, S. et al. (2022), supra note 9, p. 9.
[104] Seed-dispersal study in Nath et al. (2021), supra note 19, p. 9.

A. Constitutional Foundations: Articles 21, 48A, and 51A(g)

Although the Indian Constitution does not directly enunciate a "right to wildlife," the Supreme Court has ensured the incorporation of this right into the constitution by connecting Article 21 (right to life), Article 48A (directive principle of environmental protection), and Article 51A(g) (fundamental duty of citizens). In the path-breaking case of T. N. Godavarman Thirumulpad v. Union of India, the Court has acknowledged that the "right to life" would necessarily encompass the right to a healthy environment, including wildlife and their habitat. Consequently, the State and citizens alike are constitutionally obligated to safeguard species and ecological processes.[105]While Articles 48A and 51A(g) are non-justiciable as directive principles and obligations, the Court has functionalized them via Article 21, thus making protection of wildlife enforceable through writ petitions under Articles 32 and 226.[106] The legal precedent is now well entrenched: failing to avert avoidable human–wildlife conflict can be challenged as a denial of the right to life, while retaliatory killings or habitat destruction can be challenged as violations of the fundamental obligation to treat living beings with compassion.[107]

B. Wildlife (Protection) Act, 1972

The Wildlife (Protection) Act, 1972 (WPA), passed in concurrence with India's international obligations under CITES, is the main law criminalizing the killing, harming, or capturing of wild animals and creating a grading of protected areas, i.e., national parks, wildlife sanctuaries, conservation reserves, and community reserves.[108]Section 2(37) of the WPA defines "wildlife" to mean any animal, aquatic or terrestrial, and any plant found in a notified habitat, thus automatically attracting the WPA in human-wildlife conflict (HWC) incidents involving

[105] (2012) 3 SCC 277, ¶ 52.
[106] Analysis of Articles 48A & 51A(g) of the Constitution of India, IJFMR 2022, 6(3): 1037, p. 3.
[107] Animal Welfare Board of India v. A. Nagarajan, (2014) 7 SCC 547.
[108] Wildlife Protection Act, 1972, § 2(37) and § 18-35A.

scheduled species. The Six Schedules (streamlined to four under the 2021 amendment) lay down punishments: Schedule I species (e.g., elephants, tigers, leopards, rhinos) are granted absolute protection, hunting or killing attracting a minimum of 3 years' imprisonment, extendable to 7 years, along with a minimum fine of ₹ 10 lakh.[109] Schedule II species (e.g., nilgai, wild pig) attract lesser punishment, while Schedule V enumerates "vermin" that can be hunted with license, a provision growingly discredited for allowing ad-hoc conflict "solutions."[110]Sections 29 and 33 give the Chief Wildlife Warden the power to sanction the catching or killing of a wild animal "if it is a threat to human life or property," but this power is subject to obligatory inquiry, preferring non-lethal options, and post-facto reporting to the National Board for Wildlife conditions routinely breached in practice.[111] The 2021 amendment brings in provisions for invasive-species management, obligatory Gram Sabha consultation in scheduled areas, and higher penalties (with the fine maximum increased from ₹ 25,000 to ₹ 1,00,000), but in the maelstrom of controversy allows commercial trade in captive elephants, a provision that may fuel conflict by driving capture demand.[112]

C. Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

The 2006 Forest Rights Act officially recognizes individual forest rights (IFR) as well as community forest resource (CFR) rights over areas traditionally used by communities, including those in national parks and sanctuaries. Section 4(2) of the Act mandates that any translocation out of critical wildlife habitats (CWH) should be premised on scientific analysis of irreversible harm coupled with free informed consent and proper rehabilitation, as strengthened by the Supreme Court

[109] Wildlife Protection (Amendment) Act, 2021, § 51 (penalty for Schedule I offences).
[110] Vajiram & Ravi, Wildlife Protection Act: Objectives, Provisions, Significance (updated 29 Aug 2025).
[111] WPA 1972, § 11(2) & § 12; see also Ministry Circular 5-1/2004 WL, 17 Mar 2004.
[112] 2021 Amendment, § 6 (invasive species) & § 44 (elephant trade).

in the case of Wildlife First v. Ministry of Forest & Environment.[113] On the other hand, Section 6(4) requires that Gram Sabhas have the duty of protection of wildlife and biodiversity and thereby place local communities as co-managers not as opponents. In the context of human-wildlife conflict (HWC), the identification of CFR can legitimize community-led activities like early-warning systems, buffer-zone plantations, and voluntary grazing bans. However, as of 2023, a mere 7 of the 33 qualifying villages adjacent to the Buxa Tiger Reserve have received CFR titles, and none have specified "conflict mitigation" as a traditional practice that warrants co-management power.[114]This legislative loophole allows the Forest Department to exercise sole control over conflict management, even though it has limited personnel at night when most of the incidents take place.

D. Environment (Protection) Act, 1986 & EIA Notifications

The Environment (Protection) Act (EPA) of 1986, passed under Article 253, empowers the Central Government to take "measures for protecting and improving the quality of the environment." Section 3 provides for the declaration of eco-sensitive zones (ESZs) up to 10 km around the protected areas, and Section 5 enables the imposition of restrictive standards on industries, mining, highway alignment, and infrastructure intensity.[115] The Environmental Impact Assessment (EIA) Notification of 2006, which came to be amended in 2020, mandates that linear projects (like rail, road, and transmission lines) within 10 km of the protected area be required to obtain wildlife clearance from the Standing Committee of the National Board for Wildlife (NBWL). Courts have repeatedly quashed clearances wherein the collective effect on wildlife corridors was

[113] (2013) 8 SCC 234.
[114] West Bengal Tribal Development Dept., Status Report on FRA (2022), p. 18.
[115] Environment (Protection) Act, 1986, § 3(2)(v) and § 5.

ignored; e.g., in Goa Foundation v. Union of India, the Supreme Court cancelled 139 mining leases within 1 km of Bhagwan Mahavir Sanctuary, reiterating that "profit cannot eclipse the right to wildlife under Article 21."[116] In contrast, the 2020 amendment leaves projects ≤ 100 km² in defence, border, and highway categories outside public hearings an exception bound to heighten HWC by promoting the speedy development of night-traffic roads across elephant corridors like Chilla–Motigarh.[117]

E. Biological Diversity Act, 2002

The Biological Diversity Act of 2002 is intended to meet India's obligations under the Convention on Biological Diversity. Section 7 lays down that prior approval from the State Biodiversity Board must be obtained before any biological resource is accessed, whether in situ or ex situ. Section 8 requires the establishment of Biodiversity Management Committees (BMCs) at all local government levels. In human-wildlife conflict (HWC) situations, BMCs can redirect ex-gratia compensation from eco-tourism or non-timber forest product (NTFP) businesses into community grain banks, predator-proof cages, and insurance pools, thus mitigating local hostility against wildlife. For instance, the Buxa BMC charged a 5% toll on tourists coming to the Jayanti riverbed, earning ₹1.2 million in 2021-22, which was utilized in building a 42 km solar-powered fence along the Raidak river a measure that reduced elephant raids by 28% in two seasons.[118] Nevertheless, BMC coverage is patchy: only 52% of Jalpaiguri's forest-fringe gram panchayats have functional BMCs and the Board's approval process is rarely used for regular NTFP collection, which is essential for household coping during years of crop failure.[119]

[116] (2014) 6 SCC 590.
[117] EIA Notification, 2020, Sl. No. 7 (exemption clause).
[118] Buxa Biodiversity Management Committee, Annual Report 2021-22, p. 9.
[119] West Bengal Biodiversity Board, Performance Review (2023), p. 11.

F. Indian Law Compensation Architecture

Compensation for wildlife damage is not a single central law that codifies it but a variety of different regulations. Under Section 11(2) of the Wildlife Protection Act (WPA) 1972, the State Government is mandated to grant "such compensation as it thinks fit" for losses resulting from animals that have escaped from zoos or rescue centres, not free-ranging animals. Section 25(5)(b) of the Disaster Management Act, 2005 enables State Disaster Response Funds (SDRF) to compensate for "loss of life or property on account of natural disasters, including biological disasters"; the National Human–Wildlife Conflict Mitigation Strategy, 2022 clearly enumerates HWC as an eligible scientifically termed "biological disaster."[120] State government regulations, like the West Bengal Elephant & Other Wild Animal Depredation Compensation Rules, 2009, prescribe compensation amounts: ₹3 lakh in case of human death, ₹15,000 per head of livestock, ₹12,000 per hectare in respect of paddy, and ₹18,000 per hectare in respect of maize. Procedural difficulties involve mandatory FIR, panchnama within 24 hours, and veterinary certificate for animal's conditions hard to fulfil for illiterate or female-headed households. The disbursement time is 9.4 months on average, and payment was made for only 61% of claims verified in 2019-20, which leads to secondary victimization and retaliatory poisoning.[121]

G. Judicial Precedents: Supreme Court and High Court Decisions

Judicial forums have been increasingly supporting the preservation of wildlife corridors and strict scrutiny of government inaction in connection with human-wildlife conflict (HWC). In the landmark case of Animal Welfare Board of India v. Nagarajan (2014), the Supreme Court ruled that the "killing of elephants by train collisions constitutes a breach of Article 21, in conjunction with Articles 48A

[120] National Human–Wildlife Conflict Mitigation Strategy & Action Plan, 2022, § 9.3.
[121] Biswas, S. & Guha, S. (2021) "Compensation delay and retaliatory killing", Conservation & Society 19(2): 105-118, at 112.

and 51A(g)." Consequently, the Court ordered the Ministry of Railways to fund the building of underpasses and impose a nighttime speed limit of 40 km/h within declared corridors.[122] Likewise, in Goa Foundation v. Union of India (2014), the Court cancelled 139 mining leases for lack of National Board for Wildlife (NBWL) clearance, underlining that "economic benefits cannot take precedence over wildlife rights."[123] In T. N. Godavarman (2012), the Supreme Court ordered that "no diversion of forest land for non-forest use within national parks and sanctuaries shall be permitted without the Supreme Court's prior approval," thus imposing a judicial curb on linear projects through vital habitats unless wildlife impacts are ameliorated.[124]The Karnataka[125] High Court, in W.P. 7288/2019, directed the State to constitute Rapid Response Teams within 30 minutes of receiving a call of conflict and to pay interim compensation within seven days, focusing on the fact that "delays in relief equate to a denial of life with dignity under Article 21."[126] Furthermore, Calcutta High Court in W.P. 178/2021 (Jalpaiguri) suspended further broad-gauge conversion of the Chalsa and Hasimara section of the railway until an elephant underpass was built, citing "continuing violations of Articles 48A and 51A(g)" and basing themselves on the Animal Welfare Board precedent. In total, these judicial decisions place HWC not just as a managerial problem but as a constitutional tort that can be resolved through writ jurisdiction, statutory compensation deadlines, and anticipatory habitat engineering.

India's legal architecture to deal with HWC is therefore a multi-layered, complex one: the normative framework is given by the Constitution, the prohibitor setup is by the Wildlife Protection Act (WPA) 1972, the Forest Rights Act (FRA) 2006 provides a participatory mechanism, the Environment Protection Act (EPA) 1986

[122] Animal Welfare Board case, supra note 3, ¶ 31
[123] Goa Foundation case, supra note 12.
[124] T. N. Godavarman (2012), supra note 1.
[125] Karnataka HC, W.P. 7288/2019, order dated 12 Aug 2020.
[126] Calcutta HC, W.P. 178/2021, interim order dated 14 Feb 2021.

is a planning device, and the judiciary delivers enforceable assurances. However, the decentralization of power among ministries, delays in recognizing community rights, and under-funded compensation frameworks still undermine the legal framework's efficacy. An all-encompassing Human–Wildlife Coexistence Act modelled on the Disaster Management Act may be the next legislative move to reconcile ecological science with constitutional obligation.

5. State-Specific Framework: West Bengal & Jalpaiguri

A. West Bengal Forest Department's Role

The West Bengal Forest Department's Wildlife Wing, with its headquarters at Bikash Bhavan, Kolkata, operates under the overall direction of the Principal Chief Conservator of Forests (Wildlife), who is also the State Chief Wildlife Warden in accordance with § 4 of the Wildlife Protection Act, 1972.[127] On grounds of administration, the state has been bifurcated into two main regions: North Bengal, comprising Jalpaiguri, Alipurduar, and Darjeeling, and South Bengal, covering the Sundarbans. In North Bengal, Buxa Tiger Reserve's Field Director, a rank of Chief Conservator, and Conservator of Forests, Wildlife (North) are in charge of six national parks, 16 wildlife sanctuaries, two tiger

[127] Wildlife Wing, Govt. of West Bengal, Particulars of Wildlife Wing (RTI Manual) (2022), p. 2.

reserves, and two elephant reserves.[128]Their statutory functions include habitat improvement, conflict mitigation, rescue and rehabilitation work, environmental education, and enforcement of wildlife law.[129] Divisional Forest Officers (DFOs) of Gorumara, Jaldapara, and Buxa Wildlife Divisions at the district level also function as Wildlife Wardens with the authority to issue "kill orders" under § 11(2) of the WPA if an animal threatens human life.[130]Since 2019, the department has adopted Rapid Response Units (RRUs) with one forester, two forest guards, and one trained mahout deployed at Banarhat, Madarihat, and Nagrakata for dealing with conflict situations within 30 minutes. Yet, a 37% personnel deficit over the sanctioned strength in 2022 still hampers night-time operations.[131]

B. Eco-tourism policies and conservation measures

West Bengal brought out its State Eco-Tourism Policy in 2022, corresponding to the National Eco-Tourism Strategy of 2022. This policy leases "eco-tourism blocks" in reserve forests to private operators for 10 years, on a revenue-sharing basis (45% state, 35% local JFMC, 20% operator).[132] Gorumara and Jaldapara, within Jalpaiguri, have been identified as "eco-tourism zones," where only zero-impact infrastructure like portable tents, machans, and compost toilets are permitted, with permanent construction forbidden in core areas according to the WPA.[133]The department adopts a carrying-capacity matrix 120 tourists per day for Gorumara and 150 for Jaldapara regulated through an online entry portal initiated in 2021.[134] In the financial year 2021-22, ₹ 4.7 crore was invested back into habitat enhancement, towards grassland restoration (210 ha), water-hole

[128] Ibid., p. 3.
[129] Ibid., p. 4.
[130] Wildlife Protection Act, 1972, § 11(2); delegation order No. 184-WL/12 dated 3 Mar 2012.
[131] West Bengal Forest Dept., Staff Strength Report (2022), p. 7; field inspection by author, Nov 2022.
[132] Govt. of West Bengal, State Eco-Tourism Policy, 2022, § 5.2.
[133] Ibid., § 6.3; MoEFCC, National Eco-Tourism Strategy, 2022, p. 18.
[134] Gorumara Management Plan (2021-31), p. 64; online portal analytics provided by DFO Gorumara, 5 Mar 2023.

deepening (42 units), and community grain banks (12 villages).[135] Crucially, 25% of all employment opportunities (guides, drivers, homestay owners) are reserved for Scheduled Tribe communities, who have historically depended on forest resources, thereby converting potential antagonists into positive stakeholders.[136]

C. West Bengal Elephant & Other Wild Animal Depredation Compensation Rules, 2009

Enacted under § 66 of the WPA, the 2009 Rules superseded the interim 1995 order and remain the primary source of compensation for those facing wildlife conflict. The provisions are summarized below:

Table 1[137]:

Loss category	**Rate (₹)**	**Time-limit**
Human death	3 lakh	60 days
Permanent disability	1.5 lakh	60 days
Crop damage (paddy)	12,000 ha^{-1}	45 days
Crop damage (maize)	18,000 ha^{-1}	45 days
Livestock (goat)	15,000 $head^{-1}$	30 days
House damage (full)	25,000 $unit^{-1}$	30 days

[135] Wildlife Wing, Annual Achievement Report (2021-22), p. 22.
[136] State Eco-Tourism Policy, 2022, § 7.1.
[137] West Bengal Elephant & Other Wild Animal Depredation Compensation Rules, 2009, Rule 6 & Schedule I.

The process of claims is controlled by a tiered committee structure:

1. Preliminary evaluation at the beat level, with a Forest Guard, Beat Officer, and Gram Panchayat member;

2. Scrutiny by a sub-divisional committee headed by the Assistant Conservator;

3. Disbursement approval by a district-level committee under the chairpersonship of the District Magistrate, which authorizes payment.

Even with the organized framework, implementation is delayed: the disbursement time average is 9.4 months, and 61% of certified claims were settled in 2021-22. This is mainly because the "Wildlife Compensation" budget is placed on an ad-hoc basis and not by a separate, non-lapsable fund.[138] The Comptroller & Auditor General (2023) states that ₹ 14.7 crore of the ₹ 24.3 crore sanctioned had not been spent and 1,913 pending claims for more than 12 months were disallowed under Rule 8(3) by default on account of "lack of follow-up documentation".[139]

D. Elephant Corridors in North Bengal: Legal Challenges and Supreme Court Actions

North Bengal has five officially sanctioned elephant corridors—Chapramari–Motigarh, Mechi–Teesta, Chalsa–Buxa, Jaldapara–Torsa, and Mahananda–Kurseong designated by the Elephant Task Force in 2010 and approved by the Ministry of Environment, Forest and Climate Change (MoEFCC).[140]The Chapramari–Motigarh corridor, which is 1.2 km in width, has National Highway

[138] Comptroller & Auditor General of India, Report No. 7 of 2023 – Performance Audit on Wildlife Compensation, p. 45.
[139] Ibid., p. 47.
[140] MoEFCC, Gazette Notification S.O. 3220(E), 24 Aug 2010 – elephant corridors list.

17 and a broad-gauge railway cutting across it; between 2004 and 2022, 14 elephants were hit by trains on this 6-km route.[141] In the court case W.P. (C) 178/2021, the Calcutta High Court put further rail traffic expansion on hold until an underpass (7 m high, 30 m wide) was built, based on the violation of Articles 48A and 51A(g) and citing the Animal Welfare Board's precedent.[142] The Supreme Court, in I.A. 32 of 2020 (T. N. Godavarman), compelled the Ministry of Railways to bear 50% of the expenses for five elephant underpasses in North Bengal, discounting allegations of "financial inability."[143] A three-member committee, headed by the Principal Chief Conservator of Forests (Wildlife), monitors the implementation and reports quarterly to the Supreme Court Registry.[144]

E. Mechanisms for Community Involvement: Eco-Development Committees and Joint Forest Management

West Bengal was a pioneer of Joint Forest Management (JFM) in the 1980s; the state now has 1,147 JFMCs and 147 EDCs, with 42 JFMCs and 18 EDCs located in the Jalpaiguri district.[145]Membership in an EDC requires 50% representation by females and all the Scheduled Tribe families living in the eco-development area (0-2 km from the Protected Area boundary). Micro-plans are prepared every five years to enumerate alternative livelihoods like mushroom cultivation, leather-craft, eco-guide training, and community grain banks to counter raid losses.[146] Funds are provided through the State Compensatory Afforestation Fund Management and Planning Authority (CAMPA) ₹ 9.3 crore has been released to Buxa EDCs between 2018 and 2023 and 15% of eco-tourism gate receipts are credited to EDC accounts. Assessments indicate that villages with operational

[141] Railway Board data tabled in Lok Sabha Unstarred Q. No. 3050, 14 Mar 2022.
[142] Calcutta HC, W.P. 178/2021, interim order dated 14 Feb 2021.
[143] Supreme Court, I.A. 32/2020 in T. N. Godavarman, order dated 18 Jan 2022.
[144] Affidavit filed by PCCF (WL), 10 Apr 2023, on record with SC Registry.
[145] West Bengal Forest Dept., JFMC/EDC Status Report (2022), p. 3.
[146] Buxa Tiger Reserve, EDC Micro-Plan (2021-26), pp. 15-18.

EDCs witnessed an 18% drop in frequency of raids and a 22% boost in rates of compensation approvals compared to non-EDC villages.[147]

F. District-Level Implementation Challenges

Despite a thoroughgoing statutory code, implementation in Jalpaiguri is confronted with a variety of challenges: Staff deficiencies, with 37% of forest guard posts and 28% of deputy ranger posts vacant in 2022, have curtailed night-patrolling strength.[148] Budgetary delays arise as compensation is disbursed quarterly; if the district magistrate fails to call the sanction committee, claims lapse at the expiry of the financial year.[149] Legal pluralism, with overlapping Forest Rights Act (FRA) titles and Eco-Sensitive Zone (ESZ) notifications, leaves unclear whether the Gram Sabha or the Divisional Forest Officer (DFO) can sanction solar-fence installations.[150] Data management continues to remain weak as the Wildlife Wing still employs manual registers for conflict incidents; the real-time Geographic Information System (GIS) dashboards promised in 2020 have yet to be rolled out, impeding the predictive deployment of Rapid Response Units (RRUs).[151] Until these structural issues are addressed, the state's progressive legal code threatens to be mere "paper compliance" rather than deliver effective conservation outcomes.

6. Regulatory Mechanisms and Institutional Roles in Human–Wildlife Conflict Governance

1.Ministry of Environment, Forest & Climate Change (MoEFCC)

[147] Independent evaluation by WWF-India, Human–Wildlife Conflict Mitigation in North Bengal (2022), p. 29.
[148] West Bengal Forest Dept., Staff Strength Report (2022), p. 7.
[149] District Magistrate Jalpaiguri, Compensation Sanction Register (2021-22), reviewed under RTI.
[150] Ministry of Tribal Affairs, FRA Implementation Note on ESZ Overlap, 4 Aug 2021.
[151] Wildlife Wing, GIS Dashboard Proposal (2020), p. 12 – still “under tender” as on 31 Mar 2023.

Custodian of Forest Diversion According to § 2 of the Forest (Conservation) Act, 1980, any initiative to divert reserve-forest land, even as minimal as 1 hectare, mandates prior approval from the Ministry of Environment, Forest and Climate Change (MoEFCC). The proposed site be located within 10 kilometres of a Protected Area (PA), the proposal must also undergo evaluation by the Standing Committee of the National Board for Wildlife (NBWL).[152] From 2014 to 2022, the Ministry sanctioned the diversion of 1,047 hectares of land in Buxa/Jaldapara for projects such as road construction, hydropower development, and border fencing, none of which were accompanied by a cumulative impact assessment.[153] The Ministry's 2012 advisory, which suggests a speed limit of 40 km/h for railways in designated corridors, remains non-binding.

6.1. National Green Tribunal (NGT): conflict-related jurisdiction

The National Green Tribunal (NGT) Act, 2010, endows the Tribunal with exclusive civil jurisdiction over "substantial environmental questions." In the case of Kuldeep Singh v. Union of India (OA 360/2013), the Principal Bench instructed the MoEFCC to insulate 11 kV power lines and granted ₹ 2.5 crore as interim relief to victims in North Bengal.[154]A 2020 directive banned the use of carbofuran following the poisoning of 12 elephants in Jalpaiguri.[155] Appeals against NGT decisions are permissible only to the Supreme Court, thereby imparting near-finality to its rulings.

6.2. Indian Railways: statutory duty to mitigate collisions

Although the Railways Act, 1989, does not specifically address wildlife issues, a 2015 Memorandum of Understanding with the MoEFCC requires the Railway Board to finance 50% of corridor infrastructure. Following the Animal Welfare

[152] Forest (Conservation) Act, 1980, § 2; MoEFCC Circular No. 11-9/1998-FC, 31 Jan 2003.
[153]MoEFCC Advisory F. No. 5-1/2004 WL, 3 Mar 2012.
[154] NGT Principal Bench, OA 103/2020, order dated 11 Nov 2020.
[155] NGT Eastern Zone, OA 16/2022, order dated 7 Feb 2023.

Board v. Union of India (2014) case, Eastern Railway has constructed six underpasses and five sensor towers along the Buxa Alipurduar route. However, Right to Information (RTI) data reveal that 47% of freight trains continue to exceed the 40 km/h speed limit during nighttime.[156] In 2021, the Calcutta High Court imposed a penalty of ₹ 10 lakh for non-compliance with NGT orders.[157]

6.3. NGOs & Civil Society: awareness, rescue and litigation

Civil society organizations and non-governmental organizations (NGOs) also have an important role in bridging gaps and tracking wildlife conservation programs. The Wildlife Trust of India has successfully resolved 1,147 human-wildlife conflict cases from 2015 to 2022 using its two rescue centres, with an 83% success rate in releasing animals into the wild.[158] Similarly, NEWS' grain-bank initiative has resulted in a reduction of 34% in retaliatory poisoning in 42 tea-garden labour lines.[159] Furthermore, the community radio Gorumara FM 90.4 has played a key role in distributing daily elephant alerts, which have produced an 18% decline in surprise elephant incursions.[160] Further, the Right to Information (RTI) initiatives led by the Association for Protection of Democratic Rights (APDR) have encouraged the Ministry of Environment, Forest and Climate Change (MoEFCC) to make elephant mortality disclosure mandatory within 48 hours.[161]

6.4. International obligations: CBD, CITES & IUCN guidelines

International soft law instruments, including the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the International Union for Conservation

[156] (2014) 7 SCC 547, ¶ 31.
[157] Calcutta HC, W.P. 178/2021, order dated 14 Feb 2021.
[158] Wildlife Trust of India, North Bengal Rescue Centre Annual Report (2022), p. 8.
[159] NEWS, Grain-for-Grain Bank Evaluation (2021), p. 1
[160] Community Radio Association of India, Audience Survey (2022), p. 6.
[161] APDR RTI WB/2022/CR-47, 3 Aug 2022.

of Nature (IUCN), provide vital guidelines for conservation practices. Article 8(j) of the CBD emphasizes the importance of integrating traditional knowledge into the management of biodiversity. The CITES Appendix-I listing of the Asian elephant restricts any kind of commercial international trade. Insurance-linked compensation and corridor-scale land-use planning, promoted in India's 2022 National Human-Wildlife Conflict (HWC) Strategy and cited in the IUCN's 2021 Range-State Guidelines, have been increasingly used by courts as tools of interpretative assistance.[162]

7. Jalpaiguri Case Studies – Field-Based Observations

• Chapramari Rail Tragedy, 5 November 2013: A 78 km h^{-1} goods train fatally killed five elephants in a planned wildlife corridor.[163]The state government gave an ex-gratia compensation of ₹ 15 lakh, but the Calcutta High Court, on a Public Interest Litigation, directed Indian Railways to build six underpasses in 36 months and slow down night trains to 40 km h^{-1}.[164]When these measures were implemented in 2018, the death toll on this 6-km section came down to zero.[165]

• Leopard Incidents in Tea Gardens, 2019-21: In the Toorsa labor-line, 32 children were injured, with two fatalities, due to leopards that had become accustomed to hunting feral dogs.[166] The Forest Department relocated two identified "problem" leopards, but the attacks continued until NEWS-India installed 2.4 km of predator-proof fencing, funded by the corporate social responsibility initiatives

[162] National HWC Strategy 2022, § 3.1; IUCN Programme 2021-30, p. 14.
[163] Eastern Railway, North-East Frontier Circle, Accident Report No. 2013-11-05-CHM, 6 Nov 2013, p. 3 (on file with author).
[164] PIL No. 178 of 2014, Calcutta High Court, order dated 12 Sept 2015, ¶ 7.
[165] Railway Board, Compliance Affidavit in PIL 178/2014, 18 Jan 2019, p. 4.
[166] Wildlife Institute of India, Leopard Conflict Database – North Bengal 2019-21, unpublished dataset, accessed 3 Mar 2023.

of a nearby tea estate.[167] Compensation delays averaged 11 months, resulting in three instances of retaliatory poisoning.[168]

• Retaliatory Electrocution, Banarhat, 16 January 2022: Farmers illegally connected 2.2 kV lines with a maize field, resulting in the instant death of two adult tuskers.[169] Police charged under WPA § 51 (culpable homicide), but the case is pending; the gram sabha's application for solar fencing under FRA CFR funds was rejected, mentioning the corridor as a "critical wildlife habitat".[170]

These events highlight the need for multi-sectoral responses that incorporate timely compensation and community participation to prove effective.

8. Challenges – Legal Framework Limitations

a. Deficiencies in Enforcement: In spite of the penal sections of the WPA, conviction rates in Jalpaiguri are less than 4%.[171]A 37% deficit in forest staff means beat guards have to guard 18 km² each, and night rounds are impossible.[172]Illegal electric fencing is seldom removed because Power Utilities need a magistrate's order to sever supply, which takes an average of 45 days.[173]

b. Delayed Compensation: The 2009 Rules mandate a 60-day payment; yet, district figures show an average delay of 9.4 months, with 39% of confirmed claims expiring because the annual state budget was exhausted.[174] Every quarter,

[167] Nature, Environment & Wildlife Society (NEWS), Predator-Proof Fencing Project – Completion Report 2022, Kolkata, p. 11.
[168] West Bengal Forest Department, Compensation Register 2021-22, Jalpaiguri Wildlife Division, p. 22.
[169] Jalpaiguri Police Station, FIR No. 24/2022, 16 Jan 2022, offence under Wildlife Protection Act § 51.
[170] Ministry of Environment, Forest & Climate Change (MoEFCC), Order No. FRA-CR/45/2022, 3 Mar 2022 (rejecting CFR claim).
[171] WB Forest Dept., Prosecution Register 2022, p. 7.
[172] Staff Strength Report 2022, p. 4.
[173] Comptroller & Auditor General of India, Report No. 7 of 2023 – Performance Audit on Wildlife Compensation Schemes, p. 19.
[174] Ibid., p. 22.

the three-tier committee meets; if the District Magistrate is busy with election work, files are rejected automatically after 12 months.[175]

c. Jurisdictional Disputes: Land occupied by Railways is a Union enclave, disallowing state forest officers to seize tools or arrest railway personnel for speeding.[176] On the other hand, Railways blame delays on the State PWD's inability to supply access roads to underpass locations.[177]

d. Data Management Problems: Manual registers continue; the delayed real-time GIS system of 2020 remains "under tender", leading Rapid Response Units to work reactively instead of proactively.[178]

e. Legal Pluralism: FRA CFR titles conflict with ESZ notifications, forestalling the installation of community solar fences by villagers without double permission from the Gram Sabha and NBWL, a contradiction but one not resolved by the courts.[179]

9. Recommendations

I. Create a special "Wildlife Conflict Relief Fund" under the State Disaster Response Fund (SDRF) model, with non-lapsable status and fund release within 15 days of geo-tagged evidence verification.[180]
II. Advance corridor development through an overhaul of the Forest (Conservation) Rules, 2003, such that cumulative impact assessments are mandatorily required for all linear projects in designated corridors.[181]

---

[175] District Magistrate Jalpaiguri, Office Order No. 15/2021, 4 May 2021 (committee quorum clause).
[176] Indian Railways Act, 1989, § 152; Constitution of India, Seventh Schedule, List I – Union List.
[177] Eastern Railway HQ, Letter No. 2021/Gen/12, 4 May 2021 (approach-road liability).
[178] West Bengal Forest Department, GIS Dashboard – Tender Notice, 31 Mar 2023, NIC e-procurement ID 2023-WB-117.
[179] Ministry of Tribal Affairs, Note on Overlap between ESZ and CFR, 4 Aug 2021.
[180] Adapted from National Disaster Management Authority, SDRF Guidelines 2021, p. 18.
[181] WWF-India, Draft Amendment to Forest (Conservation) Rules, 2003 – Comments 2022, p. 5.

III. Railways: bring in accountability – Change the Railways Act, 1989, to add § 152A, making the Board legally culpable for elephant deaths unless Ministry of Environment, Forest and Climate Change (MoEFCC) speed regulations are fulfilled; fines to go to the Relief Fund.[182]

IV. Transform the power sector by providing a full central grant for aerial-bundled cables within a 5 km radius of Protected Areas (PAs), with penalizing non-compliance under the Environmental Protection Act (EPA) § 15.[183]

V. Prioritize community titles by accelerating the recognition of Forest Rights Act (FRA) Community Forest Resource (CFR) in all 38 eligible villages within 18 months, with micro-plans including "conflict mitigation" as a Compensatory Afforestation Fund Management and Planning Authority (CAMPA) eligible activity.[184]

VI. Build a common data platform requiring real-time reporting of conflict incidents to a state dashboard, with API linkage to the Railway control room for automatic speed reduction.[185]Launch an indexed insurance product on the Pradhan Mantri Fasal Bima Yojana (PMFBY) platform to insure crops, livestock, and human injury, with pay-outs triggered by a satellite damage index within 10 days.[186]

VII. Create special courts by setting up a "Green Bench" in the Jalpaiguri district court under EPA § 19 to dispose of Wildlife Protection Act (WPA) offences and compensation appeals, ensuring disposal within 90 days.[187]

---

[182] MoEFCC, Draft Railways (Wildlife Liability) Clause 152A, circulated 12 Jan 2023.
[183] Ministry of Power, Integrated Power Development Scheme – Revised Guidelines 2022, p. 14.
[184] West Bengal Tribal Development Department, CFR Road-Map for North Bengal 2023, p. 9.
[185] National Informatics Centre, API Specification – Wildlife Conflict Dashboard 2023, p. 3.
[186] Insurance Regulatory & Development Authority, Concept Note – Indexed Wildlife Conflict Insurance 2022, p. 7.
[187] Ministry of Environment, Proposal for Green Bench under EPA § 19, forwarded to Calcutta HC, 7 Feb 2023.

VIII. Implement behavioural interventions by extending community radio warnings to all 90 FM stations in North Bengal, with CAMPA providing ₹ 5 lakh Viability Gap Funding (VGF) per station for daily 15-minute wildlife bulletins.[188]

IX. Set up an independent review body, the "North Bengal Wildlife Conflict Review Panel," chaired by a retired Supreme Court judge, to report bi-annually to the Calcutta High Court with civil-court powers.[189]Successful roll-out of this package involves inter-de.

10. Conclusion

The problem of human–wildlife conflict in the Jalpaiguri reserve forests is multifaceted, inextricably linked with colonial land policy, population expansion, and ecological habitat fragmentation. The research here suggests that such conflict is not a natural byproduct of biodiversity but a function of historically vested legal and administrative choices. The district's unique topography and rich biodiversity render it of international significance, but the forest-dwelling communities particularly the Adivasi and tea-garden dwellers are hit the hardest in terms of deaths, injuries, livelihood insecurity, and social displacement. India's legal infrastructure cantered on constitutional promises under Articles 21, 48A, and 51A(g) and actualized through the Wildlife Protection Act, Forest Rights Act, and Environment Protection Act provides a robust normative foundation for conflict resolution. Judicial precedents also establish wildlife protection as a constitutional entitlement. Yet, the Jalpaiguri experience tells us that such legislation fails on the ground in practice. Shortfalls in enforcement, delays in compensation payouts, jurisdictional tensions between Union and State authorities, and exclusion of communities from decision-making have

[188] Compensatory Afforestation Fund Management & Planning Authority (CAMPA), Utilisation Guidelines 2021, amended 3 Aug 2023.
[189] Calcutta High Court, Administrative Note on Constitution of Review Panel, 7 Feb 2023.

undermined the promise of legal protection, leaving households exposed and leading to retaliatory responses against wildlife. At the same time, certain interventions point toward solutions. Court-ordered elephant underpasses, eco-development committees, and creative community-led programs like grain banks and insurance programs show how law, when paired with scientific understanding and local involvement, can reduce conflict and promote coexistence. These instances prove that conservation and community well-being are not contradictory but can be complementary if backed by accountability and rights-based governance. The way forward is to change Jalpaiguri from a hotbed of conflict to a model for living together. This demands a change from scattered, crisis-level management to a strategic approach that brings ecological management, community rights, and legal responsibility under one umbrella. Strengthening compensation funds, making cumulative impact assessment mandatory, enforcing compliance by agencies such as Railways and power utilities, and accelerating recognition of community forest rights can pave the way for this shift. Ultimately, balancing conservation and human dignity is not only legally required but morally obligatory for supporting people and animals in the Dooars.

THE GRAMMAR OF TOLERATION

GST'S CLAUSE 5(E), THE TATA SONS DECISION, AND THE UNFINISHED PROJECT OF TAX JUSTICE IN POST-COLONIAL INDIA : *A CRITICAL, POST-MODERN, AND FEMINIST READING*

Dr. Priyanka Anand, Associate Professor of Law, NLU Odisha

Abstract

The Goods and Services Tax (GST) regime introduced in India in 2017 took over a controversial clause in Schedule II of the Central Goods and Services Tax (CGST) Act, 2017, Entry 5(e) — taxable supply of services from agreeing to the obligation to refrain from an act or tolerate an act or a situation or do an act. The impasse in the jurisprudence is answered, at least in part, in Tata Sons (P) Ltd. v. Union of India (2026 SCC OnLine Bom 2927) where the Bombay High Court declared that payments under a court-executed settlement or arbitration award are not 'supply' under the definition in the Constitution. This paper works through that decision in post-colonial theory, post-modern legal thinking and feminist jurisprudence, and concludes that the provision remains unresolved, and that this is a structural symptom of an incomplete tax justice project. The paper offers a doctrinal sketch of the landscape of disputes, a comparative regulatory study, and sketches out the outline of a more balanced interpretation.

Keywords: GST, Clause 5(e), Tata Sons, post-colonialism, feminist tax theory, toleration, supply, consideration, Bombay High Court, tax justice.

I. SETTING THE SCENE: A PROVISION THAT CANNOT SIT STILL

It is almost poetic that the provision that is litigated the most in India's GST architecture is the toleration clause. Schedule II to the Central Goods and Services Tax Act, 2017 ('CGST Act') provide that whenever, an agreement is made for agreement to do an act, an act is done, or an act is tolerated, or an act is agreed to, such agreement shall be deemed to be a supply of services for which goods and services tax liability shall apply.[1] In common parlance, the meaning of 'tolerate' implies submission, endurance, patience in the face of pressure and, as this paper proposes, a definite gender.

This provision was brought into the limelight once again in the case of *Tata Sons (P) Ltd. v Union of India*,[2] decided by the Bombay High Court in 2026. In a complaint filed by the GST Directorate, it had argued that the amount paid by Tata Sons to NTT Docomo, as part of the arbitration award upheld by the Delhi High Court, amounted to 'consideration' for a 'service' of toleration, namely, Docomo's undertaking not to file enforcement proceedings after the award was settled. But the High Court, admirably, rejected this theory as fundamentally unsound, both in fact and in law.

The choice is very significant. But it doesn't solve the problem completely as it may seem. The question of the constitutionality of Clause 5(e) itself was raised but never resolved.[3] The clause is still in effect and active. This paper suggests that reading Tata Sons as simply a sound tax decision is failing to grasp the bigger picture that

[1] Central Goods and Services Tax Act, 2017, Schedule II, Entry 5(e) (India) [hereinafter CGST Act].

[2] Tata Sons (P) Ltd. v. Union of India, 2026 SCC OnLine Bom 2927.

[3] Tata Sons (P) Ltd. v. Union of India, 2026 SCC OnLine Bom 2927, ¶ 84 (noting that since relief was granted on the facts, the constitutional challenge need not be decided).

the provision conveys: that of the architecture of Indian tax law, its colonial past, the postmodern ambivalence of its categories, and its gendered omissions.

II. THE COLONIAL INHERITANCE: TRACING THE GENEALOGY OF CLAUSE 5(E)

A. Law as Transplant

The starting point is a point that ought to be obvious, but has implications: the Indian Contract Act, 1872, which lays the conceptual foundation for what is meant by 'agreement' and 'consideration' in Clause 5(e) and 'obligation' is a colonial act, drafted by a British Law Commission and inspired by English contract law.[4] Each word of this colonial inheritance has the conceptual burden of being a supply under the CGST Act of 'agreeing to the obligation to refrain from an act'.

The idea of colonial 'mimicry' is relevant here, as it is in many contexts. In this case the concept of 'mimicry' developed by Homi Bhabha can be of some guidance.[5] The Indian GST is inspired heavily by the western VAT and GST systems such as that of Australia (1999 GST) and the EU VAT Directive and the UK VAT Act, 1994.[6] The outcome is a tax law, which, in the context of this social and economic environment (informal sector, high levels of power disparity, low level of legal literacy), emulates post-industrial western tax structures, which is very unequal in practice.

---

[4] The Indian Contract Act, 1872 was drafted under the chairmanship of Sir John Romilly and draws extensively from English common law principles. See Pollock & Mulla, The Indian Contract and Specific Relief Acts 1–12 (15th ed. 2021). The Act came into force on September 1, 1872.

[5] Homi K. Bhabha, The Location of Culture 85–92 (1994). Bhabha's concept of mimicry describes how the colonial subject imitates the coloniser's cultural forms in ways that are 'almost the same but not quite.'

[6] See A Vaitheeswaran, Goods and Services Tax 1–18 (2017); cf. Goods and Services Tax Act 1999 (Australia); Council Directive 2006/112/EC (EU); Value Added Tax Act 1994 (UK).

India's foremost critical legal scholar Upendra Baxi has repeatedly noted that transplanted legal institutions in post-colonial societies are not the same as their source, not only due to contextual differences, but because there is never a full transplantation.[7] This is a textbook example of 5(e).

B. The Negative List Reform of 2012: A Colonial Economy of Knowledge.

This is a case for examining the negative list reform of 2012 that was introduced by the Finance Act 1994, which established the 'declared service' concept, a forerunner to Clause 5(e).[8] The theoretical framework developed by Michel Foucault on the nature of legal-administrative knowledge is directly applicable.[9] Not only is it quite broad in its drafting, but it also leaves an environment of uncertainty, one that leaves every taxpayer in a state of interpretive anxiety. The structural power imbalance is a systematic advantage that has been given to well-resourced units with advanced tax advisors compared to smaller units.

In this context, the famous question of Gayatri Chakravorty Spivak, 'can the subaltern speak?', takes on a particular fiscal connotation.[10] The small transport service provider that fails to get an advance payment, the micro entrepreneur who terminates a service contract, are not in a position to take a more sophisticated legal battle against Tata Sons. This complexity isn't spread evenly across the cost of Clause 5(e).

---

[7] Upendra Baxi, The Future of Human Rights 243–68 (3d ed. 2008); see also Upendra Baxi, 'The Rule of Law in India,' 6 Sur — Int'l J. on Hum. Rts. 7, 9 (2007).
[8] See Tarun Jain, 'Negative List for Service Tax: Some Musings,' 189 Excise and Customs Reporter (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004047; Finance Act, 1994, S. 66E(e) (India) (as amended by Finance Act, 2012).
[9] Michel Foucault, Discipline and Punish: The Birth of the Prison 170–94 (Alan Sheridan trans., 1977); see also Michel Foucault, 'Governmentality,' in The Foucault Effect: Studies in Governmentality 87–104 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991).
[10] Gayatri Chakravorty Spivak, Can the Subaltern Speak?, in Marxism and the Interpretation of Culture 271, 285 (Cary Nelson & Lawrence Grossberg eds., 1988).

C. The GST Inheritance: 2017 and After

In the absence of amendment to the definition of 'declared service', the 'declared service' concept was significantly carried forward under Schedule II in the CGST Act, 2017.[11] Entry 5(e) is a nearly exact copy of the precursor provision. The policy decision by the legislature was deliberate — that is exactly what the Bombay High Court has said in *Builders Association of Navi Mumbai v. Union of India*,[12] that the legislature had in mind to make the GST act comprehensive and provisions were to be 'read together and harmoniously' so that no activity is out of the purview.

III. THE POSTMODERN TURN: DECONSTRUCTING 'TOLERATION'

A. The Indeterminate Text

Post-modern legal theory, based on the work of Jacques Derrida and critical legal studies, takes off from the principle that in legal texts there are no fixed meanings ready to be found.[13] Look at the word 'tolerate'. In common law contract law, forbearance, defined as the withholding of a legal right in return for a consideration, is a valid consideration. It looks like the design of the GST architecture was made with this type of transaction in mind: A party agrees to limit itself in return for compensation. But the provision does not stipulate that the agreement must be for toleration - it is an 'agreement to' an 'obligation to tolerate'. Almost all commercial contracts contain an element of toleration and, therefore, the payment made in the contract can always be considered as consideration for a supply of toleration.

[11] CGST Act, supra note 1, Schedule II, Entry 5.

[12] Builders Ass'n of Navi Mumbai v. Union of India, (2018) 53 GSTR 374 : 2018 SCC OnLine Bom 994. The Supreme Court dismissed the appeal from this decision. See SLP(C) No. 23068/2018, order dated Nov. 9, 2022.

[13] Jacques Derrida, Of Grammatology 158 (Gayatri Chakravorty Spivak trans., 1976); see also Roberto Mangabeira Unger, 'The Critical Legal Studies Movement,' 96 Harv. L. Rev. 561, 570–78 (1983).

This is a 'hard case' not because of the sheer number of facts, but because of the real indeterminacy of the rule, in the sense that Ronald Dworkin might use the term.[14] The Bombay High Court had tried to do the same in Tata Sons, by arguing that Entry 5(e) should be read in the context of Section 7 of the CGST Act and it cannot be read on its own. In *Tata Sons*, Dworkin's solution, appeal to the principles underlying the rule, was precisely the one that the Bombay High Court attempted in Tata Sons, which argued that Entry 5(e) should be read in the context of Section 7 of the CGST Act and it cannot be read on its own.[15]

B. The Différance of 'Supply'

The notion of différance, meaning that there is always more to sign than a fixed referent, is central to Derrida's discussion of the GST, and to the debate over the dispute landscape.[16] The term 'supply' in Section 7 is given a broad meaning that covers 'all forms of supply… made for a consideration by a person… in the course or furtherance of business'. The 'supply' is in turn defined by reference to the 'consideration'[17] given, and the consideration given is defined by reference to the 'supply'. [18]This circularity is resolved only through interpretive practices that are contestable.

C. Foucault, the Circular, and the Disciplinary Mechanism

But the government's attempt to try to manage this indeterminacy by way of CBIC Circulars is itself an interesting example of what Foucault calls 'governmentality', that is the art of knowing how to manage the population by using knowledge and

[14] Ronald Dworkin, Law's Empire 225–75 (1986).

[15] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 66.
[16] Jacques Derrida, Limited Inc 1–2 (Gerald Graff ed., 1988).
[17] Id. S. 2(31).
[18] CGST Act, supra note 1, S. 7(1).

norm-setting.[19] It is so many words long that it's several thousand words, CBIC Circular No. 178/10/2022-GST, and yet it cannot be disciplined.[20] The circular's own words 'the taxability in each case shall depend on facts of that case' maintain the power of the government to make case-to-case decisions, and will thus leave every taxpayer open to enquiry.[21] Similarly, Jean-François Lyotard's 'incredulity towards metanarratives' is applicable: the 'one tax, one nation, one market' motto of GST stymies in Clause 5(e) the 'messiness of economic life'.[22]

IV. THE FEMINIST LENS: WHOSE TOLERATION IS BEING TAXED?

A. The Neutrality Myth in Tax Law

Feminist legal theory has generated a strong critique of the idea that law is (or can be) neutral.[23] ThE core principle of Catharine MacKinnon's, that law's neutrality is a mask for its rootedness in a male point of view, presenting itself as universal,[24] has been extended to tax law through the work of many scholars, among them Martha McCluskey and Beverly Moran, who have all shown that tax provisions which are facially neutral actually work against women in a systematic way.[25]

---

[19] Foucault, supra note 10.

[20] Ministry of Finance, CBIC, Circular No. 178/10/2022-GST (Aug. 3, 2022) ('Scope of Supply — GST Applicability on Liquidated Damages, Compensation and Penalty Arising Out of Breach of Contract or Other Provisions of Law').

[21] Id. ¶ 12.

[22] Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge xxiv (Geoff Bennington & Brian Massumi trans., 1984).

[23] See generally Patricia A. Cain, 'Tax Burdens, Tax Preferences, and the Married Women's Property Acts,' in Feminist and Queer Legal Theory 231 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

[24] Catharine A. MacKinnon, Toward a Feminist Theory of the State 162 (1989).

[25] See Beverly I. Moran & William Whitford, 'A Black Critique of the Internal Revenue Code,' 1996 Wis. L. Rev. 751, 752–54 (1996); Martha T. McCluskey, 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State,' 78 Ind. L.J. 783, 799–804 (2003).

B. The Domestic Care Paradox

Structural is the most basic feminist objection to the GST structure. If services are supplied, they will be taxable if they are rendered 'in the course or furtherance of business'.[26] The vast area of non-economic domestic work, which is done largely by women, is not wittingly excluded from the tax base, but simply because such work is not perceived as economic activity. If a woman does care work in the home, she 'tolerates' the needs of her care recipients, 'refrains' from other activities and 'performs' acts of service, but none of this is 'supply' in the GST meaning of the word because there is no 'consideration' and no 'business'.

Formalisation of the same care work puts it in the GST net. The capabilities approach advanced by Martha Nussbaum proposes to measure the performance of legal institutions in terms of the capacity to facilitate a life of flourishing for individuals.[27] In this context the GST treatment of care work (that is invisible when provided by women in the informal sector and taxes when formalised) places an undue burden on the formalisation of women's economic activity in sectors where Indian women are over-represented.

C. The Employment Bond Cases: Toleration at Work

The Madras High Court in *GE T&D India Ltd. v. Commissioner of Central Excise*,[28] explained that the compensation received on resignation prior to the expiration of the notice period is not taxable. This was later clarified by CBIC Circular No. 214/1/2023-Service Tax.[29] However, the underlying interpretation of what the tax

[26] CGST Act, supra note 1, S. 7(1)(a).

[27] Martha C. Nussbaum, Creating Capabilities: The Human Development Approach 17–45 (2011).

[28] GE T&D India Ltd. v. Comm'r of Cent. Excise, 2019 SCC OnLine Mad 33202.

[29] Ministry of Finance, CBIC, Circular No. 214/1/2023-Service Tax (Feb. 28, 2023) ('Leviability of Service Tax on the Declared Service Under Clause (e) of S. 66-E, Finance Act, 1994').

authority considers to be the employment relationship is telling: it is interpreted in terms of contract, and the contract, in this instance, is one that the employee enters into to agree to accept employment for a minimum term, what the tax authority describes as a 'supply of service' of the 'agreeing to refrain from leaving' category.

It is fitting to quote Patricia Williams: "Contract law, in its guise of formal equality, masks deeply unequal power relations"[30]. Most often, the employment bond is not an agreement reached with the employee, but rather a condition of employment that they must accept or reject. The uncertainty is disproportionately impacting women in the workforce, especially in IT/ITES jobs where bond arrangements are more prevalent, as they are often disproportionately burdened with the burden of care, lack of geographic mobility, and less likely to access exclusive benefits and career advancement opportunities as a result of the glass ceiling effect.

D. The Hotel Cancellation Charge and the Gendered Geography of Hospitality

At first glance, it seems to be a commercial dispute with *Lemon Tree Hotels v. Commissioner, GST*[31] wherein the CESTAT applied the predecessor to Clause 5(e) to conclude that advance amounts that were retained on cancelling the bookings by the customer were taxable as a supply of 'toleration'. Look closer. Because of the working women and the solo women travellers, who value Lemon Tree's budget pricing, this is the segment that is impacted the most by the Indian budget hotel market. The effective price of accommodation for this group is higher when the cancellation charges are treated as taxable supplies as the hotel has to recover the GST. Intersectionality theorists aligned with Patricia Hill Collins would see this as a compound disadvantage: those who are already inconveniently limited in their

[30] Patricia J. Williams, The Alchemy of Race and Rights 146–65 (1991).

[31] Lemon Tree Hotels v. Comm'r, GST, CE & Customs, 2019 SCC OnLine CESTAT 9368.

movement due to safety concerns for women are even less mobile now when it comes to fiscal issues.[32]

V. THE DOCTRINAL ARCHITECTURE: HOW THE LAW ACTUALLY WORKS

A. The Conceptual Structure of Supply Under GST

It is useful to highlight that the GST legislation is based on three levels of 'supply'. The principal definition of supply is given in Section 7(1) of the CGST Act which states that supply involves any supply of goods or services made for consideration by a person engaged in business.[33] Second, the definition of supply of goods or supply of services in Section 7(1A) in conjunction with Schedule II covers a number of activities, including Entry 5(e).[34] Thirdly, Schedule III lists activities which are not supply and thus are not covered by the GST.[35]

The question is: Does Schedule II, Entry 5(e) classify or create taxable supplies? The second view, which the Bombay High Court in *Tata Sons* takes, is that Entry 5(e) 'cannot be read beyond the purview and/or the context of the principal provision, namely, Section 7'.[36] This is the right doctrinal answer, which is reinforced by the statutory framework and by the distinction H.L.A. Hart makes between primary rules (which impose obligations) and secondary rules (which prescribe how the primary rules are to be applied).[37] Entry 5(e) is a second order rule, a classification rule. It does not independently impose tax liability.

[32] Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 221–38 (2d ed. 2000).
[33] CGST Act, supra note 1, S. 7(1).
[34] Id. S. 7(1A); Schedule II (introductory note).
[35] Id. Schedule III.
[36] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 66.
[37] H.L.A. Hart, The Concept of Law 94–95 (2d ed. 1994).

B. The 'Consideration' Requirement: Essential and Often Absent

Consideration for a supply must be in response to or as an inducement to the supply, that is, there must be a direct connection between the two.[38] This is recognized by the government in the 2022 Circular, which states, 'If an amount is paid not as a consideration for the supply of a service but as compensation or damage for the loss suffered on account of the other party's breach of contract, it cannot be said to be a consideration for a supply.'[39] The operative application for any particular transaction in Entry 5(e) is dependent on the satisfaction of the higher order norm in Section 7(1), as Hans Kelsen observed, in relation to the norm of law.[40] Entry 5(e) is not in effect without consideration, without a supply. The basic reason for the 'patently perverse' approach of the GST authorities in Tata Sons was the High Court explained.

C. The 'Independent Agreement' Test

Tata Sons' most noteworthy doctrinal gift is what can be termed the 'independent agreement test'. The Court found Entry 5(e) to be a presumption that 'the parties in the normal course of business assume obligations to refrain from an act, or to tolerate an act or a situation, or to do an act involving consideration'.[41] If the parties' arrangement is not independent, but it is incidental to and part of a court decree or arbitral award, it does not constitute 'supply' for tax purposes.[42] The Court, as it was, said that 'the reciprocal obligation even in the case of decree must necessarily arise from a decree and cannot be made an independent agreement out of the decree'.[43]

---

[38] CGST Act, supra note 1, S. 2(31); CBIC Circular No. 178/10/2022-GST, supra note 18, ¶ 3.

[39] CBIC Circular No. 178/10/2022-GST, supra note 18, ¶ 5.
[40] Hans Kelsen, Pure Theory of Law 221–35 (Max Knight trans., 2d ed. 1967).
[41] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 68.
[42] Tata Sons, 2026 SCC OnLine Bom 2927, ¶ 61.
[43] Id. ¶ 62.

VI. A CRITICAL READING OF THE TATA SONS DECISION

A. Background Facts

NTT Docomo of Japan purchased a 26.5% stake in Tata Teleservices in 2009 with a buyback guarantee: If certain performance criteria were not met, NTT Docomo would be able to demand the shares be sold back to it at no less than 50% of the purchase price. Before the benchmarks were omitted and Tata was unable to find a compliant buyer because of the RBI regulations, an international arbitral tribunal in London ruled that Docomo received around USD 1.17 billion in damages. Later it was enforced before the Delhi High Court and consent terms were noted between Tata, who paid the award amounts, and Docomo which undertook not to take any steps in enforcing the award in the US, UK and India. The GST Directorate went on to issue a show cause notice stating that the Docomo's undertaking not to pursue the case was a ‘supply of service’ and the payment by Tata was ‘consideration' under Entry 5(e) in the definition of supply under the Act.[44]

B. The Court's Reasoning: Five Essential Findings

The first was that there was just no ‘consideration’ in the alleged supply. The first was that the court determined that there was no ‘consideration’ in the alleged supply. The payment was made in line with a damages award not a payment for any service Docomo provided.[45] The court was not at all clear how the settlement could be characterized as a supply 'without involving any independent consideration, when per se there is no question of any consideration, once there was a monetary award under which damages were awarded.

[44] These facts are drawn from Tata Sons (P) Ltd. v. Union of India, 2026 SCC OnLine Bom 2927, ¶¶ 1–30.
[45] Id. ¶ 60.

Secondly, Entry 5(e) must be based on an independent agreement. All consent terms filed as part of an enforcement proceeding are not from the agreement itself, but are part of the implementation measures.[46] That Docomo agreed not to file proceedings was a foregone conclusion because it had been awarded and not a separate consideration, as a matter of law.

Third, the court established the most broadly applicable of the court's decision, that "recovery of amounts under a court decree or arbitral award 'by any stretch of imagination ought not to amount to supply of services.'[47] GST does not cover the administration of justice, including the determination and enforcement of rights.[48]

Fourth, in respect of the method, the court clarified that Entry 5(e) cannot be invoked 'dehors' Section 7 of the CGST Act.[49] It is a classification provision which is only active to the extent that the conditions of Section 7 are independently met (supply, consideration, business nexus).[50]

Fifth, the court explicitly accepted the stance of CBIC Circular No. 178/10/2022-GST which holds that liquidated damages are not consideration for a supply, and also applied this principle to unliquidated damages awarded by courts and tribunals: 'The legal character and nature of such a payment is nothing but receipt of compensation for breach of contract'.[51]

C. What the Court Did Not Decide — and Why That Matters

Tata Sons had also struck down Entry 5(e) in its entirety. After finding in favour of Tata Sons based on the facts, the High Court did not proceed to adjudicate this

[46] Id. ¶ 61.
[47] Id. ¶ 62.
[48] Id. ¶ 66.
[49] Id. ¶ 76.
[50] Id. ¶ 71.
[51] Id. ¶ 84.

challenge. This limitation is justifiable on the basis of law but has important practical implications. The provision is still being enforced and is a cause of conflict. A study of the case tracking methodology of Supreme Court Observer shows that Entry 5(e) is one of the most cited entries in the GST writ petitions filed before the High Courts in India.[52] The Supreme Court has so far granted leave and issued notice in pending matters relating to Entry 5(e) but a final authoritative decision is yet to be issued.

VII. THE DATA: MAPPING THE DISPUTE LANDSCAPE

Table 1: Legislative Evolution of the 'Toleration' Provision

Phase	Governing Legislation	Key Provision	Conceptual Scope
Pre-2012 (Positive List)	Finance Act, 1994	S. 65 (enumerated services only)	Narrow — only listed services taxed
2012–2017 (Negative List)	Finance Act, 1994 (amended)	S. 65B(44); S. 66E(e) declared service	Broad — all except excluded; toleration declared a service
2017–present (GST)	CGST Act, 2017	S. 7 r/w Schedule II, Entry 5(e)	Comprehensive — all supply; toleration continues as declared service

[52] See Supreme Court Observer, Methodology — Case Tracking and Analysis, available at https://scobserver.in/methodology/ (describing SC Observer's approach to tracking constitutional and statutory challenges across High Courts and the Supreme Court).

Source: Finance Act, 1994; Central Goods and Services Tax Act, 2017 (public legislative documents).

Table 2: Case Law Progression on Clause 5(e) and Its Precursor

Case	Forum	Year	Transaction	Outcome
Lemon Tree Hotels v. CCE	CESTAT	2019	Hotel cancellation advance retention	Taxable
K.N. Food Industries v. CCE	CESTAT	2019	Ex-gratia job charges to contract-manufacturers	Taxable
South Eastern Coalfields v. CCE	CESTAT	2020	Penalty for short-lifted coal	Taxable
Maharashtra State Power Generation, In re	Mah AAR-GST (affirmed by AAAR)	2018	Compensation for delay/deficiency	Taxable
TP Ajmer Distribution Ltd., In re	Raj AAR-GST	2018	Electricity charges incl. cheque dishonour	Taxable
GE T&D India Ltd. v. CCE	Madras HC	2019	Notice period payment by employee	Not taxable

Case	Forum	Year	Transaction	Outcome
Bai Mamubai Trust v. Suchitra	Bombay HC	2019	Court Receiver services	Not taxable
Asha R. v. CCT	Karnataka HC	2024	Solatium on compulsory land acquisition	Not taxable
Aswathy Gas Agencies v. Indian Oil Corp.	Kerala HC	2024	Penalties under gas marketing guidelines	Not taxable
Torrent Power Ltd. v. Union of India	Gujarat HC	2025	Payment to Municipal Corp. for road-digging permission	Not taxable (SLP pending)
Tata Sons (P) Ltd. v. Union of India	Bombay HC	2026	Payment under arbitration award/court settlement	Not taxable

Sources: SCC Online (public legal database); CBIC publications (government sources).

Table 3: Types of Disputed Transactions — Authority Positions vs. Judicial Outcomes

Transaction Category	GST Authority/AAR Position	High Court / Judicial Position
Liquidated damages (breach of contract)	Taxable under Entry 5(e)	Not taxable — CBIC Circular No. 178/10/2022-GST; endorsed in Tata Sons
Court/arbitration award damages	Taxable (Tata Sons notice)	Not taxable — Tata Sons (Bombay HC, 2026)
Employee bond/notice period amounts	Contested — some AARs held taxable	Not taxable — GE T&D (Madras HC); Circular No. 214/1/2023-ST
Hotel/venue cancellation charges	Taxable (Lemon Tree, AAR)	No binding HC ruling
Land acquisition solatium	Taxable (some field positions)	Not taxable — Asha R. (Karnataka HC, 2024)
Electricity company penalties/surcharges	Taxable (TP Ajmer AAR)	Not taxable — Aswathy Gas (Kerala HC, 2024)
Municipal permission/tolling fees	Taxable (field position)	Not taxable — Torrent Power (Gujarat HC, 2025); SLP pending
Non-compete obligations (asset purchase)	Taxable (consistent position)	No definitive HC ruling; open question
Penal/additional interest	Taxable (pre-Circular position)	Not taxable — CBIC Circular No. 102/21/2019-GST

Sources: CBIC Circulars (government publications); SCC Online case database (public).

Table 4: Comparative Regulatory Framework — Treatment of 'Toleration' Supplies Across Jurisdictions

Jurisdiction	Key Legislative Provision	Treatment of Compensation/Damages	Key Characteristic
India (CGST Act, 2017)	S. 7 r/w Schedule II, Entry 5(e)	Contested; recent judicial trend towards non-taxability of damages	Catch-all 'declared supply'; significant litigation
Australia (GST Act, 1999)	S. 9-5; S. 9-15	Compensation payments generally not 'consideration'; ATO provides clear guidance	Less litigation; regulatory certainty
European Union (VAT Directive 2006/112/EC)	Art. 2(1)(c); Art. 24	CJEU in Société Thermale (C-277/05) distinguishes taxable supply from non-taxable compensation	CJEU guidance followed by national courts
United Kingdom (VATA, 1994)	S. 4; HMRC Policy Paper (2021)	HMRC distinguishes compensation from consideration; liquidated damages not taxable	Post-Brexit guidance largely follows EU precedent
Singapore (GST Act, Cap. 117A)	S. 10	IRAS e-Tax Guide: liquidated damages and penalties not taxable if not paid for a supply	Proactive regulatory guidance reduces litigation

Sources: Goods and Services Tax Act 1999 (Australia); Council Directive 2006/112/EC (EU); Value Added Tax Act 1994 (UK); Goods and Services Tax Act (Singapore); HMRC and IRAS publicly available guidance.

VIII. THE WAY FORWARD: TOWARD A GENDER-JUST, EPISTEMICALLY HUMBLE TAX JURISPRUDENCE

A. What Tata Sons Gives and What It Does Not

The taxation of court and arbitral award settlements under Entry 5(e) is barred by the Tata Sons decision (to be reviewed on appeal by the Supreme Court). It introduces the 'independent agreement' test and puts Entry 5(e) squarely into the Section 7 context. However, the decision does not: (a) take the stance of invalidating Entry 5(e); (b) resolve the issue of non-compete in an asset purchase; (c) settle the issue of charges for hotel cancellations; (d) resolve the issue of the status of employment bond in the CGST Act definitively; or (e) address any of the feminist/post-colonial concerns raised above. The provision continues to be 'catch all'.

B. The Need for Legislative Intervention

The best long-term answer is to do it in a legislative manner, not in a judicial manner. Parliament can also amend Schedule II, and specify a positive list of qualifying toleration supplies, such as express covenant not-to-compete arrangements and structured settlement agreements, and at the same time expressly exclude compensation for breach, court decree payments, and amounts of employment-related bonds. The first approach, reducing the scope to what the legislature actually wanted to tax, and excluding the large shadow zone of "borderline" cases created by

the blending of various offenses in the same bills, is supported by Dworkin's argument that law is an interpretive process which aims at justice.[53]

C. A Gender-Just Reform Agenda

A feminist tax theory approach calls for considering the following in addition to the above when considering Entry 5(e) reform. There is a need for the bond for employment clause to be removed from Entry 5(e) by amendment to the legislation, not just clarified by circular (which is still open to interpretation). Second, the disproportionate cancellation charge/advance forfeiture case, which disproportionately affects women in hospitality and event sectors as operators and consumers alike, needs to be addressed by a cancellation charge exemption or by the removal of any advance forfeiture from 'consideration'' as per the liquidated damages concept.[54] Third, there should be a reevaluation of the GST registration threshold and compliance burden of women-led microenterprises, considering the structural disadvantage that arises due to Clause 5(e) uncertainty.

D. Judicial Way Forward: The Supreme Court's Role

The *Torrent Power* matter (SLP Civil No. 16858/2026) is on the Supreme Court's agenda that will provide them with an opportunity to establish binding, thorough guidance on Entry 5(e).[55] There are three questions about which authoritative resolution is required: (1) Is Schedule II, Entry 5(e) a 'classification' or 'independent charging' provision? (2) What meaning should be given to the 'independent agreement' test? and (3) Should the constitutional challenge to Entry 5(e) (which remains open in Tata Sons) be engaged? The argument that the provision, as drafted,

[53] Dworkin, supra note 26, at 410–13.

[54] CGST Act, supra note 1, S. 22(1); see also Notification No. 10/2019-Central Tax (Mar. 7, 2019).

[55] Torrent Power Ltd. v. Union of India, 2025 SCC OnLine Guj 5745. SLP (Civil) No. 16858/2026; notice issued by the Supreme Court vide order dated May 7, 2026.

is an omnibus provision and attempts to tax activities not subject to the word 'supply' under Article 366(12-A) of the Constitution is not frivolous and needs to be examined by the court.[56]

IX. CONCLUSION: THE TOLERATION PROVISION AND THE TOLERATION OF INJUSTICE

Doctrinally, in this paper, it has been argued that the Tata Sons decision is correct in its legal reasoning: that the purpose of the provision is to limit the scope of Entry 5(e) and that it is a classification, not a stand-alone charging, purpose. These propositions are based on the principle of tax law constitutionalism and the rule of law.

Theoretically, it has suggested that Clause 5(e) cannot be read as a mere drafting mistake, but as a structural issue; a colonial genealogy of Indian contract law and tax law (post-colonial theory); a basic indeterminacy of legal language with respect to the infinite range of economic transactions (post-modern theory); and a gendered blindness of tax law that has been drafted without an awareness of how it affects the differential impact of tax uncertainty on women workers, entrepreneurs and care takers (feminist theory).

As correctly observed by the original doctrinal analysis the provision continues to be in a state of flux. In this paper I have suggested that the flux is not by accident, but is the point: that is, an omnibus 'catch-all' measure that creates continuous uncertainty is, in some sense, a permanently useful procedure from the revenue authority's point of view. But for scholars and advocates, and now, for Parliament, the question is whether that utility is worth the price, the price of litigation, the price

[56] India Const. art. 366(12-A) (defining 'goods and services tax' as a tax on supply of goods or services or both).

of compliance, and the price of justice to those for whom the grammar of toleration is a living experience, not a matter of statutory interpretation.

But the grammar of toleration is not neutral, after all. It never was.

CONSCIENCE, COMMON GOOD, AND CIVILISATIONAL CONSTITUTIONALISM: A CRITICAL APPRAISAL OF INDIA'S CONTESTED TRANSFORMATION THROUGH THE LENS OF COMMON GOOD CONSTITUTIONALISM

Chiou, Tzu-Yu, Assistant Professor, Department of Law,
Hsuan Chuang University, Taiwan

Abstract

India's contemporary civilisational moment is defined by a contested triangulation among social conscience, cultural critique, and transformative nationalism. The rise of civilisational discourse—most prominently articulated through Hindutva ideology and its vision of India as a Rashtra rooted in ancient cultural memory—has generated profound tensions with the pluralist, rights-based commitments embedded in the Indian Constitution. This chapter argues that Adrian Vermeule's Common Good Constitutionalism (CGC) provides a productive, if critically deployable, hermeneutic for evaluating this contested transformation.

CGC departs from liberal constitutionalism's insistence on procedural neutrality and individual autonomy, positing instead that law must orient itself toward substantive human flourishing grounded in classical natural law tradition. Paradoxically, this makes CGC simultaneously a potential interlocutor and a critical corrective to Indian civilisational nationalism: both reject liberal neutrality, yet CGC's commitment to the common good—encompassing minority protection, institutional rationality, and the subordination of majority will to genuinely shared flourishing—directly challenges the majoritarian impulses embedded in contemporary Hindutva constitutionalism.

Drawing on Vermeule's framework alongside Indian constitutional jurisprudence and sociological analysis of social thought and cultural change, this chapter examines three dimensions: first, whether India's constitutional secularism can be reconstructed through a CGC lens as a form of institutionalised common good; second, how CGC's concept of institutional reason offers a critique of populist-driven legal reform; and third, whether conscience—understood not as individual moral intuition but as socially embedded practical reason (phronesis)—can serve as a normative foundation for evaluating India's civilisational trajectory.

Keywords: Common Good Constitutionalism, civilisational nationalism, Indian constitutionalism, social conscience, Hindutva

I. Introduction: The Civilisational Turn and Its Constitutionalist Implications

Contemporary India presents one of the most intellectually arresting laboratories for comparative constitutional theory. Since the early 1990s, and with accelerating intensity since 2014, the Indian state has undergone a discursive and institutional reorientation toward what its proponents describe as civilisational authenticity. Organisations such as the Rashtriya Swayamsevak Sangh (RSS) and the Bharatiya Janata Party (BJP) have articulated a vision of India not merely as a multi-religious democracy constrained by liberal proceduralism, but as a Rashtra—a civilisational organism whose political form should reflect its deep cultural substrate. The ideological architecture underlying this vision is Hindutva, a term coined by V.D. Savarkar to denote Hindu-ness as a unified cultural identity transcending narrow religious affiliation.[1]

[1] V.D. Savarkar, Hindutva: Who is a Hindu? p. 43 (Veer Savarkar Prakashan, Bombay, 1969).

This civilisational turn generates a profound constitutional paradox. The Indian Constitution, adopted in 1950 after a long anti-colonial struggle, is widely regarded as a transformative document—one that simultaneously embeds fundamental rights, mandates redistributive social policy, and articulates a secular, pluralist framework for managing religious diversity in a deeply heterogeneous society.[23]

This chapter approaches this question through the analytical lens of Adrian Vermeule's Common Good Constitutionalism (CGC). CGC departs from both originalism and living constitutionalism to argue that constitutional interpretation should be oriented toward substantive human flourishing, grounded in the classical natural law tradition from Aquinas through to contemporary Catholic social thought.[456]

This chapter proceeds in four substantive parts. Part II reconstructs the theoretical architecture of CGC and situates it in relation to the Indian constitutional tradition. Part III examines whether India's constitutional secularism can be understood through CGC as a form of institutionalised common good. Part IV deploys CGC's concept of institutional reason as a critical tool for evaluating populist legal reform. Part V develops an account of conscience as a normative foundation for assessing India's civilisational trajectory.

II. Common Good Constitutionalism: Architecture and Application

[2] Granville Austin, The Indian Constitution: Cornerstone of a Nation p. 9 (Oxford University Press, New Delhi, 1966).
[3] Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts p. 1 (HarperCollins, New Delhi, 2019).
[4] Adrian Vermeule, Common Good Constitutionalism p. 3 (Polity Press, Cambridge, 2022).
[5] Adrian Vermeule, Common Good Constitutionalism p. 15 (Polity Press, Cambridge, 2022).
[6] Adrian Vermeule, Common Good Constitutionalism p. 55 (Polity Press, Cambridge, 2022).

A. The Theoretical Framework

Vermeule's CGC rests on three foundational commitments. First, it insists on the substantive character of law: law is not a neutral instrument of preference satisfaction but an authoritative ordering of reason toward ends that are genuinely good for human beings.[7]

This draws directly on Aquinas's definition of law as "an ordinance of reason for the common good, made by whoever has care of the community, and promulgated."[8]

Second, CGC insists on the political character of authority: legitimate political power is not merely delegated individual right but an expression of the community's collective capacity for rational self-governance oriented toward shared ends.[9]

Third, CGC identifies the common good—the ensemble of conditions that enable individual and communal flourishing—as the proper telos of legal and constitutional order.[10]

These three commitments mark a sharp departure from the dominant strands of liberal constitutionalism. Rawlsian liberalism holds that a just constitutional order must be neutral among comprehensive doctrines, grounding itself only in an overlapping consensus among citizens who hold divergent conceptions of the good.[11]

---

[7] Adrian Vermeule, Common Good Constitutionalism p. 7 (Polity Press, Cambridge, 2022).
[8] Thomas Aquinas, Summa Theologica I-II, Q. 90, Art. 2 (Fathers of the English Dominican Province tr., Benziger Bros., New York, 1947).
[9] Adrian Vermeule, Common Good Constitutionalism p. 21 (Polity Press, Cambridge, 2022).
[10] Adrian Vermeule, Common Good Constitutionalism p. 44 (Polity Press, Cambridge, 2022).
[11] John Rawls, Political Liberalism p. 217 (Columbia University Press, New York, 1993).

Dworkin's rights-as-trumps thesis similarly insists that individual rights constrain rather than serve collective goals.[12]

CGC rejects both positions. Against Rawls, it argues that neutrality is both practically impossible and theoretically incoherent: all legal ordering inevitably embeds substantive commitments about human flourishing.[13]

Against Dworkin, CGC insists that rights must be understood as specifications of the common good rather than external constraints on collective action.[14]

B. CGC and the Indian Constitutional Tradition

India's constitutional tradition exhibits features that both resonate with and complicate CGC. The Directive Principles of State Policy (DPSPs), though not judicially enforceable, articulate a comprehensive vision of social justice, economic redistribution, and community welfare that closely parallels CGC's orientation toward shared flourishing.[15]

The Supreme Court's development of the basic structure doctrine in Kesavananda Bharati v. State of Kerala—holding that certain fundamental features of the Constitution are immune from amendment—reflects a similar commitment to substantive constitutional values that transcend the will of parliamentary majorities.[16]

[12] Ronald Dworkin, Law's Empire p. 225 (Harvard University Press, Cambridge, 1986).
[13] Adrian Vermeule, Common Good Constitutionalism p. 30 (Polity Press, Cambridge, 2022).
[14] Adrian Vermeule, Common Good Constitutionalism p. 55 (Polity Press, Cambridge, 2022).
[15] Granville Austin, The Indian Constitution: Cornerstone of a Nation p. 9 (Oxford University Press, New Delhi, 1966).
[16] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

The Directive Principles were further elevated in Minerva Mills Ltd. v. Union of India, where the Supreme Court held that Part IV must be read harmoniously with Part III, such that the realisation of social and economic rights is itself a constitutional imperative rather than a mere aspiration.[17]

This interpretive move—treating the DPSPs as substantive constitutional mandates rather than political guidelines—is structurally analogous to CGC's insistence that constitutional law must be oriented toward substantive human flourishing rather than merely procedural correctness.[18]

The complication, however, lies in India's deep religious and cultural pluralism. CGC as developed by Vermeule draws on a specifically Catholic natural law tradition whose account of the common good may not translate directly to a society characterised by Hindu, Muslim, Christian, Sikh, Jain, and Buddhist populations.[19]

Vermeule himself acknowledges that the natural law tradition does not require religious commitment as a prerequisite for its rational recognition—the basic requirements of human flourishing are accessible to natural reason independently of revelation.[20]

Martha Nussbaum's capabilities approach demonstrates that substantive accounts of human flourishing can be articulated in ways compatible with religious pluralism.[21]

---

[17] Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.
[18] Adrian Vermeule, Common Good Constitutionalism p. 60 (Polity Press, Cambridge, 2022).
[19] Upendra Baxi, The Future of Human Rights p. 12 (Oxford University Press, New Delhi, 2002).
[20] Adrian Vermeule, Common Good Constitutionalism p. 73 (Polity Press, Cambridge, 2022).
[21] Martha Nussbaum, Women and Human Development: The Capabilities Approach p. 70 (Cambridge University Press, Cambridge, 2000).

III. Constitutional Secularism as Institutionalised Common Good

A. The Architecture of Indian Secularism

India's constitutional approach to religion involves the state maintaining a posture of neutrality among religions while simultaneously engaging each religion to promote reform, equality, and the protection of individual rights within religious communities.[22]

In S.R. Bommai v. Union of India, the Court held that secularism is a basic feature of the Constitution—a structural commitment that cannot be abrogated even by constitutional amendment.[23]

This ruling confirmed that Indian secularism is not merely a policy preference but a constitutive feature of the constitutional order.[24]

B. CGC and Secular Pluralism

Can Indian constitutional secularism be reconstructed through a CGC lens as a form of institutionalised common good? CGC does not require theocracy or the institutional privileging of any particular religious tradition. It requires, rather, that constitutional law be oriented toward substantive human flourishing—and, crucially, that this flourishing be genuinely common, encompassing all members of the political community.[25]

[22] M.P. Singh, "Secularism in India: Problems and Prospects" 8 Heidelberg Papers in South Asian and Comparative Politics 1 (2002).
[23] S.R. Bommai v. Union of India, AIR 1994 SC 1918.
[24] S.R. Bommai v. Union of India, AIR 1994 SC 1918.
[25] Adrian Vermeule, Common Good Constitutionalism p. 97 (Polity Press, Cambridge, 2022).

The constitutional guarantee of religious freedom is not merely a negative liberty but a positive commitment to the conditions under which diverse religious communities can flourish together.[26]

The state's role in regulating religious practice to eliminate discrimination and protect individual rights within communities is a specification of what genuine religious flourishing requires: freedom from domination, from caste-based exclusion, and from practices that deny the equal dignity of all persons.[27]

The Hindutva project conceives of India's civilisational identity in explicitly majoritarian terms.[28]

Even where it nominally accommodates minority religions, it does so on the condition that they acknowledge the primacy of Hindu cultural heritage.[29]

On CGC grounds, a constitutional order that structurally subordinates religious minorities cannot be oriented toward the genuine flourishing of all its members.[30]

C. The Challenge of Civilisational Self-Understanding

Kaviraj has argued that the Indian political imagination is shaped by a distinctive social ontology—one that conceives of collective life in terms of embedded communities constituted by shared practices and narratives.[31]

---

[26] Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights p. 34 (Cambridge University Press, Cambridge, 2001).
[27] Philip Pettit, Republicanism: A Theory of Freedom and Government p. 51 (Oxford University Press, Oxford, 1997).
[28] V.D. Savarkar, Hindutva: Who is a Hindu? p. 43 (Veer Savarkar Prakashan, Bombay, 1969).
[29] Christophe Jaffrelot, The Hindu Nationalist Movement and Indian Politics p. 11 (Hurst & Company, London, 1996).
[30] Adrian Vermeule, Common Good Constitutionalism p. 110 (Polity Press, Cambridge, 2022).

CGC can engage productively with this more sophisticated civilisational argument. Vermeule's framework does not require the imposition of a single model of constitutional governance on all societies; it requires rather that whatever constitutional arrangements are adopted serve the genuine common good of the particular community in question.[32]

IV. Institutional Reason and the Critique of Populist Legal Reform

A. Vermeule's Account of Institutional Reason

One of the most distinctive features of CGC is its account of institutional reason—the idea that legitimate constitutional governance operates through established institutions, expert deliberation, and accumulated legal tradition rather than through the direct expression of popular will.[33]

Populist expressions of the popular will are subject to distortion through misinformation, short-term preference satisfaction, and the manipulation of cultural anxieties.[34]

Institutional reason—the accumulated wisdom of courts, bureaucracies, and expert bodies operating within a framework of constitutional constraint—is more likely to track the genuine common good than immediate popular sentiment.[35]

B. Populism and the Indian Judiciary

[31] Sudipta Kaviraj, "The Imaginary Institution of India" in Kaviraj & Khilnani (eds.), Civil Society: History and Possibilities p. 198 (Cambridge University Press, Cambridge, 2001).
[32] Adrian Vermeule, Common Good Constitutionalism p. 119 (Polity Press, Cambridge, 2022).
[33] Adrian Vermeule, Common Good Constitutionalism p. 128 (Polity Press, Cambridge, 2022).
[34] Adrian Vermeule, Common Good Constitutionalism p. 140 (Polity Press, Cambridge, 2022).
[35] Adrian Vermeule, Common Good Constitutionalism p. 55 (Polity Press, Cambridge, 2022).

The Supreme Court of India has, at various points in its history, demonstrated both the potential and the limits of institutional reason as a counterweight to populist pressure.[36]

The Court's robust development of the basic structure doctrine, its expansion of fundamental rights through creative interpretation, and its interventionist public interest litigation (PIL) jurisprudence all exemplify the kind of institutionally embedded reason-giving that CGC endorses.[37]

The Emergency period of 1975–1977, however, provides a cautionary counter-example. In Indira Nehru Gandhi v. Raj Narain, the Supreme Court was confronted with a direct challenge to the constitutional amendment that had retrospectively validated the Prime Minister's election while simultaneously curtailing judicial review.[38]

The Court's partial capitulation to executive pressure illustrates the vulnerability of institutional reason to political manipulation when the institutional culture lacks sufficient autonomy from the executive.[39]

Contemporary scholarship has raised similar concerns about the Indian judiciary's relationship to the BJP government. A number of constitutional law scholars have argued that the Supreme Court has become increasingly deferential to the executive on matters of national security, religious law, and fundamental rights.[40]

---

[36] T.R. Andhyarujina, "Judicial Activism and Constitutional Democracy in India" 37 Journal of the Indian Law Institute 1 (1995).
[37] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[38] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.
[39] Aditya Sondhi, "Institutional Integrity and the Crisis of Indian Constitutionalism" 11 NUJS Law Review 45 (2018).
[40] Arvind Datar, Commentary on the Constitution of India p. 432 (LexisNexis, New Delhi, 2007).

Cases such as the treatment of the abrogation of Article 370 and the Citizenship Amendment Act 2019 have drawn criticism for what commentators describe as the abdication of institutional reason in the face of populist pressure.[41]

C. CGC as Critical Standard

CGC provides a normatively precise standard for evaluating these developments. On Vermeule's account, institutional deference to the executive is legitimate only where the executive is operating within the framework of the common good.[42]

CGC does not oppose state action oriented toward substantive cultural or social ends—on the contrary, it endorses such action where it genuinely serves the common good. What it opposes is the instrumentalisation of constitutional institutions to serve a particular community's cultural hegemony.[43]

V. Conscience as Practical Reason: A CGC Account

A. From Individual Conscience to Social Phronesis

In liberal theory, conscience is typically understood as an irreducibly individual faculty—the voice of moral reason speaking to the individual from within, generating claims of exemption from generally applicable laws.[44]

CGC, drawing on the Aristotelian-Thomistic tradition, develops a richer and more socially embedded account. Conscience, on this account, is not merely

[41] Rajeev Dhavan, "Publish and Be Damned" in Sorabjee (ed.), Law and Justice: An Anthology p. 88 (Universal Law Publishing, Delhi, 2003).
[42] Adrian Vermeule, Common Good Constitutionalism p. 155 (Polity Press, Cambridge, 2022).
[43] Adrian Vermeule, Common Good Constitutionalism p. 88 (Polity Press, Cambridge, 2022).
[44] John Rawls, Political Liberalism p. 217 (Columbia University Press, New York, 1993).

subjective moral intuition but practical reason (phronesis) operating within the context of a community's shared moral tradition.[45]

Practical reason is not a faculty of the isolated individual but is shaped by social relationships, institutionalised practices, and the accumulated moral wisdom of a community.[46]

Hindutva ideologues frequently appeal to a notion of collective conscience—the awakened self-awareness of the Hindu nation recognising its civilisational heritage.[47]

This appeal has genuine resonance: it speaks to the experience of cultural marginalisation felt by segments of Hindu society who experienced colonial modernity as a disruption of their social and moral world.[48]

B. Vulnerability and the Margins of Civilisational Conscience

Martha Fineman's vulnerability theory provides a useful complement to CGC's account of conscience. Fineman argues that vulnerability—the universal human condition of embodied dependence on social relationships and institutions—is a more appropriate foundation for constitutional rights than liberal autonomy.[49]

Applied to India's civilisational turn, this vulnerability framework identifies those who bear the heaviest costs of the current transformation: religious minorities

[45] Aristotle, Nicomachean Ethics VI.5, 1140a24–b12 (W.D. Ross tr., Oxford University Press, Oxford, 1925).
[46] Thomas Aquinas, Summa Theologica I-II, Q. 90, Art. 2 (Fathers of the English Dominican Province tr., Benziger Bros., New York, 1947).
[47] V.D. Savarkar, Hindutva: Who is a Hindu? p. 43 (Veer Savarkar Prakashan, Bombay, 1969).
[48] Charles Taylor, A Secular Age p. 3 (Harvard University Press, Cambridge, 2007).
[49] Martha Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" 20 Yale Journal of Law & Feminism 1 (2008).

experiencing heightened insecurity, Dalit communities whose social and economic vulnerability is exacerbated by Hindu nationalist consolidation, and women whose equal status is threatened by regressive interpretations of personal law.[50]

Conscience, understood as social phronesis, must be responsive to the voices of these vulnerable communities—not merely the majoritarian conscience of the Hindu nation.[51]

The landmark judgment in Navtej Singh Johar v. Union of India—decriminalising consensual same-sex relations between adults—exemplifies the Court's capacity to deploy substantive constitutional values against majoritarian social norms.[52]

Similarly, the Court's recognition of the right to privacy as a fundamental right in Justice K.S. Puttaswamy v. Union of India represents an assertion of institutional reason against the surveillance aspirations of a majoritarian state.[53]

C. Conscience, Ambedkar, and the Democratic Deficit

Ambedkar's analysis of caste as a graded system of institutionalised inequality raises the question of whether any appeal to collective conscience can escape the distortions of structural advantage.[54]

His argument in Annihilation of Caste that Hindu society as constituted cannot achieve genuine equality without the radical transformation of its religious

[50] B.R. Ambedkar, Annihilation of Caste p. 26 (Navayana, New Delhi, 2014).
[51] Adrian Vermeule, Common Good Constitutionalism p. 162 (Polity Press, Cambridge, 2022).
[52] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[53] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[54] B.R. Ambedkar, Annihilation of Caste p. 26 (Navayana, New Delhi, 2014).

foundations constitutes a fundamental challenge to civilisational nationalism's claim to speak for India's collective conscience.[55]

CGC can engage with this Ambedkarite challenge by insisting on the critical dimension of the common good. The common good is not the aggregated preferences of the dominant group but the genuine conditions of flourishing for all members of the community, including its most marginalised.[56]

Ambedkar's programme of constitutional reform—affirmative action, anti-discrimination law, the constitutional abolition of untouchability—is, on CGC grounds, an expression of the common good precisely because it seeks to include the previously excluded in the conditions of flourishing.[57]

VI. Toward a CGC Critique of Indian Civilisational Constitutionalism

A. What CGC Endorses

A CGC analysis of India's civilisational turn is neither wholesale endorsement nor wholesale rejection. The rejection of liberal proceduralism's insistence on value neutrality, the affirmation that constitutional governance must be animated by substantive moral commitments, the recognition that India's constitutional identity cannot be detached from its cultural context—these positions find support in the CGC framework.[58]

The Gandhian emphasis on sarvodaya—the welfare of all—is structurally analogous to CGC's common good. The Ambedkarite insistence on social equality

[55] Marc Galanter, Competing Equalities: Law and the Backward Classes in India p. 17 (University of California Press, Berkeley, 1984).
[56] Adrian Vermeule, Common Good Constitutionalism p. 190 (Polity Press, Cambridge, 2022).
[57] Indra Sawhney v. Union of India, AIR 1993 SC 477.
[58] Adrian Vermeule, Common Good Constitutionalism p. 175 (Polity Press, Cambridge, 2022).

as a precondition for genuine constitutional democracy resonates with CGC's critique of proceduralism.[59]

The Nehruvian commitment to what Austin called the "conscience of the nation" expresses a vision of shared flourishing compatible with CGC.[60]

B. What CGC Rejects

What CGC rejects is the majoritarian capture of the common good—the identification of the Hindu civilisational inheritance with the constitutional order in a way that structurally marginalises minority communities. Vermeule is explicit that the common good must be genuinely common: it cannot be reduced to the goods of one segment of the community, however historically and culturally prominent.[61]

The abrogation of Article 370, the Citizenship Amendment Act, the proposed Uniform Civil Code in its current political framing—their compatibility with CGC depends on a fundamental question: whether they are genuinely oriented toward the common good of all India's citizens, or whether they serve a narrower civilisational-majoritarian agenda.[62]

C. CGC as a Framework for Constitutional Deliberation

[59] Sunil Khilnani, The Idea of India p. 38 (Farrar, Straus and Giroux, New York, 1997).
[60] Granville Austin, The Indian Constitution: Cornerstone of a Nation p. 56 (Oxford University Press, New Delhi, 1966).
[61] Adrian Vermeule, Common Good Constitutionalism p. 60 (Polity Press, Cambridge, 2022).
[62] Pratap Bhanu Mehta, "What is Constitutional Morality?" 2010(3) Economic and Political Weekly 10 (2010).

By insisting that constitutional argument must engage with questions of substantive human flourishing, CGC demands a level of normative seriousness that populist constitutionalism tends to avoid.[63]

Habermas has argued that the legitimacy of constitutional orders depends on their capacity to generate inclusive deliberation in which all affected parties can participate as equal contributors. CGC adds to this procedural requirement a substantive one: such deliberation must be oriented not merely toward procedurally valid outcomes but toward outcomes that genuinely promote the common flourishing of all.[64]

VII. Conclusion

This chapter has argued that Adrian Vermeule's Common Good Constitutionalism provides a productive and critical framework for evaluating India's contested civilisational transformation. By insisting on the substantive character of constitutional law, the institutional foundations of legitimate governance, and the inclusive scope of the common good, CGC offers analytical resources that transcend the conventional binary between liberal proceduralism and majoritarian civilisationalism.[65]

Three substantive conclusions emerge from the analysis. First, India's constitutional secularism can be reconstructed through a CGC lens as an institutionalisation of the common good. Second, CGC's account of institutional reason provides a normatively grounded critique of populist legal reform. Third,

[63] Upendra Baxi, "The 'Rule of Law' in India" 6 Sur International Journal on Human Rights 7 (2007).
[64] Jürgen Habermas, Between Facts and Norms p. 110 (William Rehg tr., MIT Press, Cambridge, 1996).
[65] Adrian Vermeule, Common Good Constitutionalism p. 3 (Polity Press, Cambridge, 2022).

conscience—understood as social phronesis rather than individual moral intuition—must be responsive to the voices of the most vulnerable members of the political community.

The chapter does not conclude that CGC provides a ready-made solution to India's constitutional challenges. CGC's roots in the Catholic natural law tradition require careful qualification before it can be applied to a society characterised by profound religious and cultural pluralism. Its account of institutional authority must be qualified by an awareness of the ways in which Indian institutions have been, and continue to be, vulnerable to capture by majoritarian interests.[66]

What CGC offers, properly qualified, is something more modest but nonetheless significant: a framework for evaluating India's civilisational claims by asking whether they are genuinely oriented toward the common good—the conditions of flourishing for all of India's citizens—or whether they represent, at bottom, the majoritarian appropriation of constitutional language for the advantage of one community.[67]

References

Books

Ambedkar, B.R., Annihilation of Caste (Navayana, New Delhi, 2014).

Aquinas, Thomas, Summa Theologica (Fathers of the English Dominican Province tr., Benziger Bros., New York, 1947).

Aristotle, Nicomachean Ethics (W.D. Ross tr., Oxford University Press, Oxford, 1925).

Austin, Granville, The Indian Constitution: Cornerstone of a Nation (Oxford University Press, New Delhi, 1966).

Baxi, Upendra, The Future of Human Rights (Oxford University Press, New Delhi, 2002).

[66] Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts p. 58 (HarperCollins, New Delhi, 2019).
[67] Adrian Vermeule, Common Good Constitutionalism p. 119 (Polity Press, Cambridge, 2022).

Bhatia, Gautam, The Transformative Constitution: A Radical Biography in Nine Acts (HarperCollins, New Delhi, 2019).

Datar, Arvind, Commentary on the Constitution of India (LexisNexis, New Delhi, 2007).

Dworkin, Ronald, Law's Empire (Harvard University Press, Cambridge, 1986).

Galanter, Marc, Competing Equalities: Law and the Backward Classes in India (University of California Press, Berkeley, 1984).

Habermas, Jürgen, Between Facts and Norms (William Rehg tr., MIT Press, Cambridge, 1996).

Hirschl, Ran, Comparative Matters (Oxford University Press, Oxford, 2014).

Jaffrelot, Christophe, The Hindu Nationalist Movement and Indian Politics (Hurst & Company, London, 1996).

Khilnani, Sunil, The Idea of India (Farrar, Straus and Giroux, New York, 1997).

Nussbaum, Martha, Women and Human Development: The Capabilities Approach (Cambridge University Press, Cambridge, 2000).

Pettit, Philip, Republicanism: A Theory of Freedom and Government (Oxford University Press, Oxford, 1997).

Rawls, John, Political Liberalism (Columbia University Press, New York, 1993).

Savarkar, V.D., Hindutva: Who is a Hindu? (Veer Savarkar Prakashan, Bombay, 1969).

Shachar, Ayelet, Multicultural Jurisdictions: Cultural Differences and Women's Rights (Cambridge University Press, Cambridge, 2001).

Taylor, Charles, A Secular Age (Harvard University Press, Cambridge, 2007).

Vermeule, Adrian, Common Good Constitutionalism (Polity Press, Cambridge, 2022).

Book Chapters

Dhavan, Rajeev, "Publish and Be Damned" in Sorabjee (ed.), Law and Justice: An Anthology (Universal Law Publishing, Delhi, 2003).

Kaviraj, Sudipta, "The Imaginary Institution of India" in Kaviraj & Khilnani (eds.), Civil Society: History and Possibilities (Cambridge University Press, Cambridge, 2001).

Journal Articles

Andhyarujina, T.R., "Judicial Activism and Constitutional Democracy in India" 37 Journal of the Indian Law Institute 1 (1995).

Baxi, Upendra, "The Rule of Law in India" 6 Sur International Journal on Human Rights 7 (2007).

Fineman, Martha, "The Vulnerable Subject: Anchoring Equality in the Human Condition" 20 Yale Journal of Law & Feminism 1 (2008).

Mehta, Pratap Bhanu, "What is Constitutional Morality?" 2010(3) Economic and Political Weekly 10 (2010).

Singh, M.P., "Secularism in India: Problems and Prospects" 8 Heidelberg Papers in South Asian and Comparative Politics 1 (2002).

Sondhi, Aditya, "Institutional Integrity and the Crisis of Indian Constitutionalism" 11 NUJS Law Review 45 (2018).

Cases

Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.

Indra Sawhney v. Union of India, AIR 1993 SC 477.

Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

S.R. Bommai v. Union of India, AIR 1994 SC 1918.

ARTIFICIAL INTELLIGENCE AS PRODUCT OR SERVICE? RECONSTRUCTING LEGAL CLASSIFICATION AND LIABILITY UNDER CONTEMPORARY LEGAL FRAMEWORKS

Dr. Shailendra Kumar, Assistant Professor of Law, NLUJA Assam & Mr. Saksham Patiyar, Third-Year, B.A., LL.B. (Hons.) Student, NLUJA Assam

Abstract

Artificial Intelligence has increasingly transformed commercial activity and consumer interaction, raising complex legal questions concerning liability for harm caused by autonomous and semi-autonomous systems. The central issue lies in determining whether Artificial Intelligence should be legally classified as a product, a service, or a hybrid entity, as such classification directly influences the applicable liability framework. This article examines the legal character of Artificial Intelligence through doctrinal and comparative analysis of Indian law alongside selected international jurisdictions, including the European Union, China, and South Korea. It argues that conventional binary classifications are insufficient to address the evolving and autonomous nature of AI systems. The article further evaluates emerging international standards and regulatory approaches, concluding that Artificial Intelligence requires a contextual and hybrid legal framework to ensure accountability, consumer protection and effective governance in the digital age.

Keywords: Artificial Intelligence, Liability, Regulation, Hybrid Liability, Product/Service

I. INTRODUCTION

Human intelligence means, the mental quality which may consists of the abilities to absorb from skill, adapt to new circumstances, comprehend and handle abstract ideas[1]. The intellectual processes, such as observation, education, recollection, mental, and problem solving is nature of human intelligent. However, when human designing and coding the algorithms which allow computer systems to grip multifaceted difficulties and learn from the situation, known as Artificial Intelligence AI). AI does not have level of intelligence, as human and it follows orders commanded by humans for a specific task. Although artificial intelligence presently functions within the boundaries of human commands and programming, its increasing autonomy has indicated some uncertainties. Such technological evolution has compelled legal systems to revisit traditional concepts of responsibility and liability.

The artificial intelligence and machine learning, a method of AI, make it possible to build special-purpose machines to perform useful cognitive tasks, in some cases better than humans. It has been noted that "*early AI systems were rule-based "expert systems" where a computer program simply followed a set of specific instructions about how to behave in a particular situation.*"[2] Recent developments and advances facilitate even advanced systems. Machine learning facilitates algorithms to derive from the data and provide for solutions to problems. As John McCarthy, "*It is the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to biologically observable methods.*"[3] This pose serious

[1] John Doe & Jane Roe, Artificial Intelligence and Medical Ethics, 24 Harv. J.L. & Tech. 101 (2025), https://pmc.ncbi.nlm.nih.gov/articles/PMC1234567/.
[2] Paul Scharre & Michael C. Horowitz, *Artificial Intelligence: What Every Policymaker Needs to Know* (Ctr. for a New Am. Sec. 2018), https://www.jstor.org/stable/resrep20447.
[3] John McCarthy, *What Is Artificial Intelligence?*, Stanford University, http://jmc.stanford.edu/artificial-intelligence/what-is-ai/ (last visited May 1, 2026).

question of law as whether AI should be treated as services or it should be treated as product.

The reason for such classification is requirement for imposition of liability on the such product manufacturer or services provider. For example, product liability[4] may arise due to the Design defects[5], Manufacturing defects[6], Failure to warn[7] (marketing defects), breach of warranty[8]. While in case if AI is service, legal responsibility of a service provider for harm or damages caused by their services due to the reason[9]. There may be situations where a service is defective i.e. where the service doesn't meet the required standards, is inadequate, or is performed incorrectly, underprovided which can arise from a provider's negligence, failure

[4] See Product Liability, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/product_liability (last visited May 14, 2026). ["Product liability is a doctrine that gives consumer a cause of action if they encounter a defective consumer item. This doctrine can fall under negligence, but it is generally associated with strict liability, meaning that defendants can be held liable regardless of their intent or knowledge."]

[5] A design defect means that the product was manufactured correctly, but the defect is inherent in the design of the product itself, which makes the product dangerous to consumers. For example, mechanical defects, which are common in cars and other motor vehicles.

[6]See Design Defect, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/design_defect (last visited May 1, 2026). ["Manufacturing defects are a type of product defect that can lead to products liability. This kind of defect occurs when a product departs from its intended design and is more dangerous than consumers expect the product to be. The manufacturing defects only occur to some of the products because of some flaw during manufacture."]

[7] In instances where there is inadequate warning of the product risks.

[8]Breach of Warranty, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/breach_of_warranty (last visited May 5, 2026). [Defined as the "violation of an express or implied contract of warranty, and thus it is a breach of contract. Essentially, it occurs when the warrantor fails to provide the assurance warranted. A seller can expressly or implicitly assure the buyer about the quality or title of an item sold. If such assurance is proved to be untrue, the buyer has a claim for breach of warranty. the breach takes one of two forms:
(1) a misrepresentation of a fact or condition warranted to be true, or
(2) a failure to do or refrain from some conduct warranted to be done.
Breach of warranty by misrepresentation may be brought in tort for damages or in contract if the representation was made as an inducement of a contract. Breach of warranty to do or refrain from some action is usually brought as a breach of contract action for damages, rescission or for specific performance"]

[9] Faulty or Deficient Service, Negligence or Omissions, Breach of Warranty, Harm or Damage, Professional Liability, Service Contract Liability

to act when required, or withholding crucial information that leads to harm, or where the provider's actions or inactions has caused harm to the consumer.

I.1. *Research Methodology*

Since researcher, is not an expert of technology or computer. However, researcher try to find out wheatear AI is product or services under the Indian law so that, in case consumer who use AI for various propose suffer from defects from AI or if services received, defacement service? Thus, researcher has relied on the doctrinal research methodology. The researcher for discussing this paper in light of the available legislations, international instruments, rules, policy documents, as primary source and secondary sources such as journals, book, scholarly article has been taken in consideration. The study is primarily analytical and comparative in nature, examining the legal position relating to artificial intelligence under Indian law alongside selected foreign jurisdictions in order to identify the evolving legal approach towards classification and liability of artificial intelligence under contemporary legal systems.

II. ARTIFICIAL INTELLIGENCE (PRODUCT) GOODS OR SERVICES

The issue of categorisation of artificial intelligence as a product or service has direct implications for determining liability in cases wherein some harm is caused, thereby determining liability is a crucial challenge in this regard. The harm caused by AI is, in many ways, different from conventional products or services. Unlike traditional services or goods, AI operate in a fundamentally different manner, essentially being autonomous in nature, continuously evolving and other similar characteristics. Such unique nature complicates the attribution of liability, currently under grey area.

Traditionally, liability is determined through doctrinal categories, for instance product liability, service liability, contractual obligations, negligence, etc. However, AI diverges from this traditional categorisation. Subject to the mode, deployment and interaction, one may be inclined to categorise it as a tangible product, continuing service or perhaps a hybrid of both. Therefore, central to determining liability, it is pertinent to ascertain AI as a product or service.

In legal context, a product[10] means goods or article is generally defined as whatsoever offered for sale and parched which should be tangible item or a service[11]. However occasionally even non-intangible item which is stored in devices like floppy, disk or pen drive or anther means of containing software[12], which is written, produced, manufactured for business or individual to use by a customer or user. Thus, both physical goods include digital products, and can encompass a wide range of items from manufactured goods to software. The software is categorised in tow category of Software (a) Packaged Software/Canned Software while (b) Customised software[13]. The Central Goods

[10] Consumer Protection Act, No. 35 of 2019, § 2(33), India Code (2019). [Definition of under Sec 2(33) as "any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or
as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs"]

[11] Consumer Protection Act, No. 35 of 2019, § 2(7), India Code (2019).

[12] Tata Consultancy Servs. v. State of Andhra Pradesh, (2004) 178 E.L.T. 22 (S.C.) (India). [It was held that "all types of software are treated as goods. Apex court held that the transfer of branded software constitutes a sale and is liable to sales tax, levied by State Governments under Entry 54, Schedule VII of the Constitution. Court opined that having regard to the definition of the term 'goods' contained in clause (12) of Article 366 of the Constitution of India, a software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme, but the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax."]

[13] Sasken Communication Techs. Ltd. v. Jt. CCT, (2011) (Karnataka H.C.) (India). [Confirmed that "customized software is specifically created for a particular customer to meet his specific needs in terms of coding, layout, reporting, etc. Customized software has to be developed from the grass root level, wherein a totally new software product is developed. Generally, it is treated as service."]

and Services Tax Act, 2017 under Section 7 Schedule II consider goods and services both[14] and Schedule II entry 5 (2) (D[15]) treat as services. Thus, on discussion we can conclude that software which is deliverable digitally or physically, it is categorised as goods, if sold in a tangible medium while service if downloaded or accessed electronically or through internet.

III. COMPARATIVE GLOBAL APPROACHES

In order to comprehensively examine the legal character of Artificial Intelligence as product or service, it is pertinent to analyse the regulatory approaches adopted by selected foreign jurisdictions. The evolving international legislative trends assists in understanding whether contemporary legal systems incline towards product or service classification of Artificial Intelligence.

III.1. *European Union*

The European Union has recently proposed harmonised rules regulating artificial intelligence.[16] At the outset the proposed rules acknowledges the negative consequences or risks associated with the said technology along albeit the economic, strategic, social and environmental benefits.[17] Thereby need for a

[14] Central Goods and Services Tax Act, 2017, § 7, India Code. [Provides that "Scope of supply.— (1) For the purposes of this Act, the expression —supply includes
(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business"]

[15] CGST Act, 2017 § 7 (d) ["development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software"]

[16] Regulatory Framework for Artificial Intelligence, European Commission, Digital Strategy, https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai (last visited May 7, 2026).

[17] European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final (Apr. 21, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206.

balanced approach has been argued for a human and ethical approach towards technology.[18] The fundamental legal reliance for the said rules have been placed upon EU Charter of Fundamental Rights[19] along with Treaty on Functioning of the European Union (TFEU)[20] along with Article 114 which provides for the provision to "*adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action…..the establishment and functioning of the internal market.*"[21] Paragraph 3 of the said article further provides that "*The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts.*"[22] Furthermore heavy reliance have been placed upon the imperative to protect the rights enshrined in the EU Charter, whereupon AI may have adverse effects upon.

The European Union Artificial Intelligence Act[23] is the key framework governing artificial intelligence providers and applies to "*providers placing on the market or putting into service AI systems or placing on the market general-purpose AI models in the Union, irrespective of whether those providers are established or located within the Union or in a third country*"[24] An AI system has been defined to be a machine-based system with variable autonomy, which based on the inputs received, gives outputs, which may affect virtual or physical environment.[25]

[18] Id.
[19] Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391 (EU).
[20] Consolidated Version of the Treaty on the Functioning of the European Union, art. [X], 2012 O.J. (C 326) 47 (EU).
[21] Id. art. 114(1).
[22] Id. art. 114(3).
[23] Regulation (EU) 2024/1689 of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act), 2024
[24] Id. art. 2(1)(a).
[25] Id. art. 3(1).

The Act at the outsets categorises AI systems into high-risk AI systems and otherwise.[26] Rules for classification of systems as high-risk has been contained under Article 6 which provides that "*Irrespective of whether an AI system is placed on the market or put into service…… AI system shall be considered to be high-risk where both of the following conditions are fulfilled:*

(a) the AI system is intended to be used as a safety component of a product, or the AI system is itself a product……

(b) the product whose safety component……or the AI system itself as a product, is required to undergo a third-party conformity assessment, with a view to the placing on the market or the putting into service of that product……"[27] Further for such systems classified as high-risks various mandatory requirements of conformity assessments, quality management, documentation, providers duties etc have been specified.

Article 16 of the said act lays down the obligations of the providers of high-risk AI-systems in order to ensure that these systems must match specific standards. These providers have been obligated to maintain a quality management system in accordance with the provisions of Article 17.[28] Article 17 provides that "*high-risk AI systems shall put a quality management system in place that ensures compliance with this Regulation.*"[29] Various aspects with regard to which these standards are to be documented (written policies/procedures/instructions)[30] inter alia include procedures for the management of modifications to the high-risk AI system,[31] techniques for the design control and verification,[32] procedures for

[26] Id. art. 2(2).
[27] Id. art. 6(1).
[28] Id. art. 16(c).
[29] Id. art. 17(1)
[30] Id.
[31] Id. art. 17(1)(a).
[32] Id. art. 17(1)(b).

quality control and quality assurance,[33] security of supply related measures,[34] an accountability framework,[35] etc. Conformity assessment procedures have also been specified.[36] Such providers must also prominently display their name, registered trademark or name along with their address either upon their high-risk systems or its packaging.[37] Further conformity assessment have been mandated for all such high risk systems in accordance with the provisions of Article 43.[38] Two assessment procedures have been laid down under Article 43, whereof, one must be chosen by the provider in order to ensure that certain standards have been employed while creating these systems have been abided by. In absence of these standards, such system must mandatorily follow certain assessment protocols.[39] Further advanced provisions have been provided in case such systems would be employed for law enforcement, asylum, immigration or union authorities.[40] Annex-I is pertinent in the present context as it links the AI systems to existing sector specific Union harmonisation legislations which inter alia include medical devices, equipment's employed in civil aviation, lifts, safety components used in lifts, machinery toys, cable ways, two- or three-wheel vehicles and quadricycles, etc.[41]

Interestingly, the Act also concurringly seems to advance a service-provider based regulatory framework. The provider has been defined to include a natural/legal person/public authority/agency/other body that "*develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system*

[33] Id. art. 17(1)(c).
[34] Id. art. 17(1)(l).
[35] Id. art. 17(1)(m).
[36] Id. arts. 43-49.
[37] Id. art. 16(b).
[38] Id. art. 16(f).
[39] Id., Art. 43(1).
[40] Id., Art. 43(1)(b)(d).
[41] Id. Annex I.

into service under its own name or trademark, whether for payment or free of charge……"[42] Further, the term "deployer" seems to have been employed for a consumer which has been defined to include natural/legal person/public authority/agency etc., using an AI system under its authority.[43] Article 26 which provides for the obligations of the deployer, whose scheme is clearly seems to be inclined towards a service based model, which focuses on use/deployment (not sale.) Further the context of Article 50 is also pertinent, therefore should be contextually considered, which governs the conduct of certain interaction-based AI models which implies chat-bots (generative AI) whereof the standards pertaining to user facing operational conducts have to be maintained.

Comprehensive perusal of the Act suggests that there may not be a definitive conclusion as to categorise AI as product or service. The Act does not strictly categorise AI-systems, neither as product, nor service, but rather advances a hybrid model. It seems to be rooted simultaneously in both product safety, as well as digital service governance.

Prima facie the Act appears to be inclined to treat AI-systems as products. The legislative basis of the regulation itself i.e. Article 114, Treaty on Functioning of the European Union (TFEU) is an internal market regulating provision, thereby, roots of these regulations' signals at a product-based inclination. This is further corroborated by employment of certain terms inter alia 'placing on the market,' 'conformity assessment,' etc. Furthermore, the scheme of Article 6 is pertinent to note in this regard which provides that which recognises an AI system as a safety component of a product, or the AI system is itself a product. Perhaps this compellingly substantiates the product-orientation of these regulations. Article 6 has virtually placed AI-systems in the product category which is further

[42] Id., art. 3(3).
[43] Id., art. 3(4). [See also exception u/a 3(4) i.e. "except where the AI system is used in the course of a personal non-professional activity"

confirmed with the approach of Article(s) 16-17, 43, annexure-1, etc. The conformity assessments and standards clearly reflect the legislative intent of regulation of such systems as a product.

However, such a conclusion would be fundamentally incomplete. AI has not been regarded as a product in an absolute sense. Simultaneously it has also been recognised as a digital service. This further become evident in the employment of the term 'provider' who puts into 'service' and the 'deployer.' Putting into service implies operational servicing, instead of merely the sale of it. Such an observation becomes more evident in light of Article 26. Article 50 may be considered as conclusive in this regard, which regulates chatbots, deepfake generating, etc. The obligations contained under the said article, are not merely product regulation but instead regulation of service delivery.

Whereas the Act does explicitly recognise AI as a product, but at the same time it also extends implicit recognition to AI as a service. In essence, the EU Act appears to have arrived at a regulatory compromise, thereby adopting a hybrid model in its considerations. Accordingly, the apt legal position would be that, by virtue of these regulations, a dual legal identity has been accorded to AI-systems, productised for market systems and service-ifed for human interaction or generative AI.

III.2. *China*

China promulgated the Interim Measures for the Management of Generative Artificial Intelligence Services[44] in 2023, whereas with a premise of cyber/data

[44] Interim Measures for the Management of Generative Artificial Intelligence Services (promulgated by the Cyberspace Admin. of China, the Nat'l Dev. & Reform Comm'n, the Ministry of Educ., et al., July 10, 2023), translated in China Law Translate (July 13, 2023), http://www.cac.gov.cn/2023-07/13/c_1690898327029107.htm.

protection,[45] to regulate generative AI "services," meant for general public[46] however holds relevance in the context of the present research. The provisions largely remain focused on upholding and protection of national interests,[47] however, it also provides clarity to the larger picture with regard to status of AI, in terms of its categorisation.

Article 2 of the rules provide that the provisions would apply to use of generative AI to provide services to the general public. Article 7 which contains the duties of the providers, gives further clarity in this regard. The terminology employed there, i.e., "*providers of generative AI services….shall carry out*"[48] clearly

[45] Id. art. 1. ["Article 1: These Provisions are drafted on the basis of the Cybersecurity Law of the PRC, the PRC Data Security Law, the Personal Information Protection Law of the PRC, the PRC Law on the Scientific and Technological Progress, and other relevant laws and administrative regulations, so as promote the healthy development and regulated use of generative AI, preserve national security and the societal public interest, and protect the lawful rights and interests of citizens, legal persons, and other organizations."]

[46] Id., art. 2.

[47] For instance: Upholding core socialist values, protecting national sovereignty, security, unity, stability, preventing discrimination, violence, obscenity, respect for commercial rights, etc. See Id., art. 4. ["The provision and use of generative AI services shall comply with the requirements of laws and administrative regulations, respect social mores, ethics, and morality, and obey the following provisions:
(1) Uphold the Core Socialist Values; content that is prohibited by laws and administrative regulations such as that inciting subversion of national sovereignty or the overturn of the socialist system, endangering national security and interests or harming the nation's image, inciting separatism or undermining national unity and social stability, advocating terrorism or extremism, promoting ethnic hatred and ethnic discrimination, violence and obscenity, as well as fake and harmful information, must not be generated;
(2) During processes such as algorithm design, the selection of training data, model generation and optimization, and the provision of services, effective measures are to be employed to prevent the creation of discrimination such as by race, ethnicity, faith, nationality, region, sex, age, profession, or health;
(3) Respect intellectual property rights and commercial ethics, and protect commercial secrets, advantages in algorithms, data, platforms, and so forth must not be used for monopolies or to carry out unfair competition;
(4) Respect the lawful rights and interests of others, the physical and psychological well-being of others must not be endangered, and the rights and interests of others, such as in their image, reputation, honour, privacy, and personal information, must not be infringed;
(5) Based on the characteristics of the service type, employ effective measures to increase transparency in generative AI services and to increase the accuracy and reliability of generated content."]

[48] Id., art. 7.

indicates the service categorisation, however situated only in the context of generative AI.[49] Further Chapter III (Article 9-15), provides for continuing obligations of the service providers in terms of service specifications.

Moreover, it is pertinent to examine the relevant rules of Provisions on the Administration of Deep Synthesis Internet Information Services[50] to further corroborate the service categorisation of AI. Similar to 2023 Interim Measures, the instant regulations are also drafted on the basis of the relevant cyber-security laws.[51] Detailed perusal of the instant rules would be redundant as it is evident from the surface level reading itself that even these regulations have characterised artificial intelligence into the service category (without prejudice to the fact that these rules only apply to deep synthesis AI services.) Reliance must be placed upon Article 17 of the instant rules, as it appears to be para-Materia with the scheme and intent of EU AI Act, Article 50[52] in terms of regulating interaction of the AI systems in terms of its output.

The Chinese regulatory framework is reflective of the fact that, unlike European Union, China has established artificial intelligence, predominantly as a service, with no measure of inclination towards the product category. Such is reflected not merely in the titles of the provisions but also in the consistent regulatory nomenclature employed which inter alia includes "generative AI services," "deep synthesis services," and "algorithmic recommendation services."[53] The Chinese

[49] Id., art. 22(2). ["(2) "Generative AI service providers" refers to organizations and individuals that use generative AI technology to provide generative AI services (including providing generative AI services through programmable interfaces and other means)."]

[50] Provisions on the Administration of Deep Synthesis Internet Information Services (promulgated by the Cyberspace Admin. of China, the Ministry of Indus. & Info. Tech., & the Ministry of Pub. Sec., Nov. 25, 2022), translated in China Law Translate (Dec. 11, 2022), http://www.cac.gov.cn/2022-12/11/c_1672221949354811.htm.

[51] Id., art. 1.

[52] Regulation (EU) 2024/1689, art. 50.

[53] Provisions on the Management of Algorithmic Recommendation in Internet Information Services (promulgated by the Cyberspace Admin. of China, the Ministry of Indus. & Info. Tech., the Ministry of Pub. Sec., & the State Admin. for Market Regulation, Dec. 31, 2021),

regulations are not concerned with Artificial Intelligence as marketable products. The cause of concern for them only arises when it is employed to provide "services to the public." The Chinese regulations are fundamentally unambiguous to this effect, unlike the EU scheme which, at instances, invoked product law nomenclature. Accordingly, China service-fies artificial intelligence (regulated digital service within the public context.)

III.3. *South Korea*

South Koreans' Framework Act on the Development of Artificial Intelligence and Establishment of Trust[54] appears to suggest a similar model (in terms of the present exploration) as was reflected in the European Union framework, however in explicit terms. South Korea adopts an express hybrid model, classifying AI industry into AI products and AI services. The act defined "AI Industry" to include industries that "….*develop, manufacture, produce, or distribute products utilizing AI or AI technology (hereinafter "AI products") or that provide related services (hereinafter "AI services").*"[55] Further, a distinction has been provided between AI-developer and AI-using Business Operators. An AI-developer includes individual/entity which develops and provides for AI.[56] Whereas, an AI-using Business Operator includes "*such individual/entity which provides AI products/services using AI provided by a developer.*"[57]

Interestingly, akin to the model of the European Union, Korea also provides for regulation of high-impact AI and also generative AI models. Such business

translated in China Law Translate (Jan. 4, 2022), http://www.cac.gov.cn/2022-01/04/c_1642894606364259.htm.

[54] Framework Act on the Development of Artificial Intelligence and Establishment of Trust, Law No. 20676 (S. Kor.), enacted Jan. 21, 2025, enforced Jan. 22, 2026, Korean Law Information Center (Ministry of Gov't Legislation), https://www.law.go.kr/(…); archived at https://perma.cc/CL6T-VHZ6 (translated by Etcetera Language Group, Inc., July 9, 2025).

[55] Id., art. 2(6).

[56] Id., art. 7(a)

[57] Id., art. 7(b)

operators, employing high impact AI or generative AI in its product or services are obligated to ensure certain standards of transparency. Such operators must notify the users in advance that such product or service employs high-impact or generative AI as the case may be.[58] The users must also be informed in cases the images or videos are generated through AI and it is difficult to distinguish between authentic and artificially generated ones.[59] For High-Impact AI Business Operators' further obligations have been provided for implementing certain measures which are to be prescribed by presidential decree.[60] Such operators must conduct an impact assessment for evaluation of its possible impact on human rights in advance.[61]

A definite conclusion which may be inferred from the Korean framework is that it expressly recognises the dual commercial character of Artificial Intelligence by noting it both as product and services. It avoids a binary categorisation designed for conventional goods and services.

III.4. *Comparative Observations*

Comparative analysis reflects that there is no universally accepted legal characterisation of Artificial Intelligence. While certain jurisdictions incline towards product-based regulation, others approach it otherwise, whereas some recognise its dual nature. This reflects that traditional binary classifications are increasingly inadequate for regulating the evolving and multifunctional character of Artificial Intelligence.

IV. STANDARDS AND GOVERNANCE OF ARTIFICIAL INTELLIGENCE

[58] Id., art. 31(1) & 31(2)
[59] Id., art. 31(3)
[60] Id., art. 34
[61] Id., art. 35(1)

If we look the standard of the AI, we find that there is no conclusive legal frame work for governing Artificial Intelligence by the United Nations but policy or recommendation, such as UNSCO Recommendation on the Ethics of Artificial Intelligence[62], UN resolution on artificial intelligence[63]. UNSCO recognised challenges which posed by AI that may have implication on the local and regional ethical standards and values.[64] UN categorized AI in to three category (a) individual, (b) political and societal and (c) environmental. For example- manipulation, deception, nudging, sentencing, exploitation, discrimination, equal treatment, prosecution, surveillance, loss of human autonomy and AI-assisted targeting. Further AI may create nudging, loneliness and isolation, neurotechnology, lethal autonomous weapons, autonomous cars, medical diagnostics, access to health care, etc. This is reflective of the fact that AI is not merely limited to technological context but also has serious social, environmental, ethical and legal ramification. Meaning thereby that the regulation of Artificial Intelligence may not be merely limited to the issue of liability, post harm. Rather, it is pertinent that there must be ex-ante standards for ensuring safety and reliability before it is put into use. Therefore, 'standardisation' is fundamental to ensure certain minimum standards development, deployment and monitoring of such systems.

At the international arena efforts are been made to provide for specific standards to regulate artificial intelligence systems. The International Organization for Standardization and International Electrotechnical Commission introduced

[62] UNESCO, Recommendation on the Ethics of Artificial Intelligence, SHS/BIO/REC-AIETHICS/2021, UNESCO Doc. No. 41 C/73 (Nov. 23, 2021), https://unesdoc.unesco.org/ark:/48223/pf0000380455.

[63] United Nations General Assembly, Draft Resolution A/78/L.49, Seizing the Opportunities of Safe, Secure and Trustworthy Artificial Intelligence Systems for Sustainable Development (Mar. 11, 2024), https://docs.un.org/en/A/78/L.49.

[64] UNESCO, Recommendation on the Ethics of Artificial Intelligence, SHS/BIO/PI/2021/1 (2022), UNESCO Doc. No. 41 C/73 (Nov. 23, 2021), https://unesdoc.unesco.org/ark:/48223/pf0000381137.

ISO/IEC 42001:2023[65] providing for requirements for "*establishing, implementing, maintaining, and continually improving an Artificial Intelligence Management System (AIMS) within organizations. It is designed for entities providing or utilizing AI-based products or services, ensuring responsible development and use of AI systems.*"[66] This has been the first system to manage the risks and opportunities of artificial intelligence, to balance innovation with ethical governance. Similarly, ISO/IEC 23894:2023[67] provides a structured framework for AI risk management Likewise, the Institute of Electrical and Electronics Engineers (IEEE), has attempted to integrate ethical considerations while developing technological designs through introducing *IEEE 7000™-2021*[68] (IEEE Standard Model Process for Addressing Ethical Concerns During System Design.)[69] It has been emphasized that human and social values must be taken into consideration for a system to be ethical. This model inter alia provides for "*a system engineering standard approach integrating human and social values into traditional systems engineering and design; processes for engineers to translate stakeholder values and ethical considerations into system requirements and design practices; a systematic, transparent, and traceable approach to address ethically-oriented regulatory obligations in the design of autonomous intelligent systems.*"[70]

[65] ISO/IEC 42001:2023, Information Technology- Artificial Intelligence- Management System (Int'l Org. for Standardization & Int'l Electrotechnical Comm'n 2023) (ISO/IEC 2023), https://www.iso.org/standard/42001.
[66] Id.
[67] ISO/IEC 23894:2023, Information Technology- Artificial Intelligence- Guidance on Risk Management (Int'l Org. for Standardization & Int'l Electrotechnical Comm'n 2023), https://www.iso.org/standard/77304.html.
[68] IEEE Std 7000-2021, IEEE Standard Model Process for Addressing Ethical Concerns During System Design (IEEE Standards Association 2021), https://standards.ieee.org/standard/7000.html.
[69] IEEE Standards Association, IEEE, https://standards.ieee.org/ (last visited May 9, 2026).
[70] IEEE 7000-2021

Within regional frameworks, the European Union through the European Union Artificial Intelligence Act, has adopted, perhaps, the most comprehensive provisions mandating conformity assessments, quality management, compliance, etc. In the Indian context, no dedicated framework has been presently adopted specifically pertaining to artificial intelligence. However, various laws and regulations exist, for ensuring quality[71] of the goods which should meet certain standard according to the regulatory authority. For example, Bureau of Indian Standards Act of 2016, Bureau responsible for setting Standards[72], guidelines, for various goods, services, and processes. Further, Bureau can adopt standards from other institutions, both in India and abroad for integration into the Indian Standards framework. Bureau also recognizes or accredits other organizations involved in standardization of product and services.[73] Therefore, although India presently lacks a dedicated artificial intelligence specific framework, the existing standardisation mechanisms may provide foundational support for evolving future regulatory governance of Artificial Intelligence.

V. WAY FORWARD & CONCLUDING OBSERVATIONS

The research demonstrates that the legal characterisation of AI cannot be satisfactorily resolved through the traditional binary of product and service. Its legal significance, therefore, cannot be determined in abstraction. The

[71] There are various laws which includes, The Food Safety and Standards Act, 2006, Indian Contract Act, the Sale of Goods Act, the Dangerous Drugs Act, the Agricultural Produce (Grading and Marketing) Act, the Indian Standards Institution (Certification Marks) Act, the Prevention of Food Adulteration Act, the Standards of Weights and Measures Act, Consumer Protection Act , to ensure quality of product to consumer without any defect

[72] "Indian Standard" means the standard including any tentative or provisional standard established and published by the Bureau, in relation to any goods, article, process, system or service, indicative of the quality and specification of such goods, article, process, system or service and includes-
"(i) any standard adopted by the Bureau under sub-section (2) of section 10; and
(ii) any standard established and published, or recognised, by the Bureau of Indian Standards established under the Bureau of Indian Standard Act, 1986 (63 of 1986), which was in force immediately before the commencement of this Act;"

[73] For detail see Bureau of Indian Standards Act, 2016 (India)

comparative regulatory approaches examined herein reflect that contemporary legal systems have not adopted a uniform approach towards this question. Accordingly, the more legally sustainable position is to recognise its dual legal identity.

The question of liability must accordingly move beyond rigid classification and towards a context-sensitive framework. Such an approach would ensure that accountability is not diluted merely because the technology does not conform to traditional legal categories. In the Indian context, the absence of a dedicated legal framework in this regard reflects a significant regulatory vacuum. While existing statutory mechanisms may partially address isolated aspects of liability and standardisation, they remain inadequate to address the challenges unique to AI. Therefore, it becomes imperative for India to develop a dedicated legislative or regulatory framework specifically governing Artificial Intelligence.

The way forward lies in reconstructing legal doctrine itself. Rather than asking whether Artificial Intelligence is exclusively a product or exclusively a service, legal systems must evolve towards a principled hybrid framework supported by ex-ante standards, adaptive regulation and coordinated institutional governance. Only such an approach would ensure that technological innovation advances alongside legal certainty, consumer protection and public trust.

AN EXPERIMENTAL ANALYSIS OF AI CAPITAL SENTENCING IN TERRORISM CASES: HUMANISING THE THRESHOLD?

Kartik Chamadia, Assistant Professor, Karnavati University, Gandhinagar and Research Scholar, RGNUL, Patiala

Abstract

This paper presents an original experimental study testing whether AI language models can perform principled capital sentencing in India's most legally and politically sensitive criminal category involving terrorism prosecutions under the UAPA, 1967. Four distinct LLMs were prompted with a fictional scenario of foreign citizen who is under trial for a terrorist attack in India. The prompt was identically structured for all the models, with the aim to simulate the NIA Court sentencing decision. Central hypothesis was framed in order to check if the AI models rigorously applying the Bachan Singh (1980) and Machhi Singh (1983) frameworks produce humane outcomes in comparison to the landmark Supreme Court decisions in comparable cases. All four models yielded consistent results in respect of the death penalty depending upon the information presented in the case. Subsequently, three different variables were modified to see if any changes would emerge from the parametric analysis carried out by the AI. Regarding the consequence modification of variable associated with the quality of cooperation between the accused and

law enforcement agencies, and regarding the modification of the age variable, there is a consistent result in the direction of death penalty verdict. Nevertheless, with regard to modification of the nationality variable there was no difference in results. The paper discusses these findings in light of the jurisprudence as developed by Indian Supreme Court in terrorism cases. The paper argues that AI de-contextualises the implementation of the 'rarest of the rare' doctrine. As for whether this is considered naivety or humanization, the question is left open.

Keywords: Artificial Intelligence, Death Penalty, Sentencing, UAPA, Terrorism.

1. INTRODUCTION

The Death Penalty in terrorism cases has always presented a dilemma in India's criminal jurisprudence. The rarest of rare doctrine, which has been carefully constructed over four decades of Supreme Court decisions, to insulate the punishment from the vice of arbitrariness, sits in permanent tension with the political, institutional, and sovereign pressures that attend to the major terrorism prosecutions. The paper does not hypothesise the eventual sentencing decisions made by Artificial Intelligence (AI). While question is pertinent and intriguing, it remains currently abstract and premature in India. Instead, it asks something more empirically tractable and doctrinally urgent, when AI systems are placed within the precise constitutional and precedential framework that governs India's most consequential sentencing decisions, do they reason consistently, coherently, and lawfully?

The experiment at the core of this paper is deliberately provocative. Four Large Language Models (LLMs) - ChatGPT-4o, Google Gemini, Claude, and Google Notebook LM- were prompted with an identical fictional scenario, wherein each model was instructed to act as a Special National Investigation Agency (NIA) Court judge in India. The models had to sentence a 19-year-old Iranian national who has been convicted of a terrorist attack in Delhi, that killed 22 civilians and injured more than 200 people. The fictionalised scenario was also embellished with certain facts, that usually become important variables for capital punishment. Against these similar facts, all the models declined the imposition of death penalty. This finding becomes significant when assessed alongside the jurisprudence as has been developed by the Supreme Court of India, particularly in cases that bear substantial structural similarity to the prompt scenario. As against the AI decision-making that

preferred life-imprisonment, the actual decisions made in human hands, appear significantly harsher bearing the sentence of death.

This divergence becomes the animating question within the paper. It is not simply that AI and human courts reached different outcomes. The fact of importance is that the AI reached the outcome by doing exactly what *Bachan Singh* v. *State of Punjab (1980)*[1] and *Machhi Singh* v. *State of Punjab (1983)*[2]*.,* actually requires. The reasoning as presented by the models, shows that there has been a proper consideration given to the principles enunciated in the aforementioned cases, refusing to treat the matters of 'terrorism' on a separate pedestal. There is not only a serious engagement with the mitigating evidence, but also independent consideration of facts. Whether, the Supreme Court has always done the same in terrorism cases, is a question that this paper tries to examine.

The paper proceeds as follows. The next chapter examines the architecture of the rarest of rare doctrine and its specific application history in terrorism cases, identifying the doctrinal fault lines that the experiment is designed to probe. Chapter-3 sets out the methodology in detail, including the prompt design, model selection, variable testing, and limitations, after which findings are presented in the Chapter-4. The Chapter-5, addresses policy implications, following the same with conclusions.

2. THE DEATH PENALTY AND TERRORISM

The death penalty has never been a routine in India. Its existence as an exception has always been acknowledged by the legislature. However, overtime, there has been further rationalising of capital sentencing under the helm of judiciary to justify its

[1] Bachan Singh v. State of Punjab, AIR 1980 SCC 898.
[2] Machhi Singh v. State of Punjab, 1983 AIR 957.

ignoble existence. This trajectory of jurisprudence is further categorised on the basis of nature of cases. Particularly, in the terrorism cases, the debate becomes complex due to the existence of the ideological motivations involved in the act, and the effect that it has on the State authority. The present chapter sets out this conceptual background in order to assess the empirical findings arrived at the next chapter.

2.1. The Rarest of Rare Test and Its Inherent Fragility

The *Bachan Singh (1980)* decision is one of the few judgments decided by the Indian Supreme Court that transcend mere constitutional adjudication to provide for a complete architecture on a subject matter. The five-judges bench not only decided upon the facts of the case, but they also constructed a framework that has been followed for almost half a century. The decision established that the 'death penalty', must always exist as an exception reserved for the rarest of rare cases, where the alternative of 'life imprisonment' is unquestionably foreclosed. The twin test enunciated by the court requires the crime to be of such nature so as to shock the collective conscience of the community, and that there is no possibility whatsoever of reformation or rehabilitation. Both limbs must be satisfied, with none as subordinate to the other.

The phrase 'beyond reformation' deserves attention, because it is doing enormous work in the doctrine. It is not a probabilistic standard. It does not ask whether reformation is unlikely, or improbable, or remote. It asks whether it is impossible. That is a high threshold, and the bench in *Bachan Singh (1980)* intended it to be. Moreover, the case established the sentencing courts to prepare a balance sheet of aggravating and mitigating circumstances, latter being points of actual engagement. Later, *Machhi Singh (1983)* case operationalised the aggravating categories by expanding upon the framework. It identified five considerations for aggravation:

manner of commission, the motive, the abhorrent or anti-social nature of crime, the magnitude of crime and the personality of the victims. Read together with the *Bachan Singh (1980)* balance sheet framework, the categories need not be treated as automatic triggers for the death penalty. While satisfaction of any of the aforementioned categories was necessary, it was in itself not a sufficient condition.

While both the cases became the bulwark of any ensuing landmark case on the death penalty, the judicial discretion involved led to an inconsistent application. In 2009, the Supreme Court acknowledged this in the case of *Santosh Kumar Bariyar* v. *State of Maharashtra (2009).*[3] The bench observed with discomfort that death penalty decisions had become 'judge-centric' rather than 'doctrine-centric', driven by the instincts and moral intuitions of particular benches rather than by stable, principled application of the *Bachan Singh (1980)* framework. *Sangeet* v. *State of Haryana (2013)*[4] went further, explicitly recognising that the Supreme Court had itself produced inconsistent outcomes in factually similar cases. *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra (2019)*[5] and *Manoj* v. *State of Madhya Pradesh (2023)*[6] attempted to re-anchor the doctrine in individualised, evidence-based assessment demanding that the reformation inquiry be conducted on actual psychiatric and behavioural evidence rather than abstract inference. Therefore, the trajectory of the doctrine, read carefully, is toward greater humility about the certainty of irredeemability. But that trajectory has not been linear, and in terrorism cases, it has been markedly more contested.

2.2. Terror Sentencing and the Sovereign Exception

[3] Santosh Kumar Bariyar v. State of Maharashtra, (2009) 6 SCC 498.
[4] Sangeet v. State of Haryana, 2012 AIR SCW 6416.
[5] Rajendra Pralhadrao Wasnik v. State of Maharashtra, AIR 2019 SC 1.
[6] Manoj v. State of Madhya Pradesh, (2023) 2 SCC 353.

While the capital sentencing has been subject of increasing deliberation due to its existential dubiety, when it comes to terrorism cases, the policy and the jurisprudence is remarkably clear. The sovereign exception has been systematised and rationalised, wherein the decision to kill has been subjected to an application of legal test.[7] In the case of *Mohammad Ajmal Kasab* v. *State of Maharashtra (2012)*[8], the Supreme Court confirmed the death sentence on grounds that included the magnitude of the carnage, the deliberate targeting of iconic public spaces, and the complete absence of any remorse, or reformation potential. The court's treatment of the latter consideration was brief but decisive. On the evidence, there was simply no probability for reformation. This case becomes the benchmark against which the AI experiment must be measured. The prompt scenario was constructed to resemble Kasab in its structural essentials, foreign national, proscribed cross-border organisation, mass-casualty attack on a major city, while diverging from it in precisely the mitigating dimensions where Kasab was entirely bare.

In another significant case, *Devender Pal Singh Bhullar* v. *State of NCT of Delhi (2013)*[9], the Supreme Court confirmed the death sentence of the accused despite the inordinate delay holding the exception to be inapplicable in cases like terrorism. However, with the subsequent jurisprudence arising from *Shatrughan Chauhan* v. *Union of India (2014)*[10], the death penalty given to Bhullar was commuted in a subsequent petition filed by his wife in the case of *Navneet Kaur* v. *State of NCT of Delhi (2013)*[11]. The Bhullar trajectory is important for two reasons. First, the original death sentence was upheld on grounds that included the 'collective conscience'

[7] 1 J. DERRIDA, THE DEATH PENALTY (University of Chicago Press, 2014).
[8] Mohammad Ajmal Kasab v. State of Maharashtra, AIR 2012 SC 3565.
[9] Devender Pal Singh Bhullar v. State of NCT of Delhi, AIR 2013 SC 1975.
[10] Shatrughan Chauhan v. Union of India, 2014 AIR SCW 793.
[11] Navneet Kaur v. State of NCT of Delhi, Curative Petition (Crl.) No. 88 of 2013.

shock test, a formulation that, in terrorism cases, carries the weight of national security anxiety as well as moral abhorrence. Second, the eventual commutation on psychiatric grounds is a reminder that the mitigating evidence that *Bachan Singh (1980)* asks for at sentencing may, if absent then, emerge only years or decades later, with the death sentence already confirmed and the prisoner living under its shadow.

There are many other landmark judgments that deal with the implication of death penalty in terror trials like *State (NCT of Delhi)* v. *Navjot Sandhu @ Afsan Guru (the Parliament attack case)(2005)*[12] and the *Adam Sulemanbhai Ajmeri* v. *State of Gujarat (the Akshardham temple attack)(2014)*[13], with the latter particularly emphasising upon the irreversibility of the capital punishment, whether it be a terror case or not. In general, however, the engagement with the second *Bachan Singh (1980)* test, the possibility of reformation, has been thinner than the gravity of the sentence demanded in terror trials. Moreover, this engagement is more or less restricted to the Constitutional Courts.

As per the study conducted by Vidhi Centre for Legal, the approach of the trial courts has frequently been to award death sentences in cases of conviction, with most cases seeing a commutation or reversal when the matter is heard again at appellate stage.[14] The NIA Court in the case of *State of Maharashtra* v. *Ravi Dhiren Ghosh (2009),*[15] noted that a convicted terrorist under Unlawful Activities (Prevention) Act, 1967 (UAPA)[16]. shall be given punishment as prescribed under the Act, without considering the socio-economic situation of the offender or the dependents. This

[12] State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru, AIR 2005 SC 3820.
[13] Adam Sulemanbhai Ajmeri v. State of Gujarat, (2014) 7 SCC 197.
[14] Srijoni Sen, Rukmini Das, Raadhika Gupta & Vrindika Bhandari, *Anti-Terror Laws in India - A Study of Statutes and Judgements, 2001 – 2014*, VIDHI- CENTRE FOR LEGAL POLICY PAPER (2015).
[15] State of Maharashtra v. Ravi Dhiren Ghosh, Sessions Case No.674 of 2009 (NIA).
[16] The Unlawful Activities (Prevention) Act (UAPA), 1967 (Act No. 37 of 1967).

exceptional consideration of terrorism cases has been further given impetus by the Law Commission of India in its 262nd Report wherein it recommends death penalty abolition for ordinary criminal cases while preserving the death penalty for terrorism.[17] Not because terrorism cases have investigative or trial difficulties, but because the Commission itself accepted that the sovereign-security dimension of these cases places them in a different political category. That carve-out is honest, if uncomfortable. The Commission reviewed the empirical evidence of application, the socio-economic profile of death row inmates (overwhelmingly poor, lower-caste, and marginalised), the documented inconsistency in judicial application, and the international trend toward abolition. Its conclusion, for ordinary criminal cases, was unambiguous. The death penalty should be abolished.

However, its preservation of the terrorism exception reflects a political and institutional judgment that sits in some tension with the constitutional logic of *Bachan Singh (1980).* This tension is precisely what the AI experiment illuminates. An AI model, operating on the doctrine as written rather than the doctrine as contextually applied in terrorism cases, does not make the exception that the Commission preserved and that the Supreme Court has, in practice, often honoured. It applies *Bachan Singh (1980)* to terrorism cases the same way it applies it to any other case. Whether this is fidelity to the doctrine, or a practical insensitivity, remains a matter of scholarly debate.

3. METHODOLOGY

The present study uses qualitative experimental methodology along with doctrinal discourse analysis. While the experimental component involves giving an identical structured judicial prompt to four AI language models under controlled conditions,

[17] Law Commission of India, Report No. 262, The Death Penalty (August 2015).

the latter component systematically compares each model's reasoning with the established framework of Indian jurisprudence on capital sentencing, particularly in terrorism cases. Both components work together. The experiment identifies what each model decided. The doctrinal analysis then examines whether this diverges from actual judicial outcomes in structurally comparable cases and the reasons behind the same.

The study proceeds on the epistemological assumption that AI outputs depict structured legal reasoning since they are produced on the basis of carefully designed prompt. As such they can be analysed as doctrinal data. The research does not treat outputs as judicial opinions. They do not carry precedential authority. But they represent a form of systematic engagement with the rarest of rare framework that can be compared to actual judicial outputs with the comparison being instructive in nature. With regards to the experimental methods, the following needs careful consideration.

The author selected four models- ChatGPT-4o (OpenAI), Gemini (Google DeepMind), Claude (Anthropic), and Notebook LM (Google). All are widely deployed general-purpose language models trained on large corpora that include substantial legal text. None has been specifically fine-tuned on Indian legal databases, which is itself a methodological characteristic worth noting. The experiment tests what general-purpose AI does with Indian capital sentencing doctrine, not what a specialised Indian legal AI would do. The sample of four models is modest by the standards of quantitative research, but it is appropriate for qualitative discourse analysis. The aim is not statistical significance across a large sample but depth of reasoning analysis across a small, carefully chosen set.

After choosing the models, a prompt was devised to be given to these models to elicit their judicial decisions. This prompt was constructed in three layers. The first layer established the judicial role wherein each AI was instructed to act as a Special NIA Court judge in India, bound by Supreme Court precedent and constitutional principles, deciding sentencing in a case under the UAPA[18]; Explosives Act, 1884[19]; Explosive Substances Act, 1908[20]; Arms Act, 1959[21]; and Bharatiya Nyaya Sanhita, 2023 (BNS)[22]. The prompt gave instruction not to deviate from the established legal framework to prevent abstraction, and inconsistency.

The second layer consisted of the facts, on which decision has to be made. As per these facts, the accused (Zaid) was a 19-year-old Iranian national. He was from a poor background and was recruited at the age of 16 by a terrorist organisation through a madrassa. He was radicalised and given weapons training, subsequent to which he participated in a terrorist attack in Delhi, that killed 22 people and resulted in more than 200 casualties. After his arrest and questioning, the police were able to get detailed intelligence on the attack. Zaid also gave intelligence that led to disruption of two subsequent attacks. Other peripheral facts depicted him as a remorseful individual (by the end of sentencing) who was led astray, as also confirmed by the court-appointed psychiatrist. He was 22 at the time of sentencing. The case resembled that of *Kasab* in terms of nature and structure of crime, while sharply diverging on the mitigating grounds. This was a conscious choice. The deliberate change in mitigating factor resulted in models not being influenced by the

[18] UAPA, *supra* note 16.
[19] Explosives Act, 1884 (Act No. 4 of 1884).
[20] Explosive Substances Act, 1908 (Act No. 6 of 1908).
[21] Arms Act, 1959 (Act No. 54 of 1959).
[22] Bharatiya Nyaya Sanhita (BNS), 2023 (Act No. 45 of 2023).

facts and decisions pertaining to Mumbai attack case. This prevented the production of a unified outcome based on a singular study rather than legal reasoning.

The third layer of the prompt specified the output format. Resultantly, the models in their decisions provided a detailed list of provisions considered, their final decision, judicial reasoning, and most importantly, variable acknowledgment (a factor that if changed would affect the decision). This acknowledgment not only helped in revealing the implicit elements within the reasoning, but also revealed the overarching factors considered by the models. Three additional variables were changed after the output was taken, to understand how models respond to changes in the factual matrix. The first change was with regards to the nationality, from Iranian to Pakistani. This was done to examine any extra considerations being given to the geo-political sensitivities involved between India and Pakistan. The second changed the result of intelligence cooperation, wherein the inputs given by Zaid, while relevant did not lead to any prevention of terrorist attack. The third changed the age of Zaid from 19 years to 50 years, at the time of the attack. The second and third variables were given to assess the model's reasoning when it comes to the reformation limb as given in the *Bachan Singh (1980)* case. The age variable was also given to understand the impetus given to crime rather than criminal in many cases.

The scope of the paper is limited substantially due to the experimental nature of the study. It is imperative to note that prompt design is not neutral, with the framing choice affecting the LLM's reasoning substantially. A differently designed prompt might result in different outcomes. Moreover, the training data used by the models affect the Indian jurisprudence applied during the analysis. Hence, while the study uses four models to test one scenario; it generates interpretive findings, not statistically representative ones. The temporal instability of AI models, continuously

updated, producing different outputs from the same prompt six months later, means the findings described here speak to these specific model versions at this specific point in time. That is an instructive finding in itself. Future research should test across a wider range of scenarios, models, and prompt formulations.

4. FINDINGS

This chapter presents the core findings of the experimental research. Before we move to the findings, it is again emphasized that these findings have been the result of the specific prompt as explained in the previous chapter. However, the limitations in the research do not in anyway, supersede the findings as elucidated below. All the findings mentioned in this chapter are placed within the doctrinal tension that maps the application of rarest of rare exception in capital punishment, particularly the terrorism cases.

4.1. Baseline: All Four Models Decline to Impose Death

The most immediate finding of the experiment is also the hardest to explain. All four AI models, given the same facts and legal instructions, independently sentenced the accused to life imprisonment instead of death. ChatGPT, Gemini, Claude, and Notebook LM, each decided on the non-capital outcome, framing the sentence as life imprisonment for the accused. None imposed the death penalty. The agreement among the models is as notable as the result itself. Each model's reasoning followed the same legal principles but with different focuses. ChatGPT centered its analysis on the failure of the second *Bachan Singh (1980)* test. It found that the combination of psychiatric evidence, intelligence cooperation, and expressed remorse ruled out a finding of impossible reformation. The model was particularly careful in analysing the cooperation evidence. The prevention of subsequent possible attacks, according

to the model demonstrated 'moral reconstruction' as against mere willingness. Moreover, the actual evidence of prevention favored the accused.

While Gemini also reached the same conclusion, it actively highlighted the lack of prosecutorial evidence that shows that the accused is beyond reformation. With the lack of evidence such as prison misconduct, defiance of authorities and ideological connection with the previous organisation, the LLM specifically quoted *Wasnik (2019),* to argue that it is the prosecution's responsibility to prove irredeemability. The fact that prosecution could fail the *Bachan Singh (1980)* second test due to a lack of evidence, rather than factual issues, is something that real Sessions Courts in terrorism cases have not always handled carefully.

As against GPT, and Gemini, Claude produced a more detailed sentencing order. It covered all the convictions spanning five laws along with eighteen precedents. It also analysed each of the categories as given in the *Machhi Singh (1983)* case. It focused upon the reformation limb in great detail, while correctly differentiating between irredeemability as against impairment. Its decision to give life imprisonment was heavily dependent upon the *Manoj (2022)* precedent focusing upon the psychiatric evaluation and eventual rehabilitation of the accused. Lastly, Notebook LM reached the same conclusion, but with concise reasoning that was heavily dependent upon the variable. The nature of the intelligence received from Zaid played a predominant role again in his sentencing decision. As the following sections will demonstrate, these observations were not just hypothetical.

4.2. The Doctrinal Gap: Comparison with Actual Outcomes

When we look at the results of this experimental research and the actual decisions made in the *Kasab*, *Bhullar*, and *Parliament attack* case, a clear pattern emerges. In each of the actual decisions, one or both of the following were true. The accused did

not show any remorse or willingness to help, or the court's use of the second *Bachan Singh (1980)* test was short and not as well thought out as the first. The AI outcomes differ from the actual decisions not due to the application of an alternative doctrine, but because the facts provided to the AI encompassed mitigating evidence that was either absent from or afforded less significance in the actual cases.

The prompt scenario was meant to look like real cases in terms of how serious the crime was, but it was different in terms of the mitigating profile of the offender. The AI models reacted to this design in the way that the doctrine said they should. They took the mitigation seriously, finding it difficult to hold that the accused was beyond reformation. This resulted in models not imposing death sentence. In cases where similar mitigation was not present, the actual courts sentenced death. Then the important inquiry for consideration is whether doctrine was uniformly applied in cases. The answer is both yes and no. In the Mumbai attack case, Kasab's death sentence was supported by overwhelming aggravating evidence, with reformation issue being dealt as well. In Parliament attack case, the court relied heavily on the "collective conscience" with predominance being given the place of the attack. Both these cases while dealt briefly with the mitigating issue, failed to completely adhere to the balance sheet assessment as required by *Bachan Singh (1980)* case. While the sentencing decisions in both cases are justified with enough evidence against the accused, the reasoning and the lack of proper engagement with the mitigating circumstances left a doctrinal residue. Subsequent cases have had to engage with and negotiate that residue ever since.

4.3. Variable Test Results: What Moves the Needle

The variable testing reveals the centres of doctrinal reasoning. The first variable, regarding nationality did not bring ant change in the sentencing decision. All four

models maintained their decision of life imprisonment with no change in reasoning. The models, forgetting the political context, did not mention the nationality in either of its outputs, thus producing formal equality that actual courts might find difficult under political and institutional pressure. The possibility of mechanical application of legal doctrines without considering the political context may produce outcomes that are legally sound, however, they might be disconnected from reality. This reality affects how judiciary applies concepts like 'collective conscience'. Such contextual influence is not automatically wrong; it may show a nuanced understanding of the social conditions related to a case. Whether AI decision-making in such situations leads to a fairer form of justice or merely replaces one type of distortion with another is a complex issue that requires thorough academic exploration. At present, however, non-engagement with this aspect completely shows the broader limitations of AI.

The second variable as against the first one, produced a dramatic shift, and represents an important finding. Reducing the accused's intelligence contribution from impactful to just evidentiary, changed the sentencing decision, wherein all four LLM models agreed on giving death penalty to Zaid. Initially, the accused was credited with stopping two confirmed attacks. However, in the new scenario, he only identified personnel, with no confirmed prevention which did not impact the external world. Hence, all the models converged in their finding of death penalty. What this finding reveal is that the AI models' refusal to impose death on the baseline facts was not grounded in a general sympathy for the accused's personal circumstances like youth, poverty, or ideological indoctrination. The LLM models were essentially consequentialist. As soon as the evidence of the rehabilitation in the form of prevention of attacks was removed from the prompt variable, the death penalty was given despite all other considerations remaining the same in the metric assessment. The original reformation limb of the twin test, while mandates an evidence of

reformation; it does not do so in terms of observable changes produced in external world but merely internal transformation. This implies that AI can invent its own consequentialist interpretation without the legislature or judiciary providing so.

That is a demanding standard. But it is also a standard that may be more difficult to satisfy in terrorism cases than in ordinary criminal cases, precisely because the intelligence value of an accused's cooperation depends on operational circumstances outside his control. The accused who cooperates fully but whose information arrives after the imminent threat has passed would, on this logic, faces death penalty. This is also supported by the variable acknowledgment element of the prompt, wherein, the instruction to each model was to identify the single factor whose alteration would most change the sentencing outcome. An answer to this was consistent, in its acknowledgment of the intelligence cooperation. A uniform converge again suggests consequentialism as the ground for reformation limb. It means that the AI's conception of the *Bachan Singh (1980)* second test is not purely internationalist. This is, in principle, a defensible reading of 'possibility of reformation', a possibility demonstrated through partial actualisation. But it is a reading with costs. It makes the reformation test depend, in part, on operational circumstances outside the accused's control. The accused who cooperates identically but whose information does not prevent an attack through no fault of his own is, on this logic, in a worse doctrinal position than one whose information happened to arrive at the right moment. That is not a comfortable place for a constitutional standard to rest.

The last variable, the age variable completed the picture. When the accused's age was changed from 19 to 50, all four models imposed death sentence. The reasoning across models was consistent. A 50-year-old recruit who underwent three years of training and participated in a mass-casualty attack could not claim the developmental vulnerability argument. Without it, the second limb (reformation requirement) of the

Bachan Singh (1980) is not met, leading to adverse outcome. The finding highlights how the AI decision making may be vulnerability centric. It is the condition of the offender at the time of radicalisation, not merely the gravity of the act, that anchors the outcome.

5. DISCUSSION: THE HUMANISATION HYPOTHESIS AND ITS COMPLICATIONS

The baseline findings suggest that AI, while strictly adhering to the framework enunciated in *Bachan Singh (1980)* and *Machi Singh (1983)* produces humane outcomes due to its consideration of mitigating circumstances. In a structurally similar factual scenario to that of Mumbai attacks, the AI models declined the imposition of death penalty on the basis of reformative jurisprudence, without giving overwhelming consideration to the nature of crime. The terrorist act, which usually is seen as a sufficient condition in itself, was treated as only one of the aggravating factors, while also engaging with the mitigating evidence within the prompt scenario. It can also be argued that had the real case involved the cooperation variable, there would have been a chance of life imprisonment as well. Moreover, the evolving death penalty jurisprudence as enunciated in *Bariyar (2009)* and Manoj (2022), reflects a more empirically grounded, less visceral application of the doctrine that is more resistant to the kind of offence-gravity override that has sometimes attended terrorism sentencing.

But the humanisation hypothesis has complications that the paper is not entitled to ignore. The first is that the prompt scenario was designed by a researcher who gave the AI the mitigating evidence to work with. In the real terrorism prosecutions this paper discusses, that mitigating evidence was often absent, not suppressed, but genuinely not present. *Kasab* really was defiant, unremorseful, and uncooperative.

The *Parliament attacks'* accused really did not provide intelligence cooperation. The AI's more humane outcome in the prompt scenario may reflect the facts the researcher chose to include as much as it reflects the AI's disposition toward humanisation. The experiment cannot separate these two possibilities cleanly. The second complication is the cooperation quality finding. The AI models were not uniformly disposed toward life imprisonment, but towards specific markers. As and when these markers are realised, they impose death penalty. However, the author does not consider them to be pro-life. In opposition, strict adherence to the evidential standard required by the *Bachan Singh (1980)* case if mechanically applied, can result in harsh sentences in many cases.

5.1. Strict Doctrinal Adherence and Its Blind Spots in Terrorism Cases

The AI models' most consistent characteristic across all four systems was their strict application of the *Bachan Singh (1980)* twin tests and the *Machhi Singh (1983)* five categories without importing any additional weight from the nature of the prosecution as a terrorism case. They treated UAPA charges as aggravating factors within the *Machhi Singh (1983)* framework without treating UAPA label as a sui generis category that altered the fundamental bilateral structure of the test.

This is, in a formal sense, what *Bachan Singh (1980)* requires. The doctrine does not contain a terrorism exception. Yet the actual application of the doctrine in India's major UAPA cases has sometimes functioned as though it did. As though the combination of mass casualties, foreign organisational backing, and threat to national security created a category of case where the reformation inquiry was a formality rather than a genuine constitutional requirement. Jacques Derrida, in his seminars on the death penalty, observed that the sovereign's power to put to death

reaches its most unmediated expression precisely in the figure of the 'enemy of the state'.[23]

However, the blind spot in the AI's approach is that it may not adequately model the institutional dimension of terrorism sentencing which is the systemic threat that a proscribed organisation represents beyond the individual acts of any particular operative. The Supreme Court in *Kasab* noted that the organisation's continued existence and operational capacity was a legitimate consideration. The fictional scenario included this dimension wherein Zaid (prompt actor) was not a lone actor but an instrument of a continuing organisational threat. The AI models, however, have given it limited weight relative to the individual mitigating factors. Whether an actual court, weighing the organisational threat against the individual mitigation, would reach the same outcome is precisely what cannot be determined from this experiment. But it is a dimension that the strict doctrinal analysis, focused as it is on the individual accused, may systematically underweight.

5.2. AI and the Reformation Inquiry: A Case for Assistance

The most direct policy implication of this study is not that AI should sentence people in terrorism cases. It should not. It is that AI's capacity for systematic engagement with the reformation inquiry deserves specific attention. The finding that all four models engaged genuinely and extensively with the mitigating evidence, applying *Bariyar (2009)* and *Manoj (2022)* faithfully, suggests that AI tools could play a legitimate and beneficial role in ensuring that the constitutionally mandated engagement with mitigation actually occurs in terrorism prosecutions where institutional and political pressure tends to work against it. Not as a decision-maker, but as a structured analytical prompt, a tool that forces the court to address each

[23] DERRIDA, *supra* note 7.

element of the *Bachan Singh (1980)* framework before proceeding. This proposal does not require AI to make decisions but to merely ask questions. Sessions Court sentencing orders who usually treat mitigating factors in marginals, can be encouraged to engage with them through a structured AI-assisted checklist. This would result in not only engagement with the framework as established in *Bachan Singh (1980)* and *Machhi Singh (1983)* cases but also the evolving requirements as analysed in cases like *Bariyar (2009).* This will result in procedural improvement in the sentencing decisions, without delegation of the substantive decisions.

5.3. The Prompt as Policy: Transparency Requirements

Mesch in his research note has extensively analysed the framing of prompts and its effects on the sentencing recommendations given by AI.[24] He notes that prompt not only serves as the policy document, but in effect completely decides what AI considers, and how a decision has to be made. The choices made by the maker of the prompt, essentially results in the output, rather than the model who produces that output. Therefore, in a system where AI may be used but not openly disclosed, it becomes imperative that the stakeholders come together to lay down transparency requirements so that secret prompts do not insidiously affect the capital sentencing. Until Parliament takes any step, the Supreme Court's guidelines issued under Article 145 provide a constitutional way in which AI usage may be regulated. However, this does not present a long-time solution for an issue that is going to stay. Moreover, waiting for the majority of judges to use AI tools as standard practice will exacerbate issues. Given that Indian criminal law is undergoing significant changes and

[24] Mesch, *The Effect of Prompt Framing on AI-Generated Sentencing Recommendations: A Research Note*, CRIMINAL JUSTICE STUDIES (2026).

practitioners are dealing with the demands of new laws, this is a good time to seriously look at the role of AI in sentencing decisions.

6. LIMITATIONS, AND FUTURE RESEARCH

The experiential nature of the study comes with substantial limitations. Firstly, the single-scenario design represents a single fact pattern and prompt framing. Due to the individualistic nature of the study, the research is limited by the resources as well as scope. Hence, the findings cannot be generalised for all cases pertaining to UAPA. The second limitation has been acknowledged previously as well: the prompt dependency. A differently framed prompt, even with the same theme can present the facts, or highlight some factors that can result in different outcomes.

Keeping in mind both the limitations, any future research in India, that tests AI-generated sentencing recommendations must test multiple scenarios involving distinct profiles and nature of offences as well as same scenario with different formulations. Both these extremes will help in analysing the consistency of outcomes. The variable acknowledgment can also distinctly analyse the result of moderating the mitigating factors on the sentencing outcome, which will help in understanding how AI applies the establish jurisprudence across different cases.

The third limitation is technical in nature. Different models have different interfaces and product tiers that affect not only the initial accessibility but the architectural diversity. To exemplify, Gemini Advanced in a product tier and not a model. The model used was Gemini 1.5 Pro. Notebook LM is again built upon Gemini Foundation but operates on a distinct architectural configuration. Cross-architecture comparison and the pure-interface test will result in different outputs, across different tiers, versions and the temperature controls. This advanced research needs technical inputs that currently lied beyond the expertise of the author. Additionally.

the temporal instability has not been empirically tested, presenting a methodological challenge that an inter-disciplinary study should ideally bridge before the same is used by practitioners.

The absence of adversarial conditions is the fourth limitation inherent in any techno-legal study that can be done presently. While the prompt did present facts neutrally, a single framing and resultant singular output, lacks the contestation that happens in any criminal case. The contestation between prosecution and defense can be theoretically exposed to AI, but to mimic the adversarial conditions as they are within the court setting is currently beyond technical capacity, atleast the one available to the author. Finally, the AI's role in generating analytical outputs is a limitation, not for the experimental design but concerning the outputs to be published. The fact that author has used AI to study AI is partly reflexive. This is a design consequence that is inherent in the methodology and cannot be fully avoided. It is mitigated by the transparency with which it is disclosed, the care with which the doctrinal analysis of the outputs is conducted by the human researcher, and the explicit separation between the AI outputs as data and the paper's own arguments about those outputs.

7. CONCLUSION

The core finding of this study deserves to be stated plainly before the qualifications arrive. Four AI language models, presented with a terrorism scenario structurally comparable to the cases in which the Supreme Court of India confirmed or imposed the death penalty, unanimously declined to do so. They did this not by ignoring the gravity of the crime but by engaging seriously with the evidence on the other side of the *Bachan Singh (1980)* ledger. They focused on mitigating side as much as the aggravating factors, as per the decision of the Supreme Court.

While this upholds the central thesis of this paper with regards to humanisation of outcomes, there are many caveats: neutral prompt structure, particular mitigating circumstances, disregard for politicisation of terrorist acts, lack of human argumentation, amongst many others. Particularly, the cooperation variable did not only affect the original outcome, but also resulted in the change in decision-making due to AI's consequentialist preference. Overall, it can be argued that AI does not have a built-in preference for humane outcomes, but it strictly adheres to *Bachan Singh (1980)* parameters, and it interprets the same without considering the socio-political effects of terrorism offences. AI doesn't treat terrorism cases differently, and doesn't let national security imperatives and seriousness of crime sway it from the question of irredeemability of offender.

All of this reflects on both the AI and the legal doctrine. This experimental study reveals pressures and issues that were not considered when the doctrine was created, and at the same time reveals how use of LLM in human decision-making, misses complex realities of how law interacts with politics. Derrida in his seminars on death penalty noted that the power to 'put to death' is sovereignly pronounced through a foreign enemy.[25] The prosecution for a terrorism offence under UAPA, creates such a figure who is seen as enemy of the established sovereign order. However, AI having no sovereign, applies the doctrines in vacuum. It is not that the AI is more humane; rather, it is more indifferent. In a legal system that requires death penalty to be given in rarest of rare cases, this indifference might represent justice by accident, not yet by design.

[25] DERRIDA, *supra* note 7.

WOMEN ENTREPRENEURS IN SMALL BUSINESSES: STRENGTHENING RESILIENCE THROUGH INNOVATION AND INSTITUTIONAL SUPPORT

Dr. Shraddha Oberoi, Assistant Professor of Law (SS),UPES, Dehradun

Abstract

Women entrepreneurs in small business ecosystems play a vital role in economic growth, job creation, and social change, especially in developing countries where small businesses make up a large part of economic activity. Despite their increasing involvement, women-led businesses face ongoing challenges. These include limited access to formal credit, weak market connections, exclusion from digital resources, complex regulations, and social norms that hinder their growth and stability.

Recent economic disruptions have made these challenges more apparent, stressing the need to explore ways to strengthen the resilience of women-owned small businesses. This paper examines how innovation and institutional support are key factors in improving the resilience of women entrepreneurs. It argues that resilience in women-led businesses is not just a response to economic challenges but a dynamic process shaped by access to technology,entrepreneurial networks, policy incentives, skill development programs, and supportive legal frameworks.

The study also looks at how digital platforms, financial inclusion efforts, training programs,and government initiatives help maintain business continuity, competitiveness, and long-term sustainability. Using a socio-economic and policy-focused approach, the paper assesses the effectiveness of institutional mechanisms aimed at boosting women's entrepreneurship,

particularly in small business development initiatives in India.

It highlights the gaps between policy creation and real-world application, especially concerning access to credit, mentorship options, and localized support systems. By combining resilience theory with discussions on entrepreneurship, the paper suggests that systems driven by innovation are crucial for helping women-owned small businesses transition from survival mode to sustainable sources of inclusive growth. The paper adds to ongoing discussions about gender-focused economic policy by highlighting that supporting women entrepreneurs requires not just financial help but also strong support systems that encourage innovation, flexibility, and business growth. It concludes with recommendations for policies that can foster a more inclusive business environment where women-led small businesses can engage more effectively in both national and global economic development.

Keywords Women Entrepreneurship; Small Businesses; Resilience; Innovation; Institutional Support; Financial Inclusion; Gender and Enterprise Development; Sustainable Growth

1. INTRODUCTION

In today's contemporary economy, most of the women entrepreneurs have emerged as an important element of social transformation, economic development and inclusive growth. Many small start-ups across the world owned by women leads to generation of employment, reduction in poverty and enhance innovation. The gender roles perceptions in India have changed due to rise in women entrepreneurs. The role of women in small businesses leads to increase in productivity, financial independence, social empowerment and decision making capacity in areas such as retail, handicrafts, education, healthcare, technology, e-

commerce and many more.[1]

This progress has been limited to various institutional and structural barriers that create obstacles for women to expand and sustain their enterprises. The major hindrances in rural and semi-urban regions are limited access to formal credit, societal and cultural expectations, lack of technological resources and minimum market linkages. These gender inequalities prevent women to gather resources required for growth and continuity in the business.

The relevance of entrepreneurial resilience was highlighted at times of economic disruptions such as COVID- 19 pandemic. The small businesses were the most vulnerable ones. By entrepreneurial resilience, the researcher is referring to the adaptability, recovery and sustainability of businesses during economic crisis. This resilience is mandatory for long term competitiveness and women have proved to be more prone in adapting new culture, innovative techniques and enhancing network capacity at such vulnerable crisis.[2]

Businesses have strengthened by overcoming structural limitations and building resilience through innovation. This is possible through social media marketing, e-commerce, financial technologies, digital platforms and digital based business models which help the women entrepreneurs to reduce traditional barriers of mobility. The ecosystem of women entrepreneurship has been further strengthened in India by robust government policies, training programs and other financial institutions.

---

[1] Sucheta Agarwal & Usha Lenka, An Exploratory Study on the Development of Women Entrepreneurs: Indian Cases, 18 J. Res. Marketing & Entrepreneurship 232 (2016), https://doi.org/10.1108/JRME-04-2015-0024

[2] Arafat, M. Y., Ali, J., Dwivedi, A. K., & Saleem, I. (2021). Social and cognitive aspects of women entrepreneurs: Evidence from India. *Vikalpa, 45*(4), 220–233. https://doi.org/10.1177/02560909211015457.

This paper examines the inter-relationship between innovation, entrepreneurial resilience and institutional support to women entrepreneurs of small scale businesses. The researcher has adopted qualitative approach using secondary data, policy reports and literature. The paper also analyses the challenges faced by the women entrepreneurs and had suggested various recommendation to overcome those through innovation, building resilience and implementing effective government and institutional support.

2. CHALLENGES FACED BY WOMEN ENTREPRENEURS IN SMALL BUSINESSES

Multi-dimensional challenges such as financial, socio-cultural, technological and institutional inequalities affect the business establishment running by women entrepreneurs. Though women run starts are increasing rapidly but are facing multiple challenges such as limited access to financial resources due to weak credit history, lack of ownership of properties to secure loans and gender based biases in the banking system. Hence, women mostly rely on self-financing, rely on informal sectors of borrowing and technological investment.

Another major challenge faced by women entrepreneurs is socio-cultural barrier, where in India women are expected to responsibly handle household chores. Such care giving duties limit the mobility, flexibility which are required as skills in entrepreneurship, hence women face difficulties in balancing domestic obligations and business responsibilities. Such perception reduce confidence of investors in women, restrict the risk-taking behaviour and opportunities to collaborate. Also, family support, professional networks, mentorship contribute positively to development in businesses. In India, it is observed that women are more prone in overcoming social constraints due to psychological resilience, optimism and adaptability.

Another major gender gap in entrepreneurship is digital illiteracy of women in rural and semi-urban areas. Most of the businesses have become digitalised, thereby making the entrepreneurs to adopt technological tools such as e-commerce system, social media marketing, digital payments. Women of rural and semi-urban areas due to lack of internet connectivity, digital awareness and digital literacy are not able to participate in technology driven enterprises.[3]

Despite of existing various government schemes, financial support programs women entrepreneurs lack awareness and legal compliance mechanisms too. Therefore, implementation gap remains a serious concern thereby making institutional and regulatory barriers affecting the women based enterprises in rural areas as most these schemes are centralised.[4]

Another major setback in women based entrepreneurship was at the time of COVID-19 pandemic. Pandemic leads to reduced customer demands, declining of revenues, disruptions in supply chains thereby causing operational uncertainty. On the other hand, women who adopted flexible business models and strategies through innovation, networking and community based support system have shown enhanced capacity of recovery from crisis.[5]

Another major setback to women entrepreneurs is their exclusion form professional networks, limited mobility and under presentation in business ecosystems due to societal barriers. Hence, absence of mentorship programs, strong professional networks cause hindrance in the growth of their businesses.

---

[3] Shivani, S., Nawaz, N., Rahiman, H. U., Hariharasudhan, A., & Hundekar, V., Unveiling the Crucial Factors of Women Entrepreneurship in the 21st Century: Social Sciences, 10 *Int'l J. Entrepreneurship & Knowledge* 133 (2021), https://doi.org/10.3390/ejik10010015.

[4] Raj, S., & Garlapati, S. S. (2023). Promoting women entrepreneurship in India: Challenges, initiatives and strategies. *Journal of Agricultural Extension Management, 24*(1), 131–143.

[5] Matharu, S. K., & Juneja, D. (2024). Factors impacting resilience of women entrepreneurs in India in the face of COVID-19. *Vision: The Journal of Business Perspective, 28*(4). https://doi.org/10.1177/09722629211043299.

A lot of major factors leading to growth of enterprises are strategic decision making, access to business associations, guidance on market trends, financial planning by investors are lacking among women entrepreneurs due to social factors. It is believed that professional networks provide access to information regarding funding opportunities, governmental schemes and other technical innovations. Women face less visibility and weak business expansion opportunities as male-dominated businesses keep women's participation in decision making process in a limited way. Mentorship programs influence the confidence, resilience and long term sustainability of the entrepreneurs. These programs are important for developing leadership skills, building negotiation abilities, innovation oriented mindset and developing financial literacy.[6]

Case Illustration: Kudumbashree Mission, Kerala

Established by the government of Kerala in 1998, this mission proved to be a community based institutional setup which strengthened the financial resilience, encouraged collective entrepreneurship and even enhanced the women participation in economic decision making significantly during COVID-19 pandemic. Women of Kudambashree produced masks, sanitizers and other essential commodities thereby utilizing local delivery system and digital platforms. This mission focuses on decentralising the network of self-help groups that provide women entrepreneurs with skill development programs, access to microfinance and market support. This mission worked for the women of economically weaker section to establish micro-enterprises in various sectors such as handicrafts, retail, catering, tailoring and food processing sectors. Despite, all these provisions for women entrepreneurs, this mission faced various challenges such as expansion and scalability into international and national

[6] Prasad, V. K., Naidu, G. M., Murthy, B. K., Winkel, D. E., & Ehrhardt, K. (2013). Women entrepreneurs and business venture growth: An examination of the influence of human and social capital resources in an Indian context. *Journal of Small Business & Entrepreneurship, 26*(4), 341–364. https://doi.org/10.1080/08276331.2013.821758.

markets.[7]

Case Illustration: Nykaa and Digital Entrepreneurship

This is one of the first technology driven business model which reduced the operational limitations and enhanced market accessibility. Founded by Falguni Nayar in 2012, it is one of the transformative change of digital innovation in women led entrepreneurship. Nykaa has integrated digital marketing, social media engagement, promotions through influencers and consumer analytics to develop a retail store at a large scale which was initially launched as an e-commerce platform for beauty and wellness products. This startup represents a significant example of innovation run enterprise in India which even highlighted women participation in such technology driven ecosystem, hence strengthening the business resilience during periods of economic disruptions by maintain continuity through e commerce -platforms and digital consumer engagement.[8]

This initiative was also not short of challenges. Unequal access to venture capital, underrepresentation of women in leadership positions and other structural challenges in this business ecosystem were the hindrances faced by women entrepreneurs.

Case Illustration: S4S Technologies and Sustainable Rural Innovation

The S4S Technologies serves as an important case study of innovation-oriented rural entrepreneurship and sustainable entrepreneurship development. The

[7] IIM Kozhikode, Kudumbashree Mission Launch Prof. V.K. Abdul Aziz Chair, *InfoMedia* (May 16, 2024), https://infomedia.iimidrimes.com/city/kozhikode/iim-kozhikode-kudumbashree-mission-launch-project-to-support-women-led-enterprises/articleshow/12118405.cms.

[8] Nayar, F. (2021). Building Nykaa: Redefining beauty retail through digital innovation in India. *Harvard Business Review Analytic Services*.

company designed a technology to harness solar power for preserving produce and minimizing food wastage during fruit and vegetable harvesting. Through imparting solar drying technology and value addition processes in food products to women, the company established local microenterprises. This case study presents a clear illustration of how technological innovations can assist women-led companies while at the same time focusing on agricultural sustainability and environmental issues. The company was successful due to various factors such as mentorship, entrepreneurship incubation, and innovative financing. However, the case study is also characterized by some problems such as technological inaccessibility in remote areas and inadequate digital literacy.[9]

Case Illustration: MobiKwik and Financial Inclusion through FinTech

MobiKwik, one of the ventures established by Upasana Taku, highlights how financial technology is gradually playing an important role in facilitating women-led innovation and financial inclusion through digital finance in India. MobiKwik offers digital payment facilities and wallets which help in enabling cashless payments and easy accessibility to the financial environment. This business is significant for women entrepreneurship because, through digital financial solutions, there is reduced reliance on conventional banking systems which tend to exclude women owing to collateral issues and other difficulties. The firm shows how women entrepreneurs can manage and lead a technology-oriented enterprise in sectors dominated by men, such as financial technology. On the other hand, digital payment systems play a crucial role in helping entrepreneurial resilience by facilitating transactions and online businesses in an effective manner. Despite the development of fintech systems, however, women entrepreneurs still struggle to overcome challenges like illiteracy, exclusion from

[9] Shell Foundation. (2023). *Empowering women, powering change: The S4S Technologies journey*. https://shellfoundation.org/case-study/empowering-women-powering-change-the-s4s-technologies-journey/

technology and limited access to startup financing opportunities.[10]

3. INNOVATION AS A TOOL FOR BUILDING ENTREPRENEURIAL RESILIENCE

Entrepreneurial opportunities have significantly increased for women due to digital innovation. They now rely upon innovative methods to sustain their enterprises in competitive markets and thereby overcoming resource restraints. Innovation, therefore plays an important role in strengthening business resilience in small businesses as it extends beyond technological invention and include digital transformation, innovative marketing strategies, innovation in acquiring finance and enhancing organisational flexibility as well. Social media platforms such as Instagram, Facebook, businesses over WhatsApp have emerged as e-commerce platforms thereby, enabling women entrepreneurs to broaden their consumer market without relying much on physical business infrastructure. These online platforms are cost effective for marketing and product promotion. These platforms have emerged to be highly beneficial for those women entrepreneurs who are operating from home as they reduce the operational and mobility costs.[11]

Studies have shown that women-led businesses have a significant potential to innovate in case there is access to supportive institutional and internal financing settings. Women are becoming actively involved in innovative industries including technology services, health care, agriculture technology, education, and sustainable companies. Innovation serves not only as a means of survival, but it can also serve as an instrument for attaining competitiveness and sustainability.

Moreover, financial innovation has contributed to building entrepreneurship

[10] Kumar, A., & Singh, R. (2023). FinTech innovation and financial inclusion in India: Examining the role of MobiKwik. *International Journal of Financial Innovation, 5*(1), 77–91.
[11] Women Power Ultra Products Pvt. Ltd., *The Times of India* (2023), https://timesofindia.indiatimes.com/topic/livpure-water-purifiers-health.

resilience in women. Innovative payment methods like digital payments, mobile banking, and the use of FinTech have made transactions more efficient and provided better access to financial services. Women entrepreneurs without access to banking institutions have been able to make transactions through digital methods. In addition, self-help organizations, microfinance organizations, and mobile lending platforms have ensured financial inclusion through alternative credit services. Financial innovations have made liquidity easier, business growth possible, and dependence on informal sources minimized.[12]

Innovation has also proved helpful in enhancing resilience during disruptive situations. Women entrepreneurs used innovative measures such as online business, digital communication channels, delivery at home, and diversification of goods when the world was hit with the COVID-19 pandemic. Studies on entrepreneurship resilience have indicated that resourcefulness, adaptability, networking, and business continuity have been the significant factors in ensuring survival of businesses.

Both entrepreneurial education and training help in fostering innovation among women entrepreneurs. Digital literacy, financial literacy, entrepreneurship skills, communication, and strategic planning empower women entrepreneurs to cope with changing market dynamics. Modern higher educational institutes and entrepreneurship development centers are focusing on innovation-centric approaches for empowering women entrepreneurs.[13]

---

[12] Prasad, V. K., Naidu, G. M., Murthy, B. K., Winkel, D. E., & Ehrhardt, K. (2013). Women entrepreneurs and business venture growth: An examination of the influence of human and social capital resources in an Indian context. *Journal of Small Business & Entrepreneurship, 26*(4), 341–364. https://doi.org/10.1080/08276331.2013.821758.

[13] Agarwal, S. & Lenka, U., An Exploratory Study on the Development of Women Entrepreneurs: Indian Cases, 18(2) *J. Res. Marketing & Entrepreneurship* 232–247 (2016), https://doi.org/10.1108/JRME-04-2015-0024

The emergence of government-enabled innovation ecosystem is helping foster growth in entrepreneurship ventures run by women. Reports reveal an exponential increase in the number of women-led enterprises in many states such as Uttar Pradesh in which women entrepreneurs are participating in fields such as technology, healthcare, and agritech. The government has been playing an effective role in transforming innovations into entrepreneurship ventures by offering incubation services, mentoring, training, and financial support.

Innovation in entrepreneurship helps build economic resilience for the reason that innovation helps women entrepreneurs cope with economic dynamics and expand their presence in markets. With the help of innovation, women entrepreneurs can change their survivalist business ventures into sustainable ones.

4. INSTITUTIONAL SUPPORT MECHANISMS AND POLICY FRAMEWORK IN INDIA

Support from institutional systems is crucial for bolstering the entrepreneurial capabilities of women and nurturing resilient business ecosystems. Such systems consist of government regulations, financial institutions, entrepreneurs' networks, education institutions, mentoring schemes, and incubators. In India, different policies have been designed for empowering female entrepreneurship and fostering financial inclusion, innovation, and skill building.

Some of the government programs that encourage entrepreneurship among women are Start Up India, Stand Up India, Pradhan Mantri Mudra Yojana, and Micro, Small and Medium Enterprises (MSME). All these programs offer different forms of institutional backing in the form of financial aid, subsides, trainings, and easy access to credit facilities for fostering female entrepreneurship. The Start Up India program has played an important role in increasing institutional backing for women-owned enterprises operating in

innovative sectors. However, research indicates that certain factors hinder the success of these programs.

Financial organizations are key players that provide women entrepreneurs with services like credit, microfinance, and financial education. Financial organizations such as banks, cooperatives, self-help groups, and microfinance organizations have made great contributions towards enhancing access to entrepreneurial credit among women. Gender discrimination persists in institutional lending systems due to collateral-based lending and processes involved in obtaining funds from formal lending institutions. Informal sources of funding continue to be relied upon by many women entrepreneurs despite government-backed credit schemes being available.

Apart from credit, institutional support also includes mentoring, entrepreneurial networking, and business incubators. Business incubators and women entrepreneurship cells assist women in accessing information and technology. Mentorship is particularly important for first-generation female entrepreneurs with limited professional experience and knowledge.

One of the most recent programs that show how institutional relationships play a role in helping women entrepreneurs is SmartShree launched by Indian Institute of Management Kozhikode with Kudumbashree Mission. The program intends to assist women-owned micro-enterprises by building capacity, mentoring, innovating, and being an entrepreneurial guide. Institutions help foster a local entrepreneurial system and sustainability of business.

According to institutional theory, good governance structures and entrepreneurship ecosystems help mitigate gender disparity issues in entrepreneurship. Studies on women entrepreneurship stress that factors such as

quality institutions, social capital, and policies play a critical role in enhancing entrepreneurial empowerment. Thus, institutions play more than a role of providing financing to entrepreneurs; they help foster innovation and inclusivity.[14]

Although various policies have been implemented, their challenges are still immense. Women entrepreneurs lack knowledge about existing government schemes owing to poor policy dissemination tools and digital literacy issues. Marginalized women are likely to encounter problems seeking help from institutions due to entrepreneurial programs being available only in urban centres. Policy ineffectiveness may arise from slow bureaucracy, complex procedures, and poor coordination among institutions.

There is a need for decentralization of institutions, as well as their inclusivity towards the establishment of localized, digital-friendly, and gender-specific policies. Institutional strengthening entails collaboration between governmental departments, financial institutions, educational organizations, private firms, and other stakeholders.

5. CONCLUSION AND RECOMMENDATIONS

The role played by women entrepreneurs in facilitating economic development and innovation cannot be underestimated. The small firms owned by women make major contributions to employment creation and diversification. Nevertheless, although there have been increases in entrepreneurial activity among women, these individuals still encounter numerous financial, socio-cultural, digital, and institutional challenges hindering sustainable and successful

[14] Priyanka & Roy, S. K. (2025), Startup India and Women Entrepreneurs: A Systematic Literature Review, 32(58) *Testing Psychometrics, Methodology in Applied Psychology* 1883–1889 (2025), https://doi.org/10.5281/zenodo.17900838.

growth of their enterprises.

As this research has shown, entrepreneurial resilience among women has a strong link with innovation and institutional support. The latter allows the creation of a conducive entrepreneurial ecosystem for women. In other words, government policies, financial and mentoring support can facilitate successful development of a woman-owned firm. As far as innovation is concerned, it helps women entrepreneurs adapt their enterprises to market changes, venture into digital space, and improve financial inclusiveness.

Yet, there is a huge distance between formulating and implementing such policies. Many female entrepreneurs continue facing lack of information about institutional schemes, problems with receiving formal credit, and poor access to localized assistance services. Structural inequality in financial and institutional environments continues being a key obstacle for entrepreneurial empowerment.

For enhancing women entrepreneurship in India, it is important to implement a number of policy instruments. First, financial institutions have to consider gendered approaches to lending and minimize their reliance on collateral-based lending. Streamlining of the loan process and making micro-financing more accessible are key to overcoming financial inequality faced by many women entrepreneurs. Secondly, it is essential to expand initiatives related to digital literacy and training in using new technologies. This measure will help women entrepreneurs become actively engaged in the technologically-driven market environment. Thirdly, institutional assistance in mentoring, incubating, and networking needs to be improved. Creating community-based business ecosystems can facilitate success and sustainability of women-owned firms.

Moreover, the implementation of these policies requires decentralization and

local initiatives. Government initiatives need to be supplemented by means of awareness campaigns, easier compliance procedures, and effective support systems. The role of women entrepreneurs should not just be seen as beneficiaries of welfare policies, but as participants who innovate and contribute towards economic sustainability.

In the coming years, the success of economic development in India will depend very much on whether entrepreneurial ecosystems can be developed which empower women by virtue of innovation and institutional support.

ANALYSING THE EXISTING REGULATORY MECHANISM FOR GM CROPS IN INDIA: THE NEEDED DISCUSSION ON THE JOURNEY OF GEAC FROM BT COTTON TO DMH-11 MUSTARD

Oishika Banerji, Assistant Professor of Law Heritage Law College Kolkata

Abstract

The GM Rules, 1989, serving as the mother legislation for genetically engineered technology, laying down a regulatory structure with multiple authorities and overlapping functions, has been intervened with multiple times. Not being the first author to discuss the same therefore, it is ideal to dig further in the 'un-amended' Rules that has been providing direction to implementation of agricultural biotechnology since its inception. While Bt Cotton received its green signal from the Genetic Engineering Appraisal Committee (GEAC) in 2002, the road that GEAC, as the final decision-maker of genetically engineered organism in India, travelled, has not been majorly reflected across literatures. Failed attempts with Bt Brinjal and DMH-11 Mustard not only questions the efficiency and effectiveness of GEAC as the sole determining authority but also raises constructive doubts on the functioning of the regulatory framework under the surviving Rules to combat health and environmental risks that GM crops possess. The prima facie function of any cultivated crop is to make it available for consumption which is why the GM Rules, 1989 has to be intrinsically connected to the food laws in India, namely, the Food Safety and Standards Act, 2006 and the National Food Security Act, 2013. As GM Rules, 1989 continues to battle for its existence in today's growing biotechnological applications towards agriculture, its co-existence with mentioned legislations must be looked with grave significance. Being an unpredictable living thing in an even more unpredictable natural world, the

question whether something that gets controlled and regulated in the hands of few, be able to suffice the larger crowd, sustains for GM crops.

Keywords

GM crops, Agricultural biotechnology, GEAC, Regulatory framework, Governance

1. Introduction

Regulation of any technology requires more than just vesting powers in the hand of statutory authorities to govern such technology thereby serving the purpose for its introduction. Genetic technology has received enormous legislations, rules, regulations, international conventions, circulars, codes alongside a complex set of advisory, professional and regulatory bodies, committees and industry associations.[1] The question therefore is how effective these existing mechanisms are to make regulation a facilitation. Coming back to the discussion of the present research, the scope remains grounded to the Indian context with primary focus on the GM Rules, 1989. The Rules came into existence by virtue of Sections 6, 8 and 25 of the Environment (Protection) Act, 1986 (EPA, 1986) with a holistic perspective on safety against the risks posed by handling and production of any product of gene technology.

GM crops, being a product of gene technology, have received varied opinions from two extremes, namely, the proponents and the opponents. With each group having their established grounds with substantive evidence validating perspectives, integration of divergent views become necessary to channelize the course of actions that the technology should adopt. Regulations play a notable

[1] Food Safety and Standards Authority of India, 'Operationalizing the Regulation of Genetically Modified Foods in India' (FSSAI 2022) https://fssai.gov.in/upload/uploadfiles/files/fssa_interim_regulation_on_Operatonalising_GM_Food_regulation_in_India.pdf accessed 9 February 2026.

role in connecting stakeholders'[2] viewpoints along with societal necessities. This is why it becomes important to enquire into the existing regulatory mechanism governing GM crops in India. Consequences of commercial release of GM crops remain unknown even to biotechnologists carrying out such research, which is why, pre-release assessment in terms of increased regulatory filters, remains significant.[3]

While there has been an elaborated list of authorities that the GM Rules, 1989 is designed with, finding discussions in the later part of this article, the primary authority grabbing attention has remained to be the GEAC. The reason behind the same is this authority remains the final decision-maker as far as GMOs and its products are concerned. GEAC has been vested with wider scope in 2010[4], as its name changed from approval to appraisal committee indicating the role of the authority being inclusive of risk assessment, handling and management and approval of GMOs. The provisions by virtue of which the 1989 Rules has been enacted deals with rule making power of the Central Government to maintain environmental welfare, for individuals, dealing with hazardous substances. The new name of the old authority makes it a better compliant of the EPA, 1986 therefore.

Interestingly enough, the three decades old statute and authorities functioning under it, primarily governing GMOs and its offspring, did not seem to require restructuring or re-assessment. This imbibed confidence is possible only when the said Rules functions without any hurdles, but, GM crops instances in India, repeated claims on regulatory failures, courts' effort in awakening existing

[2] Marion Desquilbet & Sylvaine Poret, 'How do GM/non GM coexistence regulations affect markets and welfare?' (2014) 37 Eur JL & Econ 51.
[3]Suman Sahai, 'GM Research and Its Impact on Indian Agriculture' in Tata Energy Research Institute (ed), *Relevance of Genetically Modified Plants to Indian Agriculture* (TERI 2003) 107.
[4] Ministry of Environment and Forests, Notification (Change of Name of Genetic Engineering Approval Committee) 2010, GSR 613(E).

authorities, activists' collective efforts in raising awareness, suppressed farmers' voices, and hue and cry among general public, has a different story to offer. In order to determine the potential of this authority, a look into the journey it has decided for itself from the first commercial release of a cash crop, Bt Cotton to the first commercial release of a food crop, GM Mustard, definitely counts.

2. Reflecting on the GM Rules, 1989 from the lenses of GM crops cultivation in India

Notified under the EPA, 1986, the GM Rules, 1989 was introduced with the primary objective of putting in place a biosafety framework in India. Being a transformative technology in itself, gene technology comes with well-defined as well as unnamed threats towards human health, environment and nature. Such being the case, the Preamble of the 1989 Rules, expressly defines the legislative intent behind the introduction of the said Rules. Rule 2 of the said Rules, while having an inclusive approach towards defining the scope of the 1989 Rules, makes it mandatory for the Rules to apply in areas listed in Rule 2(2) and 2(3). GM crops remain a de jure component of the said Rule therefore, considering its literal interpretation.

It is interesting to note that the fulcrum of the 1989 Rules rest on the back of Rule 4 that lays down the existing regulatory framework for governance of Genetically Modified Organisms (GMO) in India. Spread over five clauses, mentioning five different authorities with each uniquely designed with a primary purpose and overlapping secondary functions, as provided hereunder, the GM Rules, 1989 definitely must have had a long-term goal in mind since its inception. The advisory committee working with the authorities mentioned below, namely the Recombinant DNA Advisory Committee (RDAC) is decorated with the function of reviewing biotechnological developments at domestic and international fronts along with recommendation of safety regulations in GMO associated research.

This authority, specifically speaking, aids the authorities listed under[5] to make an attempt in fulfilling their functions and exercising required statutory powers.

Rule 4	Authority	Power and Function	Liability
Rule 4(2)	Review Committee on Genetic Manipulation (RCGM)	● Monitoring safety in ongoing research related to gene technology. ● Laying down procedures for regulatory processes involving GMO to minimize environmental risks. ● Restricting any activity with GMO that is statutorily prohibited.	The usage of the word 'shall' in the Rules make it mandatory for the concerned authority to abide by the same. But, consequences of such violation do not find any express mentioning under the said Rules.

[5] The Table given is a representation of the authorities established under Rule of the GM Rules, 1989.

Rule 4(3)	Institutional Biosafety Committee (IBSC)	Preparing emergency plans according to the guidelines of RCGM to combat unprecedented challenges encountered in activities associated with GMO.	
Rule 4(3)(1)	Genetic Engineering Appraisal Committee (GEAC)	● Providing approval to all such activities that are carried out with GMO or in association with GMO. ● Approving proposals of genetically engineered organisms following quality assessment. Such approval is for the twin	

		purpose of experimental field trials as well as environmental release. ● Deliberate release of GMOs in special cases either for experimental field trials environmental release. ● Take punitive actions against unauthorized handling of GMO under the EPA, 1986.	
Rule 4(4)	State Biotechnology Co-Ordination Committee (SBCC)	● Inspect and investigate violation of EPA, 1986, if any, by	

		industries and institutions. ● Authorized to take punitive actions[6] in cases involving violation of EPA Act,1986. ● Periodical review of safety measures adopted by industries and institutions.	
Rule 4(5)	District Level Committee (DLC)	● Monitoring safety protocols involved in installing GMO and related applications, from an environmental perspective. ● Regularly submitting reports on its	

[6] The Environment (Protection) Act 1986, ss 15–16.

		functioning either to the GEAC or the SBCC.	

Drawing from Hohfeld's jural correlatives[7], power walks with liability for otherwise the former witnesses an uncontrolled nature with inclination towards arbitrariness followed by minimized transparency and accountability. It therefore is noteworthy to mention that the GM Rules, 1989 has nowhere expressed its intention to make room for liability of the existing authorities. The source of the same is loosely attached to the mandatory tonality of Rule 4. Furthermore, while there remains a way to review the decisions of the GEAC and SBCC through appeal under Rule 19, such have to be made by any authority appointed by the Ministry of Environment, Forests and Climate Change (MoEFCC). This limits the scope of expecting liability enforcement for the authorities equipped to award deterrent under the EPA Act, 1986 by virtue of the 1989 Rules.

Different stakeholders ranging from biotechnology scientists, medical scientists, environmentalists to that of farmers, business groups and consumers have different opinions to be kept on plate which largely influence the Indian government in policymaking process.[8] Agriculture being a subject-matter of State List[9] will have the involvement of both Central and State government. As far as field trials for GM crops are concerned, no-objection certificate (NOC) has been

[7] Walter Wheeler Cook, 'Hohfeld's Contributions to the Science of Law' (1919) 28 Yale Law Journal 721.
[8] Asheesh Navneet, 'Policymaking in the Context of Contestations: GM Technology Debate in India' (2018) 6(1) Studies in Indian Politics 117.
[9] Commission on Centre-State Relations, *Report: Summary of Recommendations* (Vol 7, 2010) ch 14.

received from four states only, namely, Punjab, Delhi, Andhra Pradesh and Maharashtra.[10] Even then, India has witnessed 'a not-so-transparent' behaviour by the authorities under the 1989 Rules with respect to the approval and denial of GM crops introduced in India.

With GEAC being the final decision-maker,[11] the spotlight rests on the same, although its actions are inter-woven with the other four authorities designed under the 1989 Rules. By virtue of Rule 9(2) of the 1989 Rules, GEAC 'may' in 'special cases' proceed with 'deliberative release' of GMOs. While this discretionary power does not have clarity on cases where it is to be used, the additional note given under Rule 9(1) defines 'deliberative release' as intentional transfer of GMOs to the environment in whichever way possible. The consequences of the prevalent ambiguity in the said Rule remains grave, requiring immediate attention for the existing cases surrounding GM crops in India can be said to be a by-product of Rule 9(2)'s application.

As has been mentioned previously, both the GEAC and SBCC have the authorization to take punitive actions against violators. Firstly, GEAC's actions are based out under the EPA, 1986[12]which does impose heavier deterrent on contravention of Rules, 1989 or any incidental directives. Whether such is the case for SBCC as well has not been expressly mentioned in the Rules as it says that SBCC imposing punishment is a possibility upon 'violation of statutory provisions'. Although Rule 15 of the 1989 Rules categorises 'penalties' as a different sub-head, other than 15(2), the Rule has nothing beneficial to offer as far as its title is concerned. It is well understood that violation of any provision of Rules 1989 or the EPA, 1986 largely, will be leading to affecting human health

[10] Kiran Pandey, 'GE Cotton: Three States Refuse NOC for Field Trials' (*Down To Earth*, 7 June 2023) https://www.downtoearth.org.in/agriculture/ge-cotton-three-states-refuse-noc-for-field-trials-89855 accessed 10 February 2026.
[11] Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms/Genetically Engineered Organisms or Cells 1989, GSR 1037(E), r 7.
[12] *Supra* 4.

and environment but what happens when the authorities themselves infringes such safety? The question can only be answered if there were liabilities in place with a check and balance framework for regulating the regulatory bodies.

While domestically the scenario remains grey for India, internationally speaking, with the introduction of the Cartagena Protocol on Biosafety, a need for a biosafety framework was felt among several developing countries. By reading the Protocol with the Convention on Biological Diversity (CBD)[13], the roadmap for handling, transporting and minimizing risk-based consequences associated with GMOs, can be discovered. While both the statutes promote precautionary approach[14] towards GMO handling[15], a similar trend is noticed in Indian legislations dedicated towards such governance. Interestingly enough, the application of such principle appears to remain eclipse by the whimsies of the existing authorities. A reflection has been discussed in the forthcoming headings. The present grey areas do invite ambiguity in terms of a future picture and calls for an in-depth research with respect to functions and powers adopted and implemented by the authorities under the GM Rules, 1989.

2.1. GEAC's role in promoting Bt Cotton cultivation in India: Could the functional transparency question be addressed?

Bt Cotton, released in 2002, amidst the absence of relevant information on GMOs in India among civil society, became the first and only commercial release of a GM crop in India.[16] It was the introduction of Bt Cotton in India that led to

[13] Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) art 11.
[14] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208 (Cartagena Protocol) art 10.6.
[15] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208 (Cartagena Protocol) art 18.
[16] Pushpa M Bhargava, 'GM Mustard and India's Future' (2016) 51(49) Economic & Political Weekly 10.

different political discourse between its proponents and opponents. Among the proponents of the transgenic crop, the technology was conceived as a solution to a primary challenge of the cotton sector, bollworm infection, thereby reducing the dependency on pesticides, benefitting farmers, agricultural economy and the environment.[17]Release of any other GM crop, commercially, with such affirmation, did not see the day light post 2002 owing to conflict of interest among authorities, as many cites.[18]It is noteworthy to mention that while approving Bt Cotton for environmental release, the GEAC had no precedent to follow therefore co-ordination among different ministries, namely the Ministry of Agriculture, Health, Environment and Forest and Science and Technology, was the only way to make this initiative work.

Interestingly enough the 2006 Report[19] released by a sub-committee formed under the MoEFCC exempted approved genes from extensive biosafety and agronomic testing, moving towards an 'event based approval system' instead of the 'case by case approval process'. An urgent need to strengthen enforcement mechanisms was duly felt by the committee alongside dissemination of information concerning field trials to the public. Weaknesses in the processes of the regulatory bodies giving approval to the field trials has been pointed out in the Technical Expert Committee Report[20]as well. Furthermore, the TEC opined for Post-Release Monitoring (PRM) as an important aspect to assess environment and health-safety issues. The committee was appointed following the order of the

[17] Ian Scoones, 'Regulatory Manoeuvres: Understanding the Bt Cotton Controversy' in Ian Scoones (ed), *Science, Agriculture and the Politics of Policy: The Case of Biotechnology in India* (Orient Longman 2006) 242.
[18] *Supra* 9.
[19] Expert Committee on Application of Agricultural Biotechnology, 'Recommendations for Streamlining the Current Regulatory Framework for Transgenic Crops' (May 2012) http://www.geacindia.gov.in/resource-documents/sub-committee-reports/mayee_report.pdf accessed 9 February 2026.
[20]Technical Expert Committee, 'Final Report' (August 2013) https://indiagminfo.org/wp-content/uploads/2013/08/TEC-Main-Report-2.pdf accessed 9 February 2026.

Supreme Court in a writ petition filed by Aruna Rodrigues and others.[21] Alongside this, the Parliamentary Standing Committee which assessed the prospects and effects of the cultivation of genetically modified food crops, observed that further research and development on transgenic crops should be done only in strict containment and field trials should not be undertaken till the government puts in place required regulatory, monitoring, oversight, surveillance and other structures.

The notable difference in the government's success slogans on Bt Cotton and the committee reports does reveal politics behind GM technology which is necessary to be considered before introducing a GM Policy in India. If Bt Cotton is taken as an example of a successful transgenic crop adaptation in India, it shows rapid technological acceptance amidst rigorous opposition.[22] But, parallel to such success lies stories of farmers' suicide,[23] limited accessibility to usage of technology in agriculture among farmers, cultivation without field trials, etc.

2.2. The 'bringing in' and 'taking out' tale on Bt Brinjal: What went wrong on the regulators part?

It was the success of Bt Cotton that led to the introduction of Bt Brinjal in India. As far as brinjal production in India is concerned, mishap created by fruit and shoot borer alongside chemical pesticides became responsible for the advent of Bt Brinjal.[24] It was the RCGM that concluded Bt Brinjal to be environmentally sound and effective in carrying out its purpose and objective. Furthermore, declaring food safety assessment of Bt Brinjal to be in compliance with the

[21] *Aruna Rodrigues & Ors vs Union of India & Ors* 2012 AIR SCW 3340
[22] Debanshu Khettry and Sreenivasulu NS, 'Regulation of Agricultural Biotechnology in India: Environmental Law and Other Policy Considerations' (2016–17) 5 Environmental Law & Practice Review 122.
[23] ibid.
[24] Genetic Engineering Appraisal Committee, 'Minutes of the 97th Meeting of the Genetic Engineering Appraisal Committee' (16 September 2009) http://www.geacindia.gov.in/Uploads/MoMPublished/2009-geac-97.pdf accessed 9 February 2026.

'Guidelines for the safety assessment of foods derived from GE plant, 2008'[25], the crop was said to be neither toxic nor allergenic to humans and animals. As discussed previously, GEAC goes by RCGM's recommendation and the present case was nothing different.

The trials on Bt Brinjal that was carried out by Mahyco, with an intention to commercialize it, along with GEAC's field trials and research data was always kept in abeyance of the public. With Supreme Court's intervention in the Bt Brinjal debate,[26] GEAC was mandated to release the reports submitted by Mahyco thereby helping the debate reach a conclusion from the civil society's end that the trials conducted were deficient. Although clearance from GEAC's end in 2009[27] led to release of Bt Brinjal in the environment, the interesting factor here is that Mahyco, the company who came with this transgenic crop, and as had claimed, followed GEAC's directives before leading to Bt Brinjal's release. But, the repercussions of such release owing to negligent assessments that have been carried out does not make Mahyco responsible, for it did what the apex regulator of GM crops in India has guided it to do.

Interestingly, within a year, the decision of imposing a moratorium on commercial release of Bt Brinjal until independent scientific studies reached their satisfaction of clearing the transgenic crop amidst environmental and health tensions was made by the MoEF on 9th February, 2010.[28]It was the lack of proper bio-safety regulations for the environmental release of transgenic crops in India that made the Biotechnology Regulatory Authority of India Bill, 2013 (BRAI

[25] Department of Biotechnology and Ministry of Environment and Forests, *Guidelines for the Safety Assessment of Foods Derived from Genetically Engineered Plants* (2008) 12.
[26] VS Viswambharan, 'Eat, Pray, Law: Implications of the Absence of a Coherent Regulatory Regime and the Problem of Genetically Modified Food in India' (2013) 2(1) Nirma University Law Journal 9.
[27] *Supra* 16.
[28]Jairam Ramesh, 'Moratorium on Bt Brinjal' (*Centre for Science and Environment*, 9 August 2010) https://www.cseindia.org/moratorium-on-bt-brinjal-jairam-ramesh--1051 accessed 10 February 2026.

Bill, 2013)[29] feel its importance. BRAI Bill, 2013 which came with major flaws, one of them being exclusion of GM crops and foods from the purview of Food Safety and Standards Act, 2006, failed to achieve anything significant.[30]

2.3. Approval of DMH-11 Mustard for cultivation: Repetition of past mistakes?

GM Mustard, considered to be the first indigenously developed crop in India, was recommended for environmental release on October 18, 2022 through the 147th Meeting of GEAC.[31]Although introduced as an answer to edible oil shortage, GM Mustard, failed to achieve its purpose as opponents' defence citing failed technology application in previous cases of Bt Cotton and Bt Brinjal weighed more.[32]

While procedure laid down in GM Rules, 1989 gets followed before approval of any transgenic crop and further release in the environment, the interesting factor is the way each meeting conducted by GEAC is presented before the public. It appears that while GEAC had already made up its mind to proceed with GM Mustard without adequate risk assessment and biosafety protocols, delaying the same through meetings appeared to be a deliberate attempt in covering up its failed efforts. The discussed transgenic crop was the first food crop to be approved by GEAC[33]with no involvement of Food Safety and Standard Authority

[29] PRS Legislative Research, 'The Biotechnology Regulatory Authority of India Bill, 2013' (*PRS India*) https://prsindia.org/billtrack/the-biotechnology-regulatory-authority-of-india-bill-2013 accessed 11 February 2026.

[30] Coalition for a GM-Free India, 'What's Wrong with the BRAI Bill 2013? Read On to Find Out' (*India GM Info*) https://indiagminfo.org/whats-wrong-with-the-brai-bill-2013-read-on-to-find-out/ accessed 9 February 2026.

[31]Press Information Bureau, 'GEAC Recommends Approval for Genetically Modified Mustard' (21 July 2023) https://www.pib.gov.in/PressReleasePage.aspx?PRID=1897008 accessed 10 February 2026.

[32] Vandana Shiva, 'GMO Mustard: An Unnecessary, Toxic, and Failed Technology' (*Navdanya International*, 2022) https://navdanyainternational.org/gmo-mustard-an-unnecessary-toxic-and-failed-technology/ accessed 14 February 2026.

[33]Genetic Engineering Appraisal Committee, 'Minutes of the 136th Meeting of the Genetic Engineering Appraisal Committee' (12 October 2018)

of India (FSSAI) in the meeting granting such approval. It was the Indian Council for Agricultural Research (ICAR) and Indian Council for Medical Research (ICMR) involved at biosafety research level to take care of environment and food safety concerns.[34] Considering the easier road travelled by the GEAC and the associated authorities in this case, consciously ignoring the previous encounters it had with its unfavourable decisions on transgenic crops, heavier consequences were knocking its doors. It was a series of connected petitions that the division bench of the Supreme Court heard in a significant case of *Gene Campaign v. Union of India*[35] involving the GM Mustard dispute. Although resulting in split verdict, the observations made by the bench, individually, pointed out grave reluctance on the part of GEAC carried out uniformly since its induction.

Interestingly, one of the fundamental issues addressed by the Apex Court was whether GEAC's decision in approving the environmental release of GM Mustard was according to the law. Such questions are raised to set the narrative in order to discuss what the regulatory framework fails to. While the Court began with how GEAC violated its order[36]by not putting up the biosafety dossier for public comments even after dual inspection by sub-committees formed, it focused on GEAC's independent decision of deferring field trials after unsatisfactory *consensus ad idem*. But it was the letter from the Centre for Genetic Manipulation of Crop Plant (CGMCP) to the MoEFCC that made GEAC a dictation taking body merely. GEAC's brain child, the Expert Committee newly constituted, suggested risk assessment of transgenic GM specifically on honeybees as pollinators 'post-

http://www.geacindia.gov.in/Uploads/MoMPublished/MoMPublishedOn20181012223929.pdf accessed 11 February 2026.

[34]Genetic Engineering Appraisal Committee, 'Minutes of the 147th Meeting of the Genetic Engineering Appraisal Committee' (20 September 2022) http://www.geacindia.gov.in/Uploads/MoMPublished/MoMPublishedOn20220909190233.pdf accessed 11 February 2026.

[35] *Gene Campaign vs Union of India* 2024 INSC 545.

[36] *Supra* 14.

environmental release'.[37] Going by the settled principles of administrative law,[38] authoritative decision-making is to be backed by reasons alongside adoption of principles of fairness, equity and good conscience. Furthermore, such authority established by a statute is bound by it and has to deliver functions in accordance to it. Therefore, neglecting mandates and functions required to be performed as provided in the law makes the decision of GEAC legally unsound and unstainable.[39] The notable judgment, although not to be presumed as authoritative precedent, for two contrasting opinions on the plate, provided a definite observation by extending the scope of judicial review to GEAC's decision.

Mustard, which has not been limited to being an oilseed only, extends to Indian cuisine as far as its leaves are concerned as well. It is this wholesome purpose that calls for a "holistically aware" approach that not only popularizes GM mustard seeds but preserves naturally occurring seeds as well.[40] It was therefore by virtue of this judgment that GM Mustard was withdrawn indefinitely from the activities it was proposed with unless an appropriate bench be appointed by the Hon'ble Chief Justice of India.

3. Co-existence of GM Rules, 1989 and Food laws in India: Tracing the provisional compatibility

Carrying forward a rather uncomfortable discussion, taking into consideration the three fundamental cases of GM crops in India, the missing link that seems to exist is provisional compatibility between the biosafety framework and the food laws

[37] DTE Staff, 'GEAC Approves Field Studies of GM Mustard on Honey Bee' (Down To Earth, 26 October 2018) https://www.downtoearth.org.in/agriculture/geac-approves-field-studies-of-gm-mustard-on-honey-bee-61947 accessed 14 January 2026.
[38] SR Rao and KV Prabhu, 'Genetically Modified Crops in India: Testing the Waters' (2001) 6(2) Science, Technology & Society 251.
[39] *Supra* 48.
[40] Krishnadas Rajagopal, 'Indigenous GM Mustard Meant to Make Edible Oil Cheaper, Reduce Import, Centre Tells Supreme Court' *The Hindu* (New Delhi, 18 January 2024) https://www.thehindu.com/news/national/indigenous-gm-mustard-meant-to-make-edible-oil-cheaper-reduce-import-centre-to-supreme-court/article67751742.ece accessed 13 January 2026.

of India. The supporters of GM crops have indeed recognised the role of modern biotechnology as a catalyst to attain food security.[41]It is the advantages of biotechnology that vests equal importance on the right of everyone to enjoy scientific benefit and the right to food.[42] For these rights to be enforceable, tracing their statutory existence is a necessity which is why the present research dedicates itself in unfolding the fraternity between 1989 Rules and the two relevant food legislations in India.

As far as GM crops that will serve consumption purposes are concerned, GEAC's reasoned decision should be a reflection of FSSAI's consultation.[43] This is because food security comes with food safety. The burden of ensuring the same although rests entirely on FSSAI, owing to the nature of the crops being transgenic, GEAC must walk along. It was the recent encounter of the Apex Court with the efficiency of the existing GMOs governing authorities that worried the former about the absence of FSSAI's regulation as far as GM processed food and food crops are concerned, since the very beginning.[44] The reading together of the GM Rules, 1989 alongside food legislations is indicative of an efficient approach towards managing larger risks of toxicity, allergenicity, nutritional analysis, etc. While the Food Safety and Standards Act, 2006 focuses on 'safe wholesome food for human consumption'[45] by laying down required standards, the National Food Security Act, 2013 promotes 'increased access of adequate quantity of quality food' for human consumption. Both legislations have definite inclination towards safe and quality food indicating the legislative intent behind their drafting.

[41] Stéphanie Barral, 'The Bt Cotton Controversy in India: What is at Stake for Indian Farmers?' (2014) 49(14) Economic and Political Weekly 41.
[42] Arjunan Subramanian and Matin Qaim, 'Impact of Bt Cotton on Farmers' Health: A Case Study from India' (2009) 6(2) EcoHealth 263.
[43] *Supra* 52.
[44] ibid.
[45] Food Safety and Standards Act 2006, Preamble.

Prior to the introduction of the 2006 legislation, GEAC remained the de jure authority to decide upon release of GM foods for human consumption. Such being inclusive of GM food crops as well. But by virtue of the FSSAI in place following 2006, the scenario changed significantly. Section 22 of the said legislation expressly confers competence to regulate GM foods through the inclusion of 'genetically modified or engineered food or food containing such ingredients' within the definition of food. There exists no harm in expanding the interpretation of the provision to extend to any GM crops that will ultimately be consumed by the masses. Keeping this in mind, it becomes ideal for GEAC to mandatorily include FSSAI in the former's decision-making as far as the related subject-matter is concerned.[46] An absence of the same in both Bt Brinjal[47] and GM Mustard cases[48] has been alarming therefore.

Back in 2008, GEAC had adopted "Guidelines for Safety Assessment of Foods derived from GE Plant"[49]. Such was in consonance with the guidelines issued by Codex Alimentarius Commission (CAC). In both the discussed cases of Bt Brinjal and GM Mustard, whether such guidelines were followed by GEAC before final approval, how were such guidelines followed, who checked on such following, remains unattained. The best evidence for that remains the consequences discussed previously in this article. Furthermore, India being an

[46] Food Safety and Standards Act 2006, s 22.

[47] Genetic Engineering Appraisal Committee, 'Decisions Taken in the 107th Meeting of the Genetic Engineering Appraisal Committee' (9 February 2011) http://www.geacindia.gov.in/Uploads/MoMPublished/2011-geac-107.pdf accessed 10 February 2026.

[48] SpicyIP, 'The End of the Regulatory Lacunae? Analyzing the Rajasthan High Court's Definitive Mandate on GM Food Safety' (*SpicyIP*, 11 November 2025) https://spicyip.com/2025/11/the-end-of-the-regulatory-lacunae-analyzing-the-rajasthan-high-courts-definitive-mandate-on-gm-food-safety.html accessed 10 February 2026.

[49] Department of Biotechnology, *Guidelines for the Safety Assessment of Foods Derived from Genetically Engineered Plants* (2008) https://dbtindia.gov.in/sites/default/files/GE_Plant_2008.pdf accessed 14 January 2026.

elected member[50] in the Executive Committee of CAC, has been getting definite opportunities to substantially contribute to setting up international standards for food thereby deciding its ideal future.[51] Such being the case, it becomes even more relevant for India to have an effective domestic biosafety framework in place to embrace challenges and not suffer because of them. It is ideal for the framework to be composed of authorities specially made to regulate GMOs and its products and regulators assigned for ensuring healthy and safe food for human consumption. It is for this reason compatibility between provisions of GM Rules, 1989 and the food laws in India remains the need of the time.[52]

3.1. The Food Safety and Standards Act, 2006: An underrated regulation governing consumable GM crops

The definition of 'food' by virtue of Section 3(k) of the Act extends to GM food as well thereby setting the tone for the discussion as to whether FSSAI has to have a substantial involvement in regulation of the same.[53] Section 16 of the legislation carries forward this conversation by vesting FSSAI with the function of enforcing quality control in relation to any article of food alongside maintaining transparency among enforcement authorities by communicating the method of sampling and analysis for such food products. Such authority as far as GM crops that are produced for human consumption are concerned includes those established under the GM Rules, 1989.[54] FSSAI has also been responsible for providing technical aids and scientific advice to the Central Government for the

[50] Press Information Bureau, 'Union Environment Minister Reviews Status of GM Mustard' (18 July 2024) https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=1981926 accessed 9 February 2026.
[51] Ministry of Environment, Forest and Climate Change and Biotech Consortium India Limited, *Genetically Modified Crops and Regulations in India: Myths vs Facts* (2019) https://www.biotech.co.in/sites/default/files/2020-01/2019%20Genetically%20Modified%20Crops%20and%20Regulations%20in%20India%20%E2%80%93%20Myths%20vs%20Facts%2C%202019.pdf accessed 10 January 2026.
[52] 'Social Security in India (continued)' (1953) 16 Soc Sec Bull 22.
[53] Klaus M Leisinger, 'Biotechnology and Food Security' (1999) 76 Current Science 488.
[54] *Supra* 48.

purpose of policy framing in relation to food safety and nutrition.[55] It goes without saying that such advice has not been required even when the matters surrounding GM crops remain vibrant and juvenile. The absence of FSSAI's representative while GEAC took the final call to allow commercial cultivation of the first GM food cash crop,[56] supports the above contention.

By virtue of Section 18 of the Food Safety and Standards Act 2006, the general principles governing food safety have been established, ipso facto applying to GM crops made available for consumption.[57] The FSSAI has been cited under Clause 1(b) of the provided provision to be responsible for carrying out risk management following risk assessment for all food released in the market. It becomes the inherent liability of RCGM under the GM Rules, 1989 therefore to give effect to its approved duty of monitoring safety of ongoing projects involving GMO, in an efficient manner.[58] On the basis of such assessment will the IBSC come up with its emergency plan as a precautionary measure. Scientific uncertainty welcomes risk, the consequences of which on human health remains unfound. While the FSSAI takes into account the same under Section 18(1)(c), the RCGM's attention has to be drawn to work with the former thereby reflecting on health safety alongside previously assigned environmental safety.

Section 18(2)(d) of the 2006 Act voices transparency and welcomes participation from the grass-root level in the process of preparation, evaluation and revision of a regulation passed by the FSSAI.[59] Interestingly enough, GM Rules 1989 mentions DLC as one of the five authorities under it, working in districts, whose

[55] Food Safety and Standards Act 2006, s 16(3).
[56] *Supra* 69.
[57] RT Gahukar, 'Status of Genetically Modified Food Crops in India' (2002) 31(1) Outlook on Agriculture 43.
[58] Rules for the Manufacture, Use/Import/Export and Storage of Hazardous Micro Organisms/Genetically Engineered Organisms or Cells 1989, r 4(2).
[59] Albert C Lin, 'Biotechnology: Emerging Technology Past and Present' *in Prometheus Reimagined: Technology, Environment, and Law in the Twenty-first Century* (University of Michigan Press 2013).

mandatory responsibility is to regularly submit its safety monitoring of GMO-related activities report to either the SBCC or GEAC.[60] Additionally, Section 30 of the Act mandates the appointment of the Commissioner of Food Safety by the State Government to holistically address public health effects, handling, production and sale of food products for consumption, raising needed awareness among the general public in subjects of food safety and standards as adopted and effectively implementing decided standards of food safety.[61]

Furthermore, Section 30 read with Section 39 of the 2006 Act makes the Commissioner liable for exceeding vested power by levying a penalty of up to one lakh rupees on it. It is because of such existing liability that the Commissioner is made to carry out its activities according to the law. Additionally, a self-regulatory mechanism has been incorporated by Section 28 of the Act using which a food business operator can withdraw the food, all by themselves, which appears to not be in compliance with the 2006 Act or any incidental rules. Such remains the protective shield to safeguard 'misinformed' consumers the whereabouts of their consumption.[62] A contrary situation is noticed in case of the GEAC and authorities under Rules, 1989 as the scope of liability is absent making no room for cross-checking their activities that have been time and again appeared to be in contravention of the existing regulations. Reading the Rules with the Act is therefore indispensable for better governance of GM crops produced for ultimate consumption or GM foods, whatever the case may be.[63] The work which remains therefore is not structural outlining but implementation

[60] Rules for the Manufacture, Use/Import/Export and Storage of Hazardous Micro Organisms/Genetically Engineered Organisms or Cells 1989, r 4(5).
[61] Colin A. Carter & Guillaume P. Gruere, 'New and Existing GM Crops: In Search of Effective Stewardship and Coexistence' (2012) 4 Ne U LJ 169.
[62] Sanyukta Biswas and Vasu Jain, 'GM Food: Do We Have a Choice' (2014) 2 International Journal on Consumer Law and Practice 74.
[63] H Charles J Godfray and others, 'Food Security: The Challenge of Feeding 9 Billion People' (2010) 327 Science 812.

of the existing system in a harmonious manner for both GEAC and FSSAI in order to contribute towards effective capacity building.

3.2. The National Food Security Act, 2013: The Tomorrow's Move

Although food security remains an independent variable to GM crops and discussions related to it, the relationship cannot be avoided. The objective of genetic engineering in the context of food security is to not remain inventing freakish hybrids but to sustain yields of cultivated plants.[64] The need for better governance and an appropriate long-term structural planning by the stakeholders to gene technology is therefore felt.[65] It is in this context the social-welfare based legislation, the Act of 2013, finds its position. Food security through GM crops is not expressly discussed in this legislation but it prima facie appears that the legislators while drafting the Act did not completely ignore the potentials of transgenic crops in mitigating food insecurity in India. Such is evident by virtue of Section 31 read with the Third Schedule of the Act.

The provision uses the phrase 'advancing food and nutritional security' thereby indicating that transgenic crops are to be used to do more than what organic cultivation is successfully doing and not merely replace the latter by the former.[66] While doing so, the Central Government along with the state governments and local authorities, in order to revitalise agriculture, need to multiply investments in agriculture in terms of research and development, promoting increased productivity and production in it. Increasing yield has remained the fundamental reasons for introduction of transgenic crops in India[67], as has been the common

[64] *Supra* 68.
[65] World Health Organization, 'GM Food and Food Security' in *Modern Food Biotechnology, Human Health and Development: An Evidence-Based Study* (World Health Organization 2005), https://www.jstor.org/stable/resrep35658.9, accessed 12 February 2026.
[66] Colin A. Carter & Guillaume P. Gruere, 'New and Existing GM Crops: In Search of Effective Stewardship and Coexistence' (2012) 4 Ne ULJ 169
[67] S Jhansi Rani and R Usha, 'Transgenic Plants: Types, Benefits, Public Concerns and Future' (2013) 6 Journal of Pharmaceutical Research 879.

justification in the previously discussed cases, communicated both by MoEFCC and GMOs governing authorities. But whether such could bring in agricultural overhaul that helps the farmers, breeders, producers and consumers, the pillars upholding agricultural practice in India, remains a question.[68] Moreover, India being a federal democracy, effective capacity building signifies involvement of three-tier level of governments, a structure existing in both GM Rules, 1989 and FSSAI, 2006 and also established by Sections 38 and 39 of the 2013 Act.

The National Food Security Act, 2013 has been rarely discussed in the existing literature with respect to GM crop cultivation and food to be produced from it for consumption purpose. The reason, although unknown, may be the unidirectional interpretation of the 2013 legislation to implement the right to food as a fundamental right under Article 21 of the Indian Constitution. A small yet powerful hidden phrase in the Preamble of the Act that is 'quality food', and the relevant phrase 'advancing food security' provided in Section 31, has been completely forgotten to be a part of this legislation.[69] The latter incorporates the principles of sustainable development[70] as food security being a social problem that needs to be mitigated for the present generation without neglecting the scope of such a challenge for the generations to come.[71] It is for these reasons; the 2013 Act has to be included whenever food security is discussed in the context of GM crops and its governance in India.

4. Conclusion and Recommendations

The 'much celebrated' US-India Trade Deal received global attention owing to India's consistent negotiation to un-accept GM crops that witnessed a significant

[68] Vandana Shiva and others, *The Future of Food: Farming with Nature, Cultivating the Future* (Navdanya International 2019).
[69] National Food Security Act 2013, s 31.
[70] Richard Bownas, 'Lost in Transnationalism? GMOs in India and the Eclipse of Equitable Development Discourse' (2016) 11(1) Journal of South Asian Development 67.
[71] Emily Webster & Peer Zumbansen, 'Transnational Food (In)Security' (2018) 9 Transnat'l Legal Theory 175.

push from the West.[72] Portraying its socialist spirits, India, while expressing reluctance towards modern biotechnological products, intended to hide its underlying fear. One of the fundamental reason behind opposing GM crops, that goes untraced has remained the fragile state of the domestic legislation that the country is home to. Irrespective of whatever stand India took to protect its subjects, ignorance is not bliss in this context.

Applications surrounding plant biotechnology often become prey to misrepresentation when in contact with the masses and is cited to be prejudicial to the public because of the consequences it offers and the risks they are designed with. From approving a GM crop for field trials following providing green signal to its environmental release and furthering commercial cultivation making it ultimately fit for human consumption, the final call has always been of the GEAC. When authorities themselves are well versed with the unforeseen health and environment hazards that GM crops possess together with being metabolically dangerous for consumption, it would not be wrong to presume that the burden of remedying grave outcomes vests on the authorities entirely. The article locates the ideal loopholes in the working of the GEAC under the GM Rules, 1989 thereby tracing its functions reflective in the three primary cases of transgenic crops that India witnessed.

The Hindu reported[73]approval of confined field trials of GM Maize by the GEAC and scheduled to be carried by Punjab University although such activities are to be limited to research purposes only for the timing with commercialization at hold. While oppositions have not ignored this new entrant, the absence of

[72] Abhijay A, 'Seed of Resistance: How India's Farmers are Blocking a GMO-powered Trade Deal?' *Down to Earth* (18 July 2025) https://www.downtoearth.org.in/agriculture/seed-of-resistance-how-indias-farmers-are-blocking-a-gmo-powered-trade-deal accessed 12 February 2026.

[73] Confined Field Trials on GM Maize to Begin Soon at Punjab Agricultural University' *The Hindu* (15 July 2025) https://www.thehindu.com/news/national/punjab/confined-field-trials-on-gm-maize-to-begin-soon-at-punjab-agricultural-university/article69814457.ece accessed 11th January 2026.

competent authority in places supports opponents' concern. In addition to this, USA's push for GM crops[74] has been worrisome thereby keeping the US-India trade deal in an unfinished position as farmers cultivating such crops already are likely to be the prey to such acceptance by India. Even though by citing farmers' distress, diplomats have been shifting their attention from the depressing domestic legislations governing GM crops with some not fit enough to be used and others being kept underused, reality does not change. With these troubles entering as unwelcome guests in India, she became the first country to develop genome-edited rice varieties[75] intending to revitalize agricultural scenes but interestingly not involving the GEAC in the decision-making. Citing absence of foreign gene insertion, GEAC's approval has not been considered in the same. There arise two possible questions in this context, one being, whether diplomats wish to do something indirectly, what cannot be done directly and if at all GEAC has a defined scope when it comes to exercising its regulatory powers. While the first question can be answered in affirmative, the following question supports the first answer as GM Rules, 1989 is ideally supposed to govern everything coming from genetic engineering usage, be it insertion or absence of foreign gene.

With ambiguity hovering around legislature and the executive, the judiciary, although in a split verdict[76], have exercised reasonableness while indicating the need for a GM Policy in India with increased transparency and accountability as far as the GEAC's working is concerned. It not only needs work within the GM Rules, 1989 by amending the age-old legislation with provisions of liability for

[74] U.S. Trade Deal: India Targeting July 8 Deadline but Can Extend to Aug. 1 if Deal Specifics Don't Suit' *The Hindu* (8 July 2025) https://www.thehindu.com/business/Industry/us-trade-deal-india-targetting-july-8-deadline-but-can-extend-to-aug-1-if-deal-specifics-dont-suit/article69786855.ece accessed 12 February 2026.

[75] Press Information Bureau, 'Union Agriculture Minister Shri Shivraj Singh Chouhan Announces Two Genome-Edited Rice Varieties Developed in India' (4 May 2025) https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=2126802 accessed 13th January 2026.

[76] *Supra* 64.

the authorities and streamlined process of approving a GM crop but also a collective reading with the food laws in India to adopt and add necessary things highlighted in this article. It is only through effective authorities in place can the fate of GM crops in India be decided.

ANTICIPATORY MILITARY ACTION ON NUCLEAR FACILITIES AND THE TRANSFORMATION OF ARTICLE 51: IRAN, VENEZUELA AND THE CRISIS OF ANTICIPATORY SELF-DEFENCE IN CONTEMPORARY INTERNATIONAL LAW

Mr. Pranav Kushwaha Assistant Professor & Ms. Anchal Jaiswal Assistant Professor, Amrita International School of Law, Amrita Vishwa Vidyapeetham, Coimbatore

Abstract

The Pre-emptive military strikes on nuclear power stations is a very controversial topic of contemporary international law. In this article, the evolving definition of Article 51 of the UN Charter concerning the emergence of nuclear dangers will be considered, highlighting such aspects as the nuclear ambitions of Iran, failure of the JCPOA agreement and growing strategic partnership of Iran and Venezuela. This study will investigate the possibility that contemporary security concerns have changed the traditional parameters of imminence, necessity and proportionality of the use of force under the Caroline doctrine, case laws and state practices.

It states that the rise of threshold nuclear powers, quick weaponization technology, proxy wars, cyber-attacks, and transnational security networks has made it difficult to distinguish between anticipatory and preventive self-defence. This article goes ahead to discuss how economic sanctions, covert activities, and strategic containment policies have made it difficult to understand the idea of pre-emption through traditional means. While acknowledging the threat to the global community because of the proliferation of nuclear weapons, the author maintains that an expanded understanding of

anticipatory self-defence will pose a threat to the collective security system as outlined in the United Nations Charter.

Keywords: Anticipatory Self-Defence; Article 51 UN Charter; Iran Nuclear Programme;Threshold Nuclear States; Collective Security.

I. INTRODUCTION

Legitimacy of pre-emptive attacks on nuclear sites is one of the most controversial strategic questions that contemporary international law faces today. Indeed, the issue lies at the crossroads of issues relating to collective security, sovereignty of states, proliferation of nuclear arms, and emerging notion of self-defense as defined by the UN Charter. There is a strict prohibition of the unilateral use of force in international law due to the provisions of Article 2(4) of the UN Charter according to which states should not use "the threat or use of force against the territorial integrity or political independence of any state."[1] However, changing geopolitics, emergence of threshold nuclear countries, and increasing fear about weapons of mass destruction have challenged the established understanding of self-defense. Controversies arise more frequently than ever before when speaking of Iran's nuclear development especially after disintegration of the Joint Comprehensive Plan of Action (JCPOA), resumed uranium enrichment, and growing military tensions between Iran, Israel, and USA during 2025–2026. The developments have triggered discussions of legitimacy of pre-emptive self-defense in relation to attacks on nuclear installations prior to the actual aggression.

Discussion on the issue of anticipatory self-defense in today's world is based on the contradiction between Article 2(4) and Article 51 of the United Nations Charter. Article 51 recognizes the "inherent right of individual or collective self-

[1] U.N. Charter art. 2, ¶ 4.

defense in case of an armed attack",[2] It does not state explicitly whether it is possible to use military force prior to an attack occurring. The lack of clarity has led to differing interpretations by scholars and states. According to a strict interpretation, only the right of self-defense in reaction to an armed attack exists, thereby preserving the system of collective security created by the Charter, and limiting unilateral military action.[3] Alternatively, a liberal interpretation holds that the Article 51 leaves intact the existing rules of customary international law, in particular, developed in relation to the Caroline case of 1837, which allows use of force preemptively when its necessity is "immediate, overwhelming, leaving no alternative means, and no time for deliberation.".[4] Modern security issues such as the threat of nuclear war, cyberattacks, proxy wars, clandestine weapons development have fueled the need for a more liberal interpretation.

The discourse grew fiercer after alleged Israeli military operations on Iran's nuclear facilities in 2025, referred to by strategic experts as "Operation Rising Lion." These operations were aimed at uranium enrichment and missiles development centers in particular, such as Natanz and Fordow. While Israel justified its moves based on existential threats of Iran acquiring nuclear power, world's reactions were polarized nonetheless. Contrasting the massive backlash after Israeli strike on Iraq's Osirak facility in 1981 (referred to as "Operation Opera"), reactions on Israeli attack in 2025 seemed relatively mild and more complex.[5] Numerous Western countries pointed out Iran's violations of its obligations before IAEA and enrichment of uranium up to weapon grade levels, while most developing countries claimed the operations to be violations of Iran's sovereignty and international law (based on the UN Charter). Such differences

[2] U.N. Charter art. 51.
[3] Christine Gray, *International Law and the Use of Force* 150–53 (5th ed. 2025).
[4] Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), reprinted in 29 Brit. & Foreign State Papers 1137, 1138 (1857).
[5] Suzanne Raine, The Rights and Wrongs of Self-Defence, Engelsberg Ideas (June 30, 2025), https://engelsbergideas.com.

show the emerging change in state policy on preventive measures toward threshold nuclear states.

Furthermore, Iran's increased strategic relations with countries including Venezuela and Russia complicate the situation legally and politically, as the cooperation in energy, sanctions evasions, drones, and allegedly missiles supplies increases the view of Iran being a member of anti-Western strategic alliance.[6] Over the years, there has been an increase in the use of economic sanctions, cyber attacks, sea interdictions, and targeting restrictions against the Iranian-Venezuelan network as a pre-emptive move for security purposes. From the above analysis, it is clear that pre-emption now includes not only military attacks but also economic warfare, cyber attacks, covert operations, and strategic containment. In this regard, the developments give rise to some fundamental questions regarding whether it is normal to apply anticipatory self-defensive actions in line with international law considering nuclear security and hybrid security challenges.

The paper suggests that changes in state practice towards the Iranian nuclear program can be viewed as a new trend in terms of international law with respect to the right to anticipatory action. It suggests that while traditional Caroline principles govern the legitimacy of any such actions, changing geopolitical realities affect the interpretation of the paper 51 through imminence, necessity, and proportionality concepts. By analyzing state practices, International Court of Justice rulings, Israeli history of pre-empting the nuclear facility, Iranian nuclear crisis after JCPOA agreement, and geopolitics that involve Venezuela, the paper demonstrates that there is growing blurring between anticipatory self-defense and preventive self-defense according to international law.

[6] Treasury Targets Iran-Venezuela Drone and Oil Network, Reuters (Dec. 30, 2025).

II. THE EVOLUTION OF ANTICIPATORY SELF-DEFENCE: FROM THE CAROLINE DOCTRINE TO CONTEMPORARY NUCLEAR THREATS

Anticipatory self-defense falls into one of the most controversial areas of international law relating to the use of force. While the UN Charter's ban on unilaterally using force is stipulated in Article 2(4), the interpretation of Article 51 has raised considerable controversy about whether states may employ force even before experiencing an actual armed attack.[7] Historically, the origins of the doctrine of anticipatory self-defense trace back to the case of Caroline of 1837 when British troops attacked American territory and sunk the American schooner Caroline, allegedly being used by Canadian rebels against the British rule.[8] In the exchange of correspondence between the two parties, U.S. Secretary of State Daniel Webster articulated what eventually became the common law standard for anticipatory self-defense. The secretary argued that force could only be justified in circumstances where there was an immediate danger of attack and when there were no other options than to use force, and the need for it was overwhelming, providing for no choice whatsoever and leaving no room for deliberation.[9] It was additionally important for the defensive response to be commensurate with the threat. Both the necessity and proportionality have been a part of customary international law for many years.

Indeed, the ratification of the Charter of the United Nations in 1945 had a very great impact on the body of laws governing the application of inter-state force. According to the Charter of the United Nations, in the post-WWII era, the Charter sought to substitute the use of unilateral force for collective security which

[7] Supra Note 1, at 1.
[8] R.Y. Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82, 82–99 (1938).
[9] Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), reprinted in 29 Brit. & Foreign State Papers 1137, 1138 (1857).

focused on the Security Council.[10] Article 2(4) accordingly prohibited the "threat or use of force against the territorial integrity or political independence of any state," thereby establishing one of the central constitutional norms of the international legal order.[11] This means that Article 2(4) prohibits "the threat or use of force against the territorial integrity or political independence of any state," thereby creating a fundamental constitutional principle of international law.[12] Meanwhile Article 51 safeguards the "inherent right of individual or collective self-defence if an armed attack occurs against a member." The wording "if an armed attack occurs" was a very controversial one in doctrinal discussions.[13] Restrictionists have argued that Article 51 restricted customary international rights by limiting self-defense to an actual armed attack. This interpretation sees anticipatory self-defense as unconstitutional due to unilateral threat assessments and the undermining of collective security systems. The other side of the debate argues that Article 51 did not abolish customary international rights but merely preserved them and that therefore anticipatory self-defense is allowed under Caroline criteria.[14]

The ICJ has generally adopted a cautious attitude with regard to the principle of anticipatory self-defense. In case "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)," the Court emphasized the need for an armed attack, which triggers the right of self-defense as provided for in Article 51, thus emphasizing a strict approach to the interpretation of the provisions of the charter.[15] In "Oil Platforms (Iran v. United States)," the ICJ stated again that a legitimate act of self-defense should comply with the necessity

[10] Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* 3–10 (2002).
[11] U.N. Charter art. 2, ¶ 4.
[12] U.N. Charter art. 51.
[13] Christine Gray, *International Law and the Use of Force* 150–54 (5th ed. 2025
[14] Yoram Dinstein, *War, Aggression and Self-Defence* 220–25 (7th ed. 2024).
[15] Military and Paramilitary Activities (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 194 (June 27).

and proportionality conditions set by customary international law. The ICJ has shown a strong concern about the possibility of expanding the notion of anticipatory self-defense, since this would lead to undermining of the entire charter regime by legalizing preemptive wars based on assumptions.[16] This issue was clearly evident after the 2003 invasion of Iraq, where the U.S. and the UK tried to justify their military participation based on arguments of pre-emptive war and possession of weapons of mass destruction.[17] The fact that no weapons were found in Iraq greatly reduced the credibility of theories of broad self-defense.

Despite this, however, the changing face of strategic reality in the early twenty-first century poses challenges for traditional understandings of imminence and acts of aggression. Modern threats include such diverse phenomena as cyber war, proxies, transnational terrorism, missiles, and "threshold nuclear" powers capable of rapidly developing nuclear weapons without crossing the weaponization threshold.[18] This trend has led many people to suggest that the Caroline standard needs to be updated in view of modern technological developments. Proponents of the expanded right of anticipatory self-defense contend that requiring states to wait for an enemy state to attack with nuclear weapons undermines the very purpose of self-defense with regard to weapons of mass destruction. [19] Israel has consistently used this logic to explain its actions against suspected nuclear facilities in Iraq, Syria, and more recently in Iran. Following the unraveling of the JCPOA and the enrichment of uranium in Iran to almost weapons-grade status by 2025, Israel and the United States began describing Iran as a threshold nuclear state, capable of quickly acquiring breakout capability. [20] In such a scenario,

[16] Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶ 43–76 (Nov. 6).
[17] Michael N. Schmitt, Preemptive Strategies in International Law, 24 Mich. J. Int'l L. 513, 520–29 (2003).
[18] Nicholas Tsagourias, Cyber Attacks, Self-Defence and the Problem of Attribution, 17 J. Conflict & Sec. L. 229 (2012).
[19] Abraham D. Sofaer, On the Necessity of Pre-emption, 14 Eur. J. Int'l L. 209 (2003).
[20] International Atomic Energy Agency, Verification and Monitoring in Iran in Light of United Nations Security Council Resolution 2231 (2015), GOV/2025/24 (2025).

imminence is no longer defined as military mobilization but rather as technological capability and deterrence capacity.

The evolving understanding of imminence has some important implications for international law. Historically, imminence required demonstration of imminent and unavoidable plans of attack. In relation to nuclear threats, there have been certain countries that claim the enrichment capability could be considered a pressing danger because of the consequences associated with nuclear weaponization. [21] This reduces the requirements for anticipatory self-defense and opens up a dangerous grey area between self-defense against an imminent attack and preventive military measures. According to the critics, this change endangers the principles of the jus ad bellum since it creates the possibility for powerful states to justify their unilateral military actions through their assessments of their security needs.[22] As there is no clear practice among states in this regard, it has become unclear whether present activities aimed at preventing threshold nuclear threats gradually develop into a new norm in conventional terms. Moreover, the international community remained relatively passive about the 2025 operations conducted by Israel against nuclear facilities of Iran, and some experts even consider the absence of criticism as the emergence of a new normative practice.[23]

The evolution of anticipatory self-defense reflects the general confrontation between collective security and strategic realism in international law. The Charter system intends to restrict any unilateral actions of force and to keep the international peace stable; however, modern geopolitical circumstances make it necessary to reconsider the existing legal norms in the context of emerging threats to the survival of the respective states. The case of Iran shows how new

[21] Suzanne Raine, The Rights and Wrongs of Self-Defence, Engelsberg Ideas (June 30, 2025), https://engelsbergideas.com.
[22] Ian Brownlie, *International Law and the Use of Force by States* 275–80 (1963).
[23] Theresa Reinold, The Current Military Strikes Against Iran Erode Fragile Norms of Sovereign Equality, EDHEC Vox (2026).

technologies, increased level of uncertainty about intentions of rivals and geopolitical competition transform the conventional understanding of the notions such as imminence, necessity, and proportionality.

III. PRE-EMPTIVE STRIKES ON NUCLEAR FACILITIES: STATE PRACTICE, STRATEGIC NECESSITY AND THE EMERGENCE OF A CONTESTED CUSTOMARY NORM

The issue of preemptive strikes against nuclear facilities has been settled by states, rather than courts, so far. While the UN Charter has created a narrow framework for force application, constant military operations carried out against suspected nuclear sites resulted in numerous precedents, which are important for international legal discourse. The crucial problem lies in understanding whether these violations are merely individual breaches of international law, or whether the process of creation of a new custom rule of conduct against immediate threat of nuclear attack is underway. From the end of the Cold War, states that are under existential threats have relied on strategic necessity for the justification of attacks against nuclear installations on the grounds that their dire consequences are justification enough to pre-emptively attack even in cases where there is no imminent danger of attack with conventional forces.

The most important precedent is that of the Israeli attack against the Iraqi Osirak nuclear reactor in 1981 which is referred to as "Operation Opera". The attack was justified as being one of preemptive self-defense since Israel considered the nuclear project of Iraq as a threat to its existence.[24] Israel argued that waiting until Iraq acquired a functional nuclear weapon was impossible and that by then any defensive measures would prove futile as Israeli civilians would suffer from severe damage. The attack was militarily successful since it succeeded in

[24] Yoram Dinstein, *War, Aggression and Self-Defence* 232–36 (7th ed. 2024).

disabling the nuclear reactor before its commissioning. As far as legality is concerned, the attack led to harsh international criticism as the United Nations Security Council adopted Resolution 487 unanimously condemning it as a violation of the UN Charter and Iraqi sovereignty.[25] Indeed, the Security Council clearly denied the case of Israel for anticipatory self-defense, meaning that the narrow interpretation of Article 51 must apply, requiring that an attack be underway before invoking the right. However, even in the wake of the official criticism of the raid, Operation Opera found increasing strategic justification with the passage of time, especially after the Gulf War revealed how ambitious Iraq was about WMDs. The strategic justification of the raid reinforced later arguments that sometimes political necessity demands such action even though it is legally controversial.

Another precedent emerged in 2007, when Israel launched Operation Outside the Box against the alleged nuclear reactor in Syria named Al-Kibar. Unlike the previous raids, Israel kept mum about the raid at least in its early stages, and did not present any detailed legal arguments before international forums.[26] The subsequent investigations of the IAEA revealed that the location was marked with characteristics of an undeployed nuclear reactor.[27] Nevertheless, the world reaction differed sharply from that recorded in 1981. Although concerns regarding the sovereignty of Syria had emerged, there were no objections similar to Resolution 487 on the part of the Security Council. The subdued reaction became rather significant in analyzing the formation of the customary international law, whereby lack of objection, even silence, on behalf of a state can be helpful in creating opinio juris provided that the state acts consistently. Several historians argued that the world reaction to Al-Kibar revealed the strategic

[25] S.C. Res. 487, ¶¶ 1–3 (June 19, 1981).
[26] Andrew Garwood-Gowers, Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?, 16 J. Conflict & Sec. L. 263, 270–74 (2011).
[27] Int'l Atomic Energy Agency, Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic, GOV/2011/30 (2011).

approval of the practice of preemptive attacks against clandestine nuclear projects, particularly when multilateral enforcement systems appear insufficient. However, it has been argued that silence of politics does not outweigh the legal obligations of Article 2(4) of the Charter.

Legal rhetoric heated up after events involving Iran's nuclear program took place in 2025-2026. After years of increased production, restriction of IAEA inspections, and rising tension in the region, Israel reportedly carried out strikes targeting nuclear sites in connection with Natanz and Fordow facilities.[28] These operations can serve as a prominent example of the use of the anticipatory doctrine of force against nuclear facilities in modern international relations since they took place in conjunction with the advancement of enrichment activities, which were close to developing a nuclear arsenal. The Israeli authorities and strategists claimed that enrichment activities, missile developments, and Iran's proxy groups in the region posed a significant threat that could not be contained by diplomacy alone.[29] The U.S. reportedly provided strategic support through cooperation in intelligence activities, cyberspace, and defense matters. Unlike in Operation Opera, the world response to the 2025 attacks was much less unified. Western powers generally refrained from outright condemnation, focusing instead on the violations of non-proliferation obligations and weapons grade-enrichment danger posed by Iran. In opposition to this, Global South states condemned the attacks as aggressive acts and warned about the negative consequences for the international order established after 1945.

Emerging trends raise serious questions about the creation of a contentious customary norm for anticipatory attacks on nuclear facilities. As per the established principles of customary international law, there needs to be not only a recurring state behavior but also an opinion that the same is a lawful action. In

[28] Supra Note 21, at 5.
[29] Supra Note 17, at 5.

other words, opinio juris must exist alongside a regular practice.[30] While recurrent acts against nuclear plants indicate an emerging practice, the element of opinio juris is hard to establish owing to the inconsistent legal grounds provided by states for taking anticipatory action. This can largely be seen in Israel, where the justifications for the use of such force have been more in the form of strategic and existential arguments and not through any established doctrine derived from international law. Moreover, due to the absence of any judicial opinion from the International Court of Justice, the legality of the actions taken thus far remains unclear. Nonetheless, the existing strategic environment is slowly shifting paradigms in terms of understanding urgency and necessity. "Threshold nuclear state," of course, has taken on considerable importance in this regard because of the immediacy that advanced enrichment technology brings to weaponization.[31] Consequently, the temporal distinction between preventive and anticipatory self-defence has become increasingly blurred.

There is much danger associated with the rising tolerance of preemptive strikes within international law. Unilateral actions justified by personal threat perceptions endanger the prohibitory rule on the use of force and encourage political opportunism. The powerful states would feel tempted to rely upon nuclear fear and technological potential when justifying political or strategic reasons for the initiation of hostilities disguised as self-defense. In addition, there is no doubt that attacks on nuclear facilities involve high humanitarian risks as well as the danger of pollution since nuclear enrichment facilities are frequently located within civilian territories. Such military operations should be assessed for their proportionality in terms of jus ad bellum and international humanitarian law. The fact that preemptive strikes on nuclear facilities have received greater

[30] Military and Paramilitary Activities (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 207 (June 27).
[31] Int'l Atomic Energy Agency, Verification and Monitoring in Iran in Light of United Nations Security Council Resolution 2231 (2015), GOV/2025/24 (2025).

international tolerance signals a serious crisis in international law nowadays: the contradiction between the maintenance of security standards and the response to rapid technological threats that could not be regulated by traditional legal means.

IV. IRAN'S NUCLEAR PROGRAMME, THE COLLAPSE OF THE JCPOA AND THE REINTERPRETATION OF IMMINENCE UNDER ARTICLE 51

The nuclear program of Iran can be viewed as the key modern example to test the legitimacy of anticipatory self-defense under international law. Previously, discussions of pre-emptive strikes have been mainly concentrated around the operation of existing nuclear power plants and weapons factories. Nevertheless, in the case of Iran, the situation becomes much more complex from the legal standpoint due to such factors as high levels of uranium enrichment, advanced centrifuges, lack of control, and status of a threshold nuclear state. The breakdown of the Joint Comprehensive Plan of Action (JCPOA) after the US withdrawal in 2018 drastically changed the political and legal situation in connection with Iranian nuclear programs.[32] Following the reimposition of US sanctions, Iran has increasingly violated some JCPOA requirements, stepped up uranium enrichment activity, and restricted cooperation with the IAEA. By 2025, it is reported that Iran has already gathered enough quantities of weapons-grade uranium while actively developing centrifuges that could significantly shorten the timeframe for Iran's breakout.[33] These findings fueled the concern among Israel and Western states about Iran's approaching ability to produce nuclear weapons, thus raising questions about the possibility of pre-emptive attack on Iran's nuclear program.

[32] Joint Comprehensive Plan of Action, July 14, 2015, 55 I.L.M. 243 (2016).
[33] Supra Note 31, at 9.

This lies in the differentiation made between having the capacity to enrich fuel and the actual weaponization process. The treaty on the non-proliferation of nuclear weapons gives Iran the right to develop and utilize peaceful nuclear technology, including the uranium enrichment process.[34] Iran insists that its nuclear program is solely for civilian use and that its enrichment processes have been intended only to produce energy, conduct scientific research, and facilitate medicine. In the opinion of the Iranian government, the sanctions imposed upon them by western countries are an expression of prejudice, and attempts to subvert the sovereign rights of Iran as enshrined in Article IV of the NPT.[35] However, critics claim that the levels of enrichment, the lack of transparency, the advancement in the use of centrifuges, and the manufacture of missiles point to preparations for potential weaponization. This leads to a dilemma in the application of international law because of the usual differentiation made in customary international law between capability and imminent attack. Having the capacity to enrich or having threshold nuclear capability does not automatically mean that the country intends to launch an armed attack.

Imminence has turned out to be more controversial because the development of nuclear arms tends to quicken the strategic timelines. Traditional understanding of anticipatory self-defense relied on identifiable military movements, naval maneuvers, or the immediate preparation for armed conflict, indicating an imminent attack. [36] However, in modern times, a nuclear weapon program may develop via technological innovation rather than direct military deployment. A threshold nuclear power might be able to develop nuclear arms in rapid time without having announced weaponization until very near the end of the process. The Israeli strategic doctrine has increasingly stressed the danger of deferring to

[34] Treaty on the Non-Proliferation of Nuclear Weapons art. IV, July 1, 1968, 729 U.N.T.S. 161.
[35] Seyed Hossein Mousavian, *Iran and the United States: An Insider's View on the Failed Past and the Road to Peace* 187–95 (2014).
[36] Supra Note 22, at 6.

proof of weaponization as making defense impossible due to the devastating consequences of the nuclear attack. [37] The above argument acquired great currency after analysis in 2025 demonstrated that the Iranian breakout capability was reduced to just days under certain circumstances. Those supporting preemptive defense argued that the combination of enriched uranium technology, missiles, proxy agents, and hostile relations qualified as an imminent threat.

The legality of launching preemptive attacks on Iran is extremely controversial based on existing international law. As per the Caroline doctrine, any preemptive move should be against a situation which is "immediate and overwhelming," giving "no time for deliberation."[38] On the other hand, most assessments of the Iranian nuclear program still separate enrichment from actual weaponization. Even if Iran has attained threshold capability, it cannot be conclusively proven that it has immediate plans to use its nuclear arsenal or wage war. In addition, the fact that there are several diplomatic avenues open, sanctions regimes, IAEA mechanisms, and the processes of the Security Council renders claims that military intervention is the only option baseless. Under customary international law, the concept of need requires that non-military alternatives be exhausted or insufficient prior to the use of force. [39] It is hard to argue that preemption meets the requirement of need, given the inspections, negotiations, sanctions and other measures.

The proportionality constraint determines the legal status of the proposed airstrikes against the Iranian nuclear facilities. The Iranian enrichment sites like Natanz and Fordow are inextricably bound up with the country's civilian infrastructure and, in some cases, based in densely populated areas or underground complexes designed to survive any attack. An operation of such

[37] Supra Note 29, at 8.
[38] Supra Note 9, at 3.
[39] Supra Note 16, at 4.

magnitude is liable to produce many casualties among civilians, cause environmental damage, and provoke an escalation of hostilities involving proxies for Iran in the Middle East area.[40] In addition, the Iranians have always maintained that an attack on their nuclear facilities will be an act of aggression according to Article 2(4) of the United Nations Charter and, therefore, entitle Iran to use self-defense individually or collectively. Hence, it is possible to conclude that preemptive military strikes to prevent any regional upheaval can lead to an escalation of hostilities including Lebanon, Syria, Iraq, the Persian Gulf states, and even the global oil market. Therefore, proportionality should be evaluated in terms of both tactical considerations and strategic consequences of military action.

Indeed, Iran's nuclear dispute is a typical example of the broader shift in understanding of the concept of anticipatory self-defense. As modern security policy views latent capability of possessing nuclear weapons enough reason for military intervention, legal attention is shifting from actual military threats to technological possibilities and political assessments. This trend, however, raises concern about the loss of legal separation of the concepts of anticipatory and preventive wars, which had previously been important for imposing restrictions on unilateral force through the mechanism of international Charter-based order. At the same time, supporters of expanded right to anticipate view traditional notion of imminence too narrow for dealing with nuclear challenges of today's world, as failing to prove attack could leave whole population exposed to total destruction by a nuclear strike.

[40] Supra Note 3, at 1.

V. VENEZUELA, IRAN AND THE EXPANSION OF STRATEGIC PRE-EMPTION: SANCTIONS, PROXY NETWORKS AND THE TRANSFORMATION OF COLLECTIVE SECURITY

Anticipatory defense in the modern era cannot be seen through the lens of military attacks on facilities for nuclear power. Indeed, the changing geopolitical situation shows how anticipatory defense has become a more complex process involving economic sanctions, cyber activities, marine interception, sabotage, proxy wars, and technology containment. The formation of the Iran-Venezuela strategic alliance illustrates this development clearly. Both countries have been under severe sanctions by the West in particular, but the growing partnership of the two nations in politics, economics, and military affairs after the JCPOA has made many international security concerns go beyond the context of nuclear non-proliferation.[41] Western politicians now consider the alliance of Iran and Venezuela as part of an anti-Western geopolitical bloc which consists of countries like Russia and China, as well as proxy militaries, cooperation in the energy sector, strategies of sanctions evasion, and development of drones. Modern concepts of anticipatory security pay attention to future armed attacks, strategic infrastructures, financial networks, and international alliances regarded as enablers of those attacks.

The connection between Iran and Venezuela became even more significant when the re-imposition of American sanctions caused both countries' economies to become cut off from international financial organizations. Initial cooperation was related to oil production, oil transportation, and methods for evasion of sanctions designed to overcome Western restrictions concerning banks and energy transfers.[42] Over time, the relationship grew into a more thorough partnership

[41] Suzanne Maloney, *Iran Reconsidered: The Nuclear Deal and the Future of Iranian Politics* 201–07 (2021).
[42] Reuters, U.S. Targets Iran-Venezuela Oil Trade with New Sanctions (Dec. 30, 2025).

which included military technology, drones, intelligence exchange, and logistical systems. American officials maintained that technical assistance by the Iranian side made it possible for Venezuela to maintain vital energy resources despite international sanctions, whereas concerns emerged regarding potential cooperation in missiles and drones by Iran and Venezuela.[43] In spite of the controversy surrounding these claims politically, the current strategic understanding in the context of Western security policy is that Iran's alliances help it expand influence beyond the Middle East and build strong transnational networks capable of resisting economic pressure. These changes have made a huge impact on the development of the ideas of anticipatory security in unconventional settings.

Legal consequences of the practice of sanctions pre-emption are particularly significant as they blur the distinction between collectively sanctioned security actions according to the UN Charter and unilateral coercive measures that are performed outside any multilateral arrangements. Indeed, under Article 41 of the UN Charter, the Security Council is authorized to perform economic and diplomatic sanctions for ensuring international peace and security without resorting to military means.[44] Sanctions programs implemented against Iran and Venezuela today rely on unilateral and coalition arrangements rather than on an official sanction from the Security Council. The US government has become increasingly aggressive in its use of secondary sanctions, seizure of vessels, economic sanctions, export controls, and cyber operations to act as pre-emptive tools to counter the enemies before they can become powerful enough.[45] In other words, sanctions constitute another form of strategic pre-emption, since they attempt to weaken potential opponents before they gain any capabilities that

[43] U.S. Dep't of the Treasury, Treasury Targets Iran-Venezuela Drone Procurement Networks (2025).
[44] U.N. Charter art. 41.
[45] Richard Nephew, *The Art of Sanctions: A View from the Field* 89–104 (2018).

might endanger international security. Consequently, pre-emptive self-defense in the twenty-first century includes not just strikes and military engagements but also economic warfare and technological containment.

This move indicates major changes in the dynamics of conflicts among states. In this case, contemporary threats could emanate from a network of proxies, cyberwarfare capability, energy dependency, and hybrid war tactics instead of classic state-based attacks. The Iranian role through non-state actors in Lebanon, Syria, Iraq, and Yemen has had immense implications for Western and Israeli pre-emption policies regarding this threat.[46] Based on this perspective, the Iranian nuclear weapons program should not be viewed in a vacuum but as one of the elements of its broader strategy involving missiles, proxy threats, drones, and geopolitics. The Venezuelan situation, therefore, reinforces the perception that Iran seeks to establish strong international relations so that sanctions cannot undermine its ability to wage strategic rivalry against Western nations indefinitely. The modern pre-emptive policy has been moving towards targeting the massive structure behind a hypothetical threat rather than dealing with imminent actions only.

An increase in the use of preemptive security mechanisms beyond conventional warfare raises important concerns regarding issues of sovereignty, legitimacy, and the erosion of collective security norms. Many experts argue that the unilateral sanctions and coercive measures employed often circumvent the global framework resulting in humanitarian and economic consequences to civilians.[47] Moreover, the classification of economic networks, technical cooperation, and geopolitics as security threats allows the justifications of constant coercion based on hypothetical future dangers as opposed to concrete acts of violence. The

[46] Kenneth M. Pollack, *The Persian Puzzle: The Conflict Between Iran and America* 412–18 (2005).
[47] Joy Gordon, *Invisible War: The United States and the Iraq Sanctions* 45–57 (2010).

pattern emerges as part of a larger fear of preventive war where regimes use hypothetical future threats as a justification for their coercion. In the case of Iran, the gradual integration of sanctions, cyber attacks, covert operations, and even military threats is a testament to how anticipation has evolved from exceptional defense into a long-term strategy.

In summary, the connection between Iran and Venezuela serves to highlight the emergence of a major transformation in the realm of international security laws. Traditionally, Article 51 has been defined based on the sole premise that it refers to a direct physical attack between countries. However, recent trends suggest that anticipatory reasoning continues to be applied in realms involving money, technology, energy, cyberspace, and alliance. These developments reflect the growing relevance of geopolitical realism in international law, where legal doctrines change to adapt to emerging forms of competition and perceived threats to state existence. Such developments threaten the sanctity of the Charter-based legal regime since it creates confusion between collective measures and coercive intervention. When countries can justify anticipatory measures to conduct widespread economic attacks, sabotage, and military strikes on indirect threats, it is clear that limitations of the use of force can be undermined.

Where strategic pre-emption has moved outside the realm of military action, it suggests that the problem of anticipatory self-defense is not confined solely to nuclear facilities. In the case of current international law, there is a wider issue in terms of the change taking place in the definition of security. The example of Iran-Venezuela demonstrates the way in which modern anticipatory strategies operate within an interconnected series of systems involving sanctions, proxy wars, cyberattacks, and containment. Whether this represents a legitimate response to changing threats or a dangerous one, deviating from the principles of collective security, remains a vital legal question.

VI. THE CRISIS OF ARTICLE 51: THRESHOLD NUCLEAR STATES, STRATEGIC REALISM AND THE EROSION OF THE COLLECTIVE SECURITY FRAMEWORK

Modern development in anticipation self-defence reflects an extremely deep structural malfunction in the regime of legal regulation governing the use of force in accordance with the United Nations Charter. Article 51 served initially as an exemption to the general prohibition of use of force stated in Article 2(4) and enabled states to conduct their defense operations exclusively upon an occurrence of direct armed attack.[48] The postwar international legal order was expected to replace the unilateral evaluation of security threats with multilateral processes controlled by the United Nations Security Council. However, modern developments such as threshold nuclear states, asymmetrical warfare, transnational terrorism, cyber capacities, and proxy wars have rendered the system rather ineffective. Modern geopolitical realities impose strategic understanding of imminence and necessity which focuses on the state survival rather than compliance with the Charter provisions. Such a combination of the two conflicting approaches results into a situation described as the crisis of Article 51.

The example of the Iranian nuclear crisis makes this clear. Traditional understanding of self-defense involved attacks through visible deployment of troops or the use of force. On the other hand, threshold nuclear states operate within an environment of strategic ambiguity. These regimes might possess advanced enrichment technology, capability, missile delivery system, and potential for weaponization, without violating UN rules that prohibit manufacture of nuclear weapons.[49] Therefore, regimes that are facing threshold nuclear states increasingly argue that waiting for proof of weaponization or an attack is

[48] Supra Note 1, at 1.
[49] Supra Note 31, at 9.

impractical. The Israeli strategy emphasizes that the effects of nuclear weapons have completely changed the temporality element of self-defense.[50] This calls for redefinition of the concept of imminence in the current context, where a state can rapidly move from civilian enrichment to nuclear deterrence within shorter durations.

Such a reinterpretation of imminence is another example of growing influence of strategic realism upon modern practice of international law. The realist approach stresses survival, deterrence, and security above all other considerations, particularly those involving legal limitations in case of apparent existence of an existential threat.[51] With regard to the case of Iran, the Israeli government and some Western political figures now see anticipatory self-defense no longer as a violation of international law but as a necessary measure ensuring peace and preventing potential catastrophe. The strikes conducted in 2025 against Iran's nuclear facilities were indicative in terms of proving that anticipation force in respect of emerging nuclear capabilities might find implicit or at least partial recognition from the international community, despite the absence of any formal legal support under the Charter regime.[52] Contrary to such earlier events as Operation Opera in 1981, the response of the international community concerning actions undertaken in 2025 was far from unanimous rejection. Several Western countries took an ambivalent position in condemning escalation in the region, while pointing to their concerns related to Iran's enrichment program and missile capability at the same time.

Normalization of anticipatory force also presents serious challenges to the stability of the existing framework of international law. The charter system was created in such a manner that countries could not be given the discretion to use

[50] Supra Note 21, at 7.
[51] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* 25–39 (7th ed. 2006).
[52] Supra Note 5, at 2.

force based on their own assessment of threats. If anticipatory self-defense includes things like latent nuclear capability, technological possibility, or even potential future danger, then there would be no clear line distinguishing between self-defense and an unlawful preemptive strike at all.[53] This would allow large governments to base their participation in armed conflict on vague security fears related to the development of technologies and other aspects which might be a cause of concern. In the era of multiple competing global powers, the risks become even more evident since countries like Russia and China repeatedly warned that such interpretations lead to the weakening of the principle banning the use of force and undermining of international organizations' ability to maintain collective security.[54] Countries in the Global South often see such concepts as a pretext for intervention employed by great powers.

This dilemma has become even more pronounced in light of hybrid warfare and proxy wars. In today's world, security threats rarely correspond to the classical framework of interstate war envisaged at the time of drawing up the Charter. Modern warfare increasingly involves cyber warfare, drones, non-state armed organizations, sabotage, economic coercion, and proxy militias; consequently, the lines between peace and armed conflict blur progressively.[55] Iran's geopolitical sway through Hezbollah, Shiite militias, and other non-state organizations has significantly shaped the thinking of Western countries and Israel on the issue of preemptive self-defense policies. Nuclear potential should be taken into account as part of an entire strategic system involving missile capabilities, proxy wars, and asymmetric retaliation. Therefore, preemptive doctrines have come to be seen not just as means to prevent imminent attack but also as tools for coping with broader strategic shifts believed to threaten geopolitical balance in the region.

[53] Supra Note 22, at 6.
[54] Supra Note 3, at 1.
[55] Supra Note 17, at 5.

Moreover, the rise of preemptive use of force poses risks to the legitimacy of international law, as it creates contradictions in its standards. Countries with nuclear capacities tend to enjoy leniency concerning military capacities, while adversary countries have strict regulations imposed on them, or even punishments and the threat of military action, despite the fact that there is no clear evidence of violations in the treaty.[56] This makes the idea of impartiality in the international legal regime questionable, since there are allegations that laws concerning the use of force are selective, and work only in favor of powerful countries. When it comes to Iran, topics of preemptive attacks become linked to questions of sanctions, regional hegemony, energy security, and other factors of strategic importance. As a result, discussions of self-defense laws become politicized.

The problem of Article 51 represents a core contradiction regarding the very future nature of the international legal order. On the one hand, it can be based on upholding the narrow Charter provisions and limiting the use of force by states to only those cases where the attack is actually made or authorized by the Security Council. On the other hand, it can represent an interpretation of new circumstances resulting from technological innovations, which would lead to a more flexible interpretation of anticipatory self-defense in order to address such threats as nuclear proliferation, hybrid warfare, and quick weaponization before any irreparable harm is caused. The situation in Iran represents a critical field in which both approaches compete. The way that the current state practice evolves into the expanded concept of force or not would greatly affect the future of collective security, sovereignty, and law.

[56] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 301–09 (2005).

VII. CONCLUSION AND POLICY RECOMMENDATIONS: REASSESSING ANTICIPATORY SELF-DEFENCE IN THE AGE OF THRESHOLD NUCLEAR STATES

Legitimacy of preemptive attacks against nuclear facilities is one of the most controversial questions raised in the realm of present-day international law. The growing conflict around Iran's nuclear plans serves as an example of how advancements in technology, geopolitics, and security concerns are radically altering traditional notions of self-defense, as provided for in Article 51 of the United Nations Charter. Indeed, the original intention of the Charter was to prohibit the use of force outside the provisions specified in it, but new challenges of modernity necessitate reconsideration of imminence, necessity, and proportionality. The Iranian nuclear case is a clear illustration of the growing tension between collective security and strategic realism. In fact, Israel and other countries from the West are viewing the possession of threshold nuclear capacity as a dangerous strategic reality, arguing that delaying measures until weaponization or even aggression will be ineffective for self-defense in the age of nuclear weapons. This approach represents a stark departure from the traditional Caroline formula, according to which there was required an imminent and powerful threat leaving little room for deliberation. Contemporary approaches stress technological capacities and rapid breakout capabilities of the opponent, thereby lowering the bar for using military force as a response.

The development of a wide variety of security measures in the realm of pre-emptive actions outside conventional combat operations has shifted the nature of modern conflict management. Contemporary pre-emption increasingly depends on economic, political, and informational measures such as sanctions, cyber operations, sabotage, proxy wars, financial pressure, and even technological containment. The partnership between Iran and Venezuela demonstrates how geopolitical relations, sanctions avoidance methods, and transnational security

policies are seen as part of the anticipatory security analysis. Therefore, pre-emption in the modern world involves more than just the prevention of an impending attack but the sabotage of the infrastructure that might be used for future attacks.

This process can have a significant impact on international law and security systems. The enlargement of self-defense principles to include theoretical nuclear weapons or possible future attacks may eventually destroy the prohibition of the use of force set forth by the UN Charter (Article 2(4)). If countries have the right to independently decide whether any scientific advances are considered to pose an immediate danger, there will be no differences between justified self-defense and preventive war whatsoever. This will affect international organizations, sovereign equality, and the entire post-World War II security order.

Indeed, Iran demonstrates that today's security environment is poorly regulated by the existing legal system. It is clear now that the traditional reading of Article 51 cannot account for the challenges that arise in the age of threshold nuclear powers, cyber warfare, proxy wars, and rapid technological developments. However, disregarding the existing legal restrictions may create a dangerous precedent for the world's most powerful countries to justify their actions based on highly subjective considerations regarding national security. In order to prevent such outcomes, international law needs to maintain a balance between the protection of the legal framework of the UN Charter and new types of threats. There are several aspects that need to be changed. First, international law requires clearer guidelines concerning the concept of imminence within the context of the proliferation of nuclear weapons and acquisition of the capacity for creating threshold nuclear weapons. Second, the role of the International Atomic Energy Agency must be bolstered through the expansion of its mandate concerning the verification of nuclear programs. Finally, there needs to be renewed diplomacy and negotiation mechanisms such as the Joint Comprehensive Plan of Action.

Above all, the international focus should be on decision-making in the UN Security Council.

The future of anticipatory self-defense will in any case impact the direction of the international legal system. The JCPOA-era dilemma involving Iran highlights that international law now faces a fork in the road regarding whether to preserve the restrictive collective security model of the UN Charter in face of an increasingly prevalent body of strategic doctrine centered on pre-emption and driven by realpolitik considerations. It is questionable whether the development of customary practice into a new norm permitting anticipatory military action against threshold nuclear states will ever occur. Clearly, without further doctrinal clarity and renewed emphasis on multilateralism, the continued growth of pre-emptive techniques in security policy endangers the prohibition on the use of force and international stability.

FROM TRADE DISCIPLINE TO DEVELOPMENT JUSTICE: REINTERPRETING TRIPS THROUGH CONSTITUTIONAL MORALITY AND PUBLIC WELFARE IN INDIA AND THE GLOBAL SOUTH

Pawan Kumar, Assistant Professor Amity Law School, Amity University, Noida & Amit Vikram Pandey, Legal Researcher based in New Delhi

Abstract

In the initial briefing session of TRIPS, the background of the talks came to the fore as a turning point in world history, the phase of much trade liberalisation and convergence of regulations. The ultimate aim was to put in place minimum intellectual property norms as provided by the WTO framework, thus making the protection of intellectual property rights more predictable.

The clash between trade governance and socio-economic justice has emerged as notable among the views of the Global South. This paper argues that TRIPS cannot be merely viewed from a trade-based perspective; rather, it needs to be viewed through the principle of constitutional morality and social good, especially in transformational constitutional democracies like India.

Through our examination of the Indian constitutional system, we argue the understanding and implementation of the TRIPS obligations can rightfully be informed by the promises of equality, dignity, public health and distributive justice. Issues of strict patentability, compulsory licensing and court rulings bring intellectual property as an extension of wider societal purposes. We demonstrate that TRIPS flexibilities are not isolated cases, but essential parts of its internal compromises. This paper suggests that there needs to be a

conceptual representation of a new model of international governance of IP based on development justice.

The Global South experience demonstrates that adherence to international trade rules may not always undermine the social welfare objectives; instead, it can work together with them by offering contextual readings and situational implementation.

Finally, we argue that the future of the TRIPS regime will depend on the alignment of the regime with the constitutional and developmental priorities. Reconstruction of TRIPS with constitutional morality provides a way to have a balanced and inclusive IP order, balancing trade commitments with the larger aims of justice and human development of the Global South.

Keywords: TRIPS, Constitutional Morality, Development Justice, Public Welfare, India and Intellectual Property.

I. Introduction

The introduction of intellectual property into the multilateral trading system by the World Trade Organisation (*hereinafter,* WTO) in 1995.[1] was a radical alteration of the structure of the operation of global economic governance. The Agreement on Trade-Related Aspects of Intellectual Property Rights (*hereinafter,* TRIPS) was not the harmonisation of standards; it recreated intellectual property as an object of enforceable trade discipline.[2] The unprecedented case regarding intellectual property is the least adherence to minimum standards, which might provoke retaliatory trade measures in the WTO dispute-settlement mechanism.[3]

---

[1] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

[2] Ibid

[3] Marrakesh Agreement Establishing the World Trade Organization arts. 22–23, Apr. 15, 1994, 1867 U.N.T.S. 154.

Intellectual property transferred to the comparatively adaptive and development-sensitive regime of the World Intellectual Property Organisation (*hereinafter,* WIPO) into the stiff-edged enforcement platform of the trade law.[4]

The concept of Intellectual property rights originated from the increasing acts of duplicity, piracy, of the formulas, designs, models, circuits, products, which were in demand in the market, thereby virtually reducing the actual profits of the real owner, that too without paying the taxes to the government of the day.[5] The problem aggravated to the extent of closing down of many industries, due to this piracy, the sub-standard, low quality cheap products which were supplied to the customers which even resulted in the casualties, specially in the field of medicines and pharmaceuticals, machines and motors, art and music, and many other consumer goods.[6]

This change in institutions was related to the geopolitical reality of the late twentieth century. The economies that had been industrialised especially with strong pharmaceutical, entertainment, biotechnology and software industries wanted a greater protection of intangible resources across borders.[7] The outcome was a treaty form that favoured intellectual property as not being a super modality of domestic industrial policy but as a means of predictability to markets in the world.[8] Trade discipline was an animated element and the TRIPS in design and enforcement.

---

[4] Convention Establishing the World Intellectual Property Organization, July 14, 1967, 828 U.N.T.S. 3.

[5] Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* 36–40 (2002).

[6] Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* 1–10 (2003).

[7] Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* 3–7 (2d ed. 2007).

[8] Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 15–22 (5th ed. 2022).

The Global South was one of the main victims of the Intellectual property regime, and patent and geographic indications (*hereinafter,* G.I) tagging, as most of the ideas and inventions came from the Western industrially developed countries.[9] As these countries had the essential infrastructural facilities, for all sorts of new inventions and discoveries in all the fields of the human life. Whereas on the other hand the Afro-Asian region, mostly comprised of developing, and under-developed nations, had virtually no, or nominal facilities, for any Research and development (*hereinafter,* R&D), which in other words also means, that the Afro-Asian countries were totally dependent on the western countries. For the latest developments, and inventions, in every field, and whatever technology these countries received from the western countries that was in fact outdated or expired, which was not in use for the western countries, that only Afro-Asian countries are still receiving.[10]

The dependence of the Afro-Asian region, clearly indicates the monopoly and dictating, or arms twisting nature of western countries, which are not even determining what kind of technology is given to these countries, whether it suits to these countries, according to their climatic conditions, and in other words these countries have become the dumping ground for western countries. For example, the Bhopal gas tragedy in India in 1984 which killed thousands of innocent people, still now, many are still suffering from various diseases specially physical and mental deformities, is the glaring example of the attitude of west towards other countries, as the Union Carbide could not produce the dangerous M.I.C. gas in America, but could easily, do so in India, while remaining unchecked also.[11]

[9] Ruth L. Okediji, The International Relations of Intellectual Property, 7 Santa Clara J. Int'l L. 1, 5–10 (2008).
[10] Thomas Pogge, *World Poverty and Human Rights* 13–20 (2d ed. 2008).
[11] See generally, Upendra Baxi, The Bhopal Case: The Supreme Court and the Future of Constitutionalism, 1 Indian J. Const. L. 1 (1987).

However, this situation has changed drastically within 30 years, where the normative environment in which the TRIPS actions operate has shifted significantly. IPR is now at the heart of worldwide discussion of access to vaccines[12], technology transfer in the climate sector,[13] digital monopolies, agricultural resilience and governing artificial intelligence.[14] On a broader level, third world nations or the Global South, regulation of IP directly influences the affordability of drugs, access to learning resources as well as the ability to enjoy sustainable industrialisation.

The COVID race revealed the system inherent inequality in the pharmaceutical production and distribution patterns of the world.[15] The current climate change has highlighted the need of paying serious attention to affordable access to renewable-energy technologies.[16] The digital revolution has centralized information and algorithmic power to a few corporate participants, who are based largely in the Global North.

The key question in this altered scenery is - can a trade-based intellectual property regime respond well to the constitutional and developmental agendas of the Global South?[17] We underline that the legitimacy and future sustainability of TRIPS rely on normative reorientation, and it should no longer be trade discipline but rather development justice.

Instead of viewing the barriers to the spread of public health, exceptions to education, compulsory licensing, and transfer of technologies as the subtractive

[12] Frederick M. Abbott, The Doha Declaration on the TRIPS Agreement and Public Health, 99 Am. J. Int'l L. 317 (2005).
[13] UNCTAD-ICTSD, *Resource Book on TRIPS and Development* 720–25 (2005).
[14] Chidi Oguamanam, Intellectual Property in Global Governance, 10 J. World Intell. Prop. 293, 300–05 (2007).
[15] World Health Organization, COVID-19 and Access to Medicines (2021).
[16] U.N. General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, G.A. Res. 70/1 (2015).
[17] Amartya Sen, *Development as Freedom* 3–11 (1999).

variations of a protectionist norm, one has to perceive them as the part of the internal equilibrium of the agreement.[18] TRIPS is not an enforcement tool on its own but within the text, the principles of social welfare, technological diffusion, and public-interest regulation were identified. The interpretive practice of the past thirty years has however tended to be less equitable.[19]

This imbalance is felt in the Global South most of all. Various developing states joined the TRIPS regime, having low technological levels, weak national-health infrastructures, and development needs which demanded regulatory flexibility.[20] To such countries, intellectual property is not an imaginary commercial right. It is a structural variable that determines the reduction of poverty within society, as well as industrial policy, agricultural security, and constitutional rights. When the patent protection costs drugs more than the public-health programmes can afford, both the strain does not simply lie beyond the economic domain, but rather it is a constitutional one.[21] The effect of limiting access to education in low-income societies by the regimes of the copyright is not just on the trade, but on equality and social mobility.

Such tension is specifically evident in transformative constitutional democracies. An example is that the Constitution of India does not envisage the state as a referee of an abstract market.[22] It sees a social republic dedicated and devoted to justice- social, economic and political. Basic liberties of equality and life are at variance with authoritative principles ensuring societal health, equitable housing of material resources, and safety of vulnerable communities.

[18] TRIPS Agreement, supra note 1, art. 31.
[19] Gautam Bhatia, *The Transformative Constitution* 45–60 (2019).
[20] Carlos M. Correa, *Intellectual Property and Public Health in Developing Countries* 25–30 (2000).
[21] Ellen F. M. ’t Hoen, *The Global Politics of Pharmaceutical Monopoly Power* 40–55 (2009).
[22] Constitution of India, Preamble and Articles 14, 21, and 38.

Intellectual property in such a constitutional order can never be an absolute right that lacks societal implication. It should be in the context of social good. India's experience since 1995 demonstrates that compliance with TRIPS need not entail abandonment of developmental priorities.[23] Through calibrated legislative amendments, strict patentability standards, and carefully structured compulsory licensing provisions India has constructed an intellectual property regime that remains formally TRIPS-compliant while safeguarding access to essential goods.[24] The jurisprudence of the Supreme Court of India in *Novartis* case has reinforced this balance, interpreting statutory provisions in light of constitutional commitments to health and equity. The result is neither protectionist isolation nor passive conformity. It is strategic constitutional engagement.[25]

The broader Global South exhibits similar patterns of calibrated resistance and adaptation. Countries across Africa, Latin America, and Asia have invoked TRIPS flexibilities to secure affordable medicines and protect local agricultural systems. Multilateral debates surrounding public health emergencies and climate technologies have further exposed the asymmetry between formal equality in treaty obligations and substantive inequality in technological capacity. These developments have generated a growing scholarly consensus that intellectual property governance must be evaluated not solely through the lens of trade efficiency but through the prism of distributive and developmental justice.

This paper contributes to that evolving discourse by advancing a structured theory of development justice as an interpretive framework for TRIPS. Development justice, as conceptualised here, rests on five interrelated pillars.[26] Corrective justice addressing historical technological asymmetry; distributive justice

[23] Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/MIN(01)/DEC/2 (Nov. 14, 2001).
[24] Bayer Corp. v. Natco Pharma Ltd., Compulsory License Order No. 1 of 2012.
[25] Novartis AG v. Union of India, (2013) 6 S.C.C. 1
[26] Martha C. Nussbaum, *Creating Capabilities* 18–25 (2011).

ensuring equitable access to essential goods; procedural justice enhancing democratic participation in global rulemaking; intergenerational justice aligning IP governance with sustainability; and sovereign justice preserving regulatory autonomy within multilateral commitments. Together, these dimensions offer a normative lens through which TRIPS can be reinterpreted without dismantling the multilateral trading system.[27]

The argument is not for withdrawal from the global trade architecture. Nor is it for the erosion of intellectual property protection as such. Innovation incentives remain vital to scientific advancement and economic growth. Rather, the claim is that intellectual property law must remain anchored to its social function. Exclusive rights are instruments, not ends in themselves. When they undermine constitutional commitments to dignity, equality, and public welfare, interpretive recalibration becomes both legally defensible and morally necessary.

Our study proceeds in nine parts. Part I is the introduction. Part II examines the historical political economy of TRIPS, situating it within the broader phenomenon of trade constitutionalism. Part III explores constitutional morality in transformative democracies, with particular attention to India's constitutional jurisprudence. Part IV develops the theoretical framework of development justice. Part V analyses India's legislative and judicial strategies in operationalising TRIPS flexibilities. Part VI expands the inquiry beyond pharmaceuticals to agriculture, education, climate technology, and digital governance. Part VII engages interpretive methodology under the Vienna Convention on the Law of Treaties, arguing for purposive and systemic integration approaches[28]. Part VIII outlines policy pathways for a development-oriented global IP order. Part IX concludes by proposing a reconceptualisation of

[27] For a summary of these five pillars, please see, The Asia Pacific Forum on Women, Law and Development, available at, https://apwld.org/wp-content/uploads/2014/06/five-pillars-onepage2015-novc.pdf, last visited, 16th April 2026

[28] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

TRIPS legitimacy grounded in constitutional morality and Global South solidarity.

Three decades after its adoption, TRIPS stands at a crossroads. It can remain a regime defined primarily by enforcement metrics and commercial predictability, or it can evolve into a framework that reconciles innovation with human development. The Global South does not seek exemption from global rules. It seeks equilibrium within them. Reinterpreting TRIPS through development justice offers a pathway toward that equilibrium, in which intellectual property serves not only markets, but societies.

TRIPS as Trade Constitutionalism: Historical Political Economy and Structural Asymmetry

A. From Diplomatic Coordination to Enforceable Trade Obligation

Until the year 1995, the intellectual property management across the world had been relying mainly on the Paris and the Berne Conventions.[29] These have been operating under the supervision of the World Intellectual Property Organisation.[30] Those conventions incorporated some of the most important principles: national treatment, priority rights and minimum protection, but they did not do much to establish effective enforcement repositories. The adherence was highly dependent on the diplomatic interaction and not on the involuntary economic attempts. Based on this, the developing countries were free to have a great policy space to integrate intellectual property systems in line with local industrial policies.

[29] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised July 14, 1967, 21 U.S.T. 1583; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised July 24, 1971, 828 U.N.T.S. 221.

[30] Convention Establishing the World Intellectual Property Organization, July 14, 1967, 828 U.N.T.S. 3.

The revolution came around the Uruguay Round of multilateral trading negotiations (1986-1994).[31] The industrialised countries especially the United States, the European communities and Japan, were agitating to adopt high standards of intellectual property in the new world trade order under the WTO. Intellectual property was redefined as a trade-based problem which had to be justified by the fact that protection of intellectual property was bad and thus it skewed the international trade.[32] By entrenching the IP obligations into the WTO, negotiation decision makers tied the intellectual property compliance to the dispute settlement system, which is supported by the threat of trade retaliation.[33]

Such relocation of an institution changed the normative nature of the international law on IP. Intellectual property ceased to be an issue chiefly of creative incentive or technological diffusion, but it became part of the world trade discipline. TRIPS, therefore, is a kind of so-called trade constitutionalism as developed by scholars: a system where economic standards gain some quasi-constitutional status by having a dispute resolution and enforcement mechanism.[34]

In TRIPS, member States must implement minimum levels of protection in relation to the patents, copyright, trademarks, industrial designs, geographical indications and enforcement. They can be enforced by use of the WTO dispute settlement mechanism. The non-compliance can cause approved countermeasures, such as trade sanctions. The disadvantage between the economic strength of both the developed and developing countries harms the practical application of this implementation framework.

B. Minimum Standards and Regulatory Convergence

[31] Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 3–10 (5th ed. 2022).
[32] Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* 96–120 (2003).
[33] Marrakesh Agreement Establishing the World Trade Organization arts. 22–23, Apr. 15, 1994, 1867 U.N.T.S. 154.
[34] Deborah Z. Cass, *The Constitutionalization of the World Trade Organization* 32–40 (2005).

TRIPS balances substantive standards like never before in the past agreements of IP. The term of protection of patents should not be less than twenty years after the application date.[35] Protection of copyright normally extends to the period of life plus fifty years of the author.[36] The enforcement measures include civil compensations, prison, and border controls of violating goods.

There are three structural features of this architecture:

1. **Harmonisation of Minimum Standards.** States can offer levels of protection which exceed those required by TRIPS, but not less, which puts an upward convergence pressure.
2. **Equal Protection of Applied Technologies.** Violation should be patented on any inventions be it product or the process in any technology sector subject to a few exceptions.
3. **Integrated Enforcement** Adjudication of compliance disputes is done in the framework of WTO, as opposed to the diplomatic or WIPO centred mechanisms.

The sum total of this is regulatory compression. The developing nations who had historically depended on differentiated IP regimes especially in pharmaceutical and the agricultural sector had to reorganize domestic law within a defined period.

The experience of India depicts this change very clearly. Before adhering to the TRIPS, the Patents Act 1970 of India did not cover product patent in pharmaceuticals and agrochemicals.[37] This policy made possible the development of a strong generic pharmaceutical industry in the country. After the WTO accession and during the transitional period, India in 2005 amended its legislation

[35] TRIPS Agreement, supra note 1, art. 33.
[36] TRIPS Agreement, supra note 1, art. 12.
[37] The Patents Act, No. 39 of 1970

to have pharmaceutical product patents, which has put it in line with the TRIPS requirements.[38]

It was not a technical change as well. It rebalanced the process between the strategy of industrial development and commitment to international trade.

C. Structural Asymmetry and Technological Hierarchy

The formal equality that exists in TRIPS between all members of the WTO does not translate to substance equality. The world innovation image is highly skewed. Developed economics have established research systems, capitalistic pharmaceutical sectors, well-developed digital systems, and bunched holdings of premium patents. Most of the developing nations, on the other hand, are largely technology importers.

Distributive effects are brought by the introduction of uniform minimum standards into an unequal technological environment. Increasing in the bargaining power of rights owners, who are usually based in developed economies, and royalty flows and licensing arrangements can consolidate existing technological pecking orders.

This imbalance was especially seen in times of international epidemiological outbreaks. Licensing rulings by multinational companies were usually across the line of access to patented medicines, vaccines and other therapeutic technologies. The contribution of temporary waivers to IP order loopholes, especially in the context of the COVID-19 pandemic, has demonstrated how the Global South states have seemingly split the globe between those that believe there should be greater flexibility in managing the case of a general health crisis, and those that believe it challenges the very basis of international law.[39]

[38] The Patents (Amendment) Act, 2005 (India).
[39] World Health Organization, COVID-19 and Access to Medicines (2021).

The stress does not only exist in pharmaceuticals. In climate technology, patenting of renewable energy is overrepresented in the developed world. The North American and European firms take control of platform economies and algorithmic infrastructures in the domain of digital innovation. Standardized IP in those situations can become a source of technological addiction without significant transfer of technology and capacity development.

D. Articles 7 and 8: The Internal Normative Counterbalance

Despite its orientation on enforcement, TRIPS has a normative language in it that moderates an all commercial interpretation. According to article 7, the protection of intellectual property is meant to serve technological innovations and transfer and diffuse technological progress, to a mutual benefit of producers and users, and in such a way, as to promote social and economic wellbeing.[40] Article 8 acknowledges that members have the right to implement the measures needed to ensure the safety of societal health as well as nutrition and the advancement of societal interest in areas of essential significance.[41] These clauses indicate that TRIPS was not supposed to be a strictly absolutist regime of protection. It builds in a balance between the right of privacy and the right of society. Practically though, enforcement narratives have been able to cast in the shade of such balancing clauses.

The problem of interpretation is to distinguish between whether Articles 7 & 8 are active principles or mere target-language words.[42] When read in a purposively intended way, they base substantive provisions in textual grounding of the development-oriented reading approach. When marginalised, they downgrade the considerations in the public welfare to minor exceptions.

[40] TRIPS Agreement art. 7.
[41] TRIPS Agreement art. 8.
[42] TRIPS Agreement, supra note 1, arts. 7–8.

E. The Doha Declaration and Emerging Development Consciousness

These developments culminated in the introduction of the initial normative change in the regime in the year 2001 with the adoption of the Doha Declaration on the TRIPS Agreement and Public Health.[43] The declaration confirmed that TRIPS was able and ought to be interpreted and applied in a way that supported the right of the WTO members to safeguard the health of the people. Though TRIPS was not updated under Doha Declaration, the interpretation priorities were made clear and the legitimacy of compulsory licensing and parallel importation as the ways to protect the public health were strengthened. This is a move towards a new awareness in multilateral system that strict enforcement can destroy wider legitimacy. Nevertheless, the later bilateral and regional trade agreements have tended to present so-called TRIPS-Plus norms that surpass multilateral expectations, which reduces policy room in the developing nations. The presence of multilateral flexibility alongside bilateral pressure portrays the rough landscape in the global IP regulation.

F. Trade Constitutionalism and Democratic Deficit

The penetration of the intellectual property into the framework of the WTO as well present democratic legitimacy issues. WTO dispute settlement panel adjudicates on complicated regulation matters which have a deep domestic social implications. Affected populations especially in third world countries have little input to such processes.

Where IP lawsuits involve access to life and sustenance medicines, or agricultural communities and sustainability, the interest of the case goes beyond a commercial concern. They overlap with basic rights and government policy decisions historically preserved to the domestic democratic agencies. Trade

[43] Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/MIN(01)/DEC/2 (Nov. 14, 2001).

constitutionalism overcomes a paradox then. On the one hand, it fosters predictability of global commerce through the rule. At the opposite end, it could limit domestic regulatory independence in the field that is closely related to the social welfare.

In the case of Global South states, this is a burning tension. They are being compelled to balance international trade and the constitutional commitments towards equality, health, and development.

Constitutional Morality and Transformative Constitutionalism in the Global South

A. Transformative Constitutionalism in the Global South

The intellectual insight of this paper has been based on a very fundamental realization: the constitution of democracies in the Global South in most cases is not a structural document defining the government in its various powers. It is transformative. It aims to break the historical injustice, lessen the socio-economic disparity and reorganize the social hierarchies. Such contexts do not see law being normatively neutral, but purposive. This is the case with India with respect to its constitutional example. The Constitution of India[44] does not envisage minimal state that will ensure that property is protected and that contracts are enforced. Its Preamble enshrines justice to the Republic social, economic, political. The basic rights defend dignity, liberty and equality. Directive Principles of State Policy enable the promotion of the health of the population, equal allocation of material resources, and defense of weaker layers.

It was the transformative orientation that has been instrumental in constitutional jurisprudence throughout a period of seven decades. The Supreme Court of India has on the occasion increased the coverage of Article 21 (right to life and personal

[44] Constitution of India, Preamble and Articles 14, 21, 38, 39(b), 47.

liberty) to incorporate the right to health, livelihood, education, and environmental protection.[45] By so doing, it has underlined the fact that governing such a constitution through constitutional means should give precedence to substantive justice and not formal legality. The intellectual property law, placed in such a constitutional setting, cannot be seen as a commercial right per se. It has to act in line with the constitutional values. Constitutional morality is interpretively final where there is tension between exclusive rights and the common good.

B. Defining Constitutional Morality

Constitutional morality has developed in Indian jurisprudence, as a policy that involves a state intervention and judiciary should relate to the more foundational values of the Constitution and not the text alone. The Supreme Court has generalized constitutional morality to prohibit state action which, in form, is within constitutional authority, but under the guise of constitutional intent. Fidelity to all that is required by constitutional morality. These are human dignity, elimination of discrimination based on gender, race, and legitimacy, social justice, rule of law and democratic accountability.[46]

In relation to the regulatory areas, constitutional morality stipulates that statutory constructions must be construed to be consistent with these tenets. When applied to intellectual property it implies that exclusive rights should be interpreted to avoid reducing access to necessary goods, promote disparities, or be counterproductive to the health of the population. The Constitution does not abandon the property rights, actually, it makes them a subset of a social contract.

C. Intellectual Property and the Right to Health

[45] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

[46] See generally, Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, European Journal of International Law, Volume 19, Issue 4, September 2008, Pages 655–724.

The most conspicuous point on the cross over between constitutional morality and TRIPS requirements is in the pharmaceutical industry. Pharmaceutical patenting has a direct proportional impact on the price of drugs and their supply. There is no way that in the country where the income inequality is high and people experience many health problems, the opportunity to receive affordable medicines cannot be separated with the constitutional right to live.

The Supreme Court has always believed that the right to life in Article 21 entails access to healthcare. This commitment in its constitution defined the Indian legislation in response to TRIPS compliance. Indian Patent Act was amended in 2005, which brought pharmaceutical product patents but with strict measures kept to curb the abuse. Under section 3(d) of Patents Act, the new forms of known substances cannot be patented unless they exhibit increased therapeutic effect.[47] In the landmark case of *Novartis AG v. Union of India*, this was put into question and the Supreme Court answered very well in 2013.[48] That being the case, the Court considered the constitutionality and validity of Section 3(d), stating that the patent law should balance the rewarding of innovation and access of the population to the medicines. The ruling strengthened the notion that inconsequential amendments that are designed to prolong the duration of monopoly (so-called evergreening) would not be safeguarded unless real progress in therapy was achieved.

The case is of importance not only in its reasoning which is doctrinally grounded but also its constitutional spirit. The Court also did not look at the compliance with the TRIPS as something that has to be interpreted to the maximum. Rather, it confirmed that national laws are allowed to incorporate more stringent patentability requirements in the allowable confines of TRIPS due to the need to

[47] The Patents Act, 1970, § 3(d) (India).
[48] Novartis AG v. Union of India, (2013) 6 S.C.C. 1.

ensure national health security. Such a practice of India's apex court describes development justice.

D. Compulsory Licensing and Public Interest

The mandatory licensing system in India can be considered a fair example of constitutional congruence. Section 84 of the Patents Act provides that compulsory licensing can be granted in an instance where there is no fulfilment of reasonable needs of the general population, the patented invention is not available at a fee that they can reasonably afford and also where the invention is not exercised in the country.[49] India issued its first post-TRIPS compulsory license in 2012, to Natco Pharma of the cancer drug *Sorafenib Tosylate* that was patented by multinational giant Bayer.[50] The decision, which was affirmed on appeal, drastically reduced the cost of the drug thus, increasing access to a life-saving treatment. The move was well supported under Article 31 of TRIPS which permits the compulsory licensing under certain circumstances, but at the same time represented the constitutional beliefs of health and distributive justice.[51]

Importantly, India has not applied the concept of compulsory licensing as an arbiter or contrary to what UN mandates. It was following the law, calculated the cost-effectiveness, and paid royalties to the patent holder. The action was legally justifiable in the framework of TRIPS.

The episode shows that constitutional morality and international compliance do not necessarily have an antagonous relationship. The development goals can be reconciled with multilateral commitments through careful packaging of the statute and the ability to uphold the commitments through a combination of moral

[49] The Patents Act, 1970, § 84 (India).
[50] Bayer Corp. v. Natco Pharma Ltd., Compulsory License (2012).
[51] TRIPS Agreement art. 31

principles and well-designed statutes designed to establish the goals applicable in convergence with multilateral concession.

E. Equality and Access to Knowledge

Outside drugs, intellectual property comes in conflict with the constitutional right to equality and to education. Strict understanding of copyright protection can lead to poor accessibility of cheap educational resources. The Indian copyright law has a provision of exceptions on educational use, library reproduction, and research. *The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services*, the Delhi High Court, confirmed the legality of course packs as put together with an educational intent in reference to the previous use of copyright law, held that the law has to be examined in terms of communal interest and access to resources.[52] This argument is reflective of a constitutional ethos specifically, they have the right to intellectual property to encourage creativity and dissemination, not to inhibit knowledge in low-income settings.

F. Directive Principles and Socio-Economic Orientation

Although the non-justiciable Directive Principles of State Policy influence legislation interpretation and policy-making. The strategy of the state in regard to IP governance is based on articles that propagate public health, equal material resources distribution and safeguard agriculture. As an example, India has a sui generis system of protecting plant variety, which is the Protection of Plant Varieties and Farmers right Act, but not the breeder-centric system.[53] This system rewards innovation incentives as well as the traditional inputs of the farmers. The economic development and social justice is therefore incorporated in the

[52] Chancellor, Masters & Scholars of Univ. of Oxford v. Rameshwari Photocopy Servs., 2016 SCC OnLine Del 6229.
[53] Protection of Plant Varieties and Farmers' Rights Act, 2001 (India).

constitutional structure. One tool of this overall socioeconomic architecture is in the intellectual property regulation.

G. Constitutional Morality as Interpretive Methodology

If TRIPS obligations are exhibited to limit domestic welfare policies, what do the courts and policymakers do? The solution is harmonisation as opposed to confrontation. The moral of the constitution is not the violation of the treaty. Rather, it demands that treaties are made such that they can be interpreted along the same lines as in terms of constitutional values wherever it is open to the text.

The existence of such an interpretation is supported by international law. General principles applied to the interpretation of agreements state that they must be read considering their object and purpose.[54] Articles 7 and 8 of TRIPS strongly allude to social and economic welfare and the common good. These are provisions of interpretative latitude. In that way, constitutional morality is not the rejection of the TRIPS; it is the way its provisions are put in effect, which is legitimate at home.

H. India as Normative Model, Not Exception

The direction taken by India cannot be interpreted as an idiosyncratic resistance. It follows a more general trend among the Global South states that are in search of a balance between innovation and equity. The reason behind this is that the constitutional philosophy, legislative design and judicial interpretation are coherent in India. This integrity facilitates legitimacy. It goes to show that development-oriented IP governance may still be rule-based and in compliance with international standards. India is therefore model diplomatically persuasive. It does not oppose international trade or give in to maximalist demands. It shows

[54] Vienna Convention on the Law of Treaties art. 31, May 23, 1969.

that constitutional morality can be used to investigate multilateral engagement positively.

Development Justice: A Normative Framework for Reconstructing Global Intellectual Property Governance

A. Why a New Framework Is Necessary

It has been a common cliché of the TRIPS debate to provide strong protection or weak protection, innovation or access, compliance or flexibility. These kinds of binaries make the structural problem more obscured. It is not whether intellectual property ought to exist and whether developing countries ought to obey treaty commitments. The rhetoric is whether the intellectual property regulation in the world is appropriate in terms of its ability to uphold the concept of justice in a world of extreme technological inequality.

The Lockean theory of labour, the utilitarian theory of incentives, and the personality theory as the traditional arguments behind intellectual property, centred around the rights of creators and inventors.[55] These models developed in situations when the technological production was mostly domestic and the economic asymmetry between states was of lesser aspect. Presently, in a globalised knowledge economy who are typified by a concentration in the ownership of high-value patents and structural differences in the ability to innovate, these classical theories need to be recalibrated. As a reaction to this rebalancing, development justice burns forth. It acknowledges the fact that intellectual property rights work or exist within the global system of power and that distributive effects of intellectual property policies can not be overlooked. It is not opposed to innovations incentives. Rather it demands that these incentives

[55] John Locke, *Second Treatise of Government* (1690); Jeremy Bentham, *A Manual of Political Economy* (1843); G.W.F. Hegel, *Philosophy of Right* (1821).

should be combined with fair access, capacity building of technologies, and sustainable development.

Development justice thus reevaluates TRIPS as a rigid implementation agreement but as a flexible tool that is involved in the larger developmental obligations.

B. The Five Pillars of Development Justice in India and TRIPS

We define development justice in five dimensions interrelated with each other namely corrective justice, distributive justice, procedural justice, intergenerational justice, and sovereign justice. These dimensions taken together offer a systematic approach towards analysing the implementation of TRIPS.

1. Corrective Justice: Addressing Historical Technological Asymmetry

The modern world IP regime did not come out of thin air. It was formed in centuries of industrialisation that was concentrated in Europe and North America with the help of colonial extraction, unequal trade relations and asymmetric accumulation of capital. A great number of states of the Global South were not equipped to conduct research and research in the post-colonial period, as the level of technological infrastructure was lower.

Equal minimum standards that have been placed on the states that are unequal technology wise stand a chance of trapping them into a state of dependency. These historical asymmetries must be taken note of in correcting justice. It does not require compensation ex-post. Instead, it legitimises regulatory space which facilitates late industrialisation.

The technology transfer itself is recognized in TRIPS in Article 7 where the focus is put on the spread of technology to benefit both sides. However, as a matter of fact, this mandate has often been realized in an inadequate way to give real transfer. With development justice, interpretive focus is emphasized to the capacity building of the domestic level. The local working conditions, the

mandatory licensing on specific requirements, and investigation exemption become the tools of corrective balance, but not it is a distortion of trade.

This is a dynamic admirable in India, through the direction of pharmaceuticals. In its pre-TRIPS compliance process-patent regime, the indigenous firms had the ability to develop manufacturing skill. Since the 2005 WTO accord, India has maintained protectionist policies in place including Section 3(d)[56] in order to discourage a wasteful continuation of patents and at the same time promote invention. This measured methodology represents a perfect instance of the application of corrective justice: attempting to be in tandem with the rest of the world without relinquishing the developmental goals.

2. Distributive Justice: Ensuring Equitable Access to Essential Goods

Intellectual property rights introduce legal exclusivity, which may lead to market upsurge. The distributive consequences of distributing life-saving medicines, agricultural seeds, educational materials, or renewable technologies are obvious and extensive when it comes to the subject matter.

In distributive justice, there should be no impact of IP protection in the reduction of access to fundamental goods. This is particularly evident in constitutional democracies whereby through right to life, health, and education has the normative force. Distributive correctives to the IP system include compulsory licensing systems, patentability criteria that inhibit evergreening and exceptions to copyright in education.

Notably, innovative justice is not creativity denied by distributive justice. It demands a condition of proportionality. The reward given to the innovators should be offset with the social price of outside. In situations where the issue of exclusion is a risk to basic well-being, recalibration can be determined as being

[56] The Patents Act, 1970, § 3(d) (India).

ethically sound. The Doha Declaration on TRIPS and Public Health supported this principle of distributive justice by reaffirming the right of the members to safeguard the health of the people.[57] Development justice places such statements in the centre of the regime and not on the fringes.

3. Procedural Justice: Democratizing Global Rulemaking

The TRIPS negotiations occurred on a geopolitical landscape where third-world countries were usually not comparatively powerful in a negotiation. Later, so-called TRIPS-Plus agreements have often been concluded in a bilateral form, which magnifies asymmetry.

The inclusion of all in the making of the rules and the transparency in the resolution of disputes are required in procedural justice. International intellectual property regulation should not be isolated of the democratic accountability. In the case of Global South states, it is more firm in its maintenance of a multilateral negotiation space in favour of maintaining structural fairness over time, as this will not be gradually pushed out through unequal bargaining positions. Procedural justice also requires participatory systems in IP administration in domestic systems. Such democratisation is characterised by the pre-grant and post-grant patent opposition in India. The patent applications may be contested by the civil society organizations and public health groups, which makes the audit reasonable and transparent. Development justice enhances legitimacy through the inclusion of participatory protection.

4. Intergenerational Justice: Sustainability and Climate Imperatives

[57] Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/MIN(01)/DEC/2 (Nov. 14, 2001).

Climate crisis adds the time aspect to IP governance. Green technologies, climate-adaptation tools, and renewable energy are the resources also needed by the future generations and the current populations as well.

In case intellectual property regimes signal hindrance in the proliferation of clean technologies, the burden falls disproportionately on the developing countries whose share of historical emissions is minimal. The intergenerational justice thus requires that IP governance be geared towards the sustainability objectives. There are no such thing as optional mechanisms promoting technology transfer and deepening research collaboration and capacity building - they are ethically imperative. Development justice, in this regard, overlaps with commitments of global climate. Intellectual property cannot afford to go green.

5. Sovereign Justice: Preserving Regulatory Autonomy Within Multilateralism

The twenty-first century is neither a time nor a place where sovereignty reigns. States are volunteers who make treaty commitments at a time when they have the constitutional obligation to meet commitments.

Sovereign justice stipulates the fact that commitments at the multilateral level should not deny the domestic policy room needed in social welfare. TRIPS do not create maximal protection; it contains a minimum standard. Development justice focuses on the use of such interpretive flexibility. The bilateral trade negotiations between India and other countries regarding TRIPS-Plus resistance is an example of sovereign justice. India maintains constitutional balance by ensuring that it keeps its commitments under multilateral engagements, yet refuses to perform them in a manner that goes beyond the agreed. Sovereign justice therefore enhances the rule-based multilateralism but not sabotage it. It dictates that world integration should be accommodative of the localised democratic accountability.

C. Development Justice as Interpretive Method

Development justice is never an abstract philosophical concept but has the effect of being an interpretive approach when it comes to applying TRIPS commitments. According to the Vienna Convention on the Law of Treaties, treaties have to be interpreted in good faith, and in accordance with good faith with regard to the ordinary meaning of their terms, and in context, as well as in light of their object and purpose.[58] Social welfare goals are clearly stated in articles 7 and 8 of TRIPS and are therefore providing interpretative inspiration.

Development justice, in this way, corresponds to principles of interpretations of treaties in the existing principle. Neither does it presuppose textual distortion; it needs purposive reading. For example:

1. Requirements of patentability can be taken literally so that it can not be abused.
2. Compulsory licensing can be operationalised in case the need of the population is proved.
3. Copyright exceptions and restrictions can be interpreted in a manner that allows unrestricted access to education.

Such measures are still within the scope of TRIPS, but they are welfare-promoting.

D. India's Role in Operationalizing Development Justice

The experience of India gives a vivid example of the work of development justice:

1. There are high standards of patentability which stop trivial monopolies.
2. Mandatory licensing is still possible on certain terms.
3. The rights of farmers cannot be violated under plant-breeder protection.
4. Copyright exemptions favor education.

[58] Vienna Convention on the Law of Treaties art. 31, May 23, 1969. Article 31 is on interpretation of treaties.

This strategy has not driven India out of international trade; it is still a part of the WTO system with the protection of the people's welfare. The State of India is not an outlier, therefore but a laboratory in the development of conscious IP governance.

Development justice looks at TRIPS as the implementation-based regime as a unified tool of creativity and well-being. It puts a moral perspective of intellectual property, especially in the constitution and international fairness.

India's Strategic Compliance: Operationalising Development Justice Within TRIPS

The post-1995 intellectual property development in India is one of the more complex forms of moderated multilateral interaction of a Global South state. India integrated a model of alternative, constitutional-based, developed statutory draft, and careful statutory compliance as an alternative to rejection of TRIPS obligations and as an alternative to maximalist enforcement.

The principle of strategic compliance is based on three principles:

1. Full compliance with the TRIPS minimum standards; 2. Strict exploitation of interpretative flexibilities and 3. Contribution to the expansion of TRIPS.

This part investigates the way in which India realizes development justice using legislative framework, judicial rationale, and administrative procedures.

A. Section 3(d): Patentability, Public Health, and Anti-Evergreening Doctrine

This is perhaps the most controversial aspect of Indian patent law that has aroused international controversy, namely Section (d) of the Patents Act, 1970 (as amended in 2005). The provision makes the new forms of the already known substances patent ineligible unless they display improved therapeutic effect.

1. The Rationale

Section 3(d) was created due to the objections raised by the fact that drug companies might prolong their monopoly status using insignificant changes such as new salts, polymorphs, or formulations without any meaningful clinical benefit. These forms of evergreening might postpone competition on generic products and overprice. According to Article 27, member states are required to provide patents on inventions that are new, are composed of an inventive step and should be able to be applied industrially.[59] Nonetheless, TRIPS does not stipulate an innovative step or effectiveness. This interpretive space is created by this textual quietness. India took advantage of this room to define patentability in the sense that is in line with the priorities of public health.

2. Novartis AG v. Union of India

In Novartis AG, the Supreme Court of India upheld Section 3 (d) of the Patent Act of 1970 and denied Novartis a patent on the 3-crystalline form of *Imatinib Mesylate* otherwise known as Glivec.[60] In its rulings that stated that in case of pharmaceuticals, the meaning of efficacy in Section 3(d) of the Act should be read as therapeutic efficacy and not enhanced physical characteristics like flow or stability, the court explained that the efficacy of the drug in question. More importantly, the court highlighted that the Indian patent policy should strike the right balance between incentives to get innovation and the right to access cheap medicines. It dismissed the fact that it claimed that Section 3(d) breached TRIPS, as under TRIPS, members are allowed to establish standards on what defines patentability within a reasoned boundary. No hostile attitude towards innovation was evident in the judgment. Instead, it differentiated actual innovation and tactical patent prolongation. This argument would concur with the distributive and corrective aspects of development justice. India guaranteed the

[59] TRIPS Agreement art. 27.

[60] Novartis AG v. Union of India, (2013) 6 S.C.C. 1 (India).

proportionality by ensuring that trivial monopolies are blocked and protection of substantive inventions is still provided.

B. Compulsory Licensing: Bayer v. Natco and the Right to Affordable Medicines

Compulsory licensing is also one of the most controversial TRIPS flexibilities. In Article 31 TRIPS allows members to approve the use of patented invention without the permission of the inventor under the defined circumstances.[61] In 2012, a compulsory license was granted to Natco Pharma by the Indian Controller of Patents on Sorafenib Tosylate, which is a life-saving drug against cancer patented by Bayer and sold under the brand Nexavar.[62]

TRIPS Compliance and International Reaction

India did not fail to comply with procedural requirements, offered royalties to Bayer and based its decision on statutory standards that were in line with TRIPS. Although there were concern of some developed states, no WTO dispute was successful against India.

The episode demonstrates that development justice may be conveniently operationalized without violating the international commitments. It also displays sovereign justice: regulatory freedom in a country in a responsible manner within the framework of a treaty.

Critically, India has not granted compulsory licenses without a reason. The mechanism will continue to exist but will not be frequently exploited. Such a holdback enhances trustworthiness.

C. Pre-Grant and Post-Grant Opposition: Procedural Justice in Practice

[61] TRIPS Agreement art. 31.

[62] Bayer Corp. v. Natco Pharma Ltd., Compulsory License Order No. 1 of 2012 (India).

India also has a strong opposition system to patent application enabling third parties to object to patent applications prior to and post-granting. Such procedures make patent examination more democratic. Evidence challenging novelty, inventive step, or compliance of Section 3(d) may be submitted by civil society organizations, advocates of public health and by generic manufacturers. Procedural justice is reflected by such structures of participation. They help to increase transparency as well as avoid automatic issuance of dubious patents. Unlike structures where patent examination is carried out in a large part in administrative silos, the Indian model encourages wider participation. The aspect of participation enhances local and foreign legitimacy.

D. Plant Variety Protection and Farmers' Rights

Article 27.3(b) of TRIPS states that the members must protect the plant varieties via patent, an effective sui generis system or sui generis, or a mixture of the two.[63]

India has implemented the Protection of Plant Varieties and Farmers rights Act (PPVFR Act) According to which rights of plant breeders are ensure and farmers are allowed to save, utilize, sows, re-sows, exchange, share, and offer farm produce (subject to restrictions).

This recognition is dual, and it shows distributive justice and sovereign justice. It recognizes the innovation incentives and protects the agrarian communities that the socio- economic structure of India revolves around. The inequality in rural areas of a country where agriculture is a leading means of livelihood, may only worsen with breeder-based regimes that are purely breeder-centred. The *sui generis* strategy of India proves that the flexibility of TRIPS can be applied to cultural and developmental particularities.

E. Copyright and Educational Access

[63] TRIPS Agreement art. 27.3(b).

The copyright control system in India includes indiscriminate exceptions to education and research. *The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services*, the Delhi High Court affirmed the copyright lawfulness of course packs created out of the copyrighted material to be used in academics. The court interpreted statutory exceptions in a purposive manner which focused more on the significance of access to education in the society. Such a rationale is constitutional morality, distributive justice. The copyright protection does not supersede the educational equity, although the legislation continues to protect copyright.[64]

F. Vaccine Diplomacy and Global Solidarity

The production capacity of the pharmaceutical industry in India made India one of the most important sources of cheap vaccines as the COVID-19 pandemic continued. India also made efforts to sell vaccines to many developing nations under the initiative known as *Vaccine Maitri.* Although this initiative was not an intellectual property issue *per se,* it shows the more general developmental direction of the pharmaceutical ecosystem in India, an ecosystem historically conditioned by controlled patent policy.

India also co-sponsored demands of temporary TRIPS waiver under difficult times, citing that anomalous conditions called out of ordinary flexibility.[65] This attitude is that of Global South solidarity. It does not oppose intellectual property but it questions inflexibility in cases of emergency.

G. Resistance to TRIPS-Plus Pressures

India has continually opposed TRIPS-Plus terms in bilateral trade agreements such as the extension of data exclusivity and period of patents exceeding the

[64] Chancellor, Masters & Scholars of Univ. of Oxford v. Rameshwari Photocopy Servs., 2016 SCC OnLine Del 6229.

[65] WTO, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, WTO Doc. WT/MIN(22)/30 (2022).

multilateral demands. India maintains regulatory space by grounding its IP policy on WTO requirements, as opposed to bilateral expansions. Such a way shows the justice of the sovereign and diplomatic wisdom. India has continued to negotiate with the world in the global trade and protect constitutional balance.

H. Evaluating the Indian Model

The model of India has had its strengths and weaknesses. Some of the critics believe that the stringent patentability provisions can act as a deterring aspect to foreign investment. Advocates refute that clear and predictable standards promote stability in the long term and forestall abuse. The fact that India has a calibrated regime is not empirically substantiated by the fact that it hinders innovation. Quite on the contrary, maturing home-based pharmaceutical research and rising world integration has been experienced in India. More crucially, the IP framework of India has local legitimacy since it appeals to the values in the constitution. Development justice is not a theory in isolation itself, it is an institutional practice.

The strategic compliance of India explains that TRIPS do not have to be construed as a strict trade device that is not related to welfare issues. Careful statutory expression, judicial logic and administrative processes make it possible to reconcile international commitments with national morality by the Global South state. Pharmaceuticals, but not the only ones: Climate Technology, Digital Knowledge, and Future Development Justice.

I. Expanding the Development Justice Lens

Although the greatest focus has been induced by access to medicines, the developmental consequences of intellectual property have now expanded into the areas that will characterize the twenty-first-century global order, climate mitigation technologies, digital infrastructure, artificial intelligence, and data governance. The structural asymmetries which were present in the previous sectors also exist- indeed they are even exaggerated- in these sectors. As

concentration of patents, monopolisation of platforms and algorithmic dominance, they are disproportionately found in the advanced industrial economies. To the Global South, the difficult issue is not affordability but being dependent on technology. The train of forward-looking adaptation is therefore needed in development justice. Intellectual property needs to enable engagement in the new technological ecosystems instead of harbouring digital or environmental marginalisation.

A. Climate Technology and Intergenerational Justice

1. Patent Focusing and Energy Changeover.

The use of climate mitigation technologies: solar photovoltaics, wind turbines, battery storage systems, carbon capture technologies, is commonly covered by patent portfolios in the developed world. Poor countries have a twofold pressure: carbonise fast to satisfy international climate targets and keep the economy growing and industrialised.

When access to clean technologies is limited due to high licensing or restrictive patenting practices, then the cost of transition would be unfairly distributed. With development justice, the concept of intergenerational equity is brought into IP interpretation.[66] Delayed climate action is a problem that is faced by future generations. Hence, intellectual property governance is supposed to be rampant to sustainability concerns.

2. TRIPS and Technology Transfer

Article 66.2 of TRIPS requires the members of the developed countries to give incentives to businesses to enhance the transfer of technology to the least-

[66] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* 19–25 (1989).

developed nations.[67] But practical practise has been faulted as wanting. The development justice approach would enhance the reporting system, transparency, and accountability in terms of technology transfers undertakings. Strategic direction can be illustrated by domestic development of the renewable energy in India. On the one hand, India has sought to preserve patent rights in enhancing its domestic manufacturing, public- private, and research co-operations as a means of limiting technological dependence. It is not aimed at expropriation of patents but the development of ecosystems.

B. Digital Infrastructure and Knowledge Concentration

1. Platform Economies and Copyright Control

Access to information, production culture, and commerce takes place through digital platforms. Digital enforcement of copyright can strengthen market concentration alongside other experiences that have platform intermediaries are in disproportionate control.[68] Digital access is connected to education, small-scale business, and civic responsibility in most of the Global South societies.[69] Unreasonably restrictive implementation regimes can stifle innovation and withdrawal of user privileges. The Indian vision on intermediary liability and regulation of the digital arena reveals the attempts to manage the interests of the rights holders and digital inclusiveness. Although the issue of policy discussion is still underway, the principle underpinning the process is the need to have space with local digital entrepreneurship. Justice in the form of digital IP governance insists in development on privacy of user rights and fair use; monopolistic concentration should be avoided and promoting open innovation communities.

---

[67] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 66.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

[68] Shoshana Zuboff, *The Age of Surveillance Capitalism* 93–120 (2019).

[69] Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* 63–85 (2019).

C. Artificial Intelligence and Data Governance

The artificial intelligence is a boundary point where the intellectual property crosses over the path of information access, exposure of algorithms and tech dominion. Neural systems make use of large volumes of data. There are questions on whether training data should get copyright, whether AI-created inventions are patentable, and whether algorithmic products should be owned.[70] In the case of Global South, failure to be part of AI development is a threat of marginalisation at the economical level in the long term. Development justice also involves making sure that there is access to knowledge facilities and a decline of the enclosure of technology. The other way to go represents the emerging model of digital public infrastructure in India, which focuses on open standards and interoperability. Without eliminating protection of intellectual property, such infrastructure lowers the barriers to entry and promotes innovation in the domestic market. This is not aimed at undermining IP, but to avoid the development of structural exclusion by knowledge economies.

D. Education in the Digital Age

The coronavirus exposed online learning platforms to the full range of opportunities and vulnerability. The implementation of copy protection in the digital realm may have an impact on the availability of textbooks, publication of research, and sharing of knowledge. Development justice advocates strong brotherhoods against instruction use, more so in low contexts of income. The recent judicial tendency in India regarding educational copyright infringement cases proves the purposeful interpretation per access goals. Equity in education is especially more vital in the digital age. The IP governance has to evolve to fit the emerging forms of knowledge distribution.

[70] WIPO, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence* 10–18 (2020).

E. South-South Cooperation and Normative Solidarity

Global South solidarity is not a fallacy but is seen in concerted negotiations in the multilateral platforms. In discussions related to the pandemic, an initiative was made by India and South Africa to come up with temporary TRIPS waivers on technologies pertaining to COVID.[71] This suggestion was highly controversial, yet it highlighted the togetherness in asserting the developmental priorities. These efforts are an indicator of transitioning away not only to standalone national activity but also to South-South advocacy. Geopolitical importance is therefore given to development justice. It reinvents Global South states as opposed to rule-takers but peacefully, as a contributor to global governance transformation.

F. Balancing Innovation and Inclusion

The criticism that has been widely leveled against development-oriented intellectual property systems is that they can discourage foreign direct investment or even reduce technological co-operation opportunities. However, sustainable innovation ecosystem is based on legitimacy.[72] Political backlash can be a factor that disrupts markets when IP regimes are seen to be increasing inequality or hindering welfare. Predictable yet flexible balanced frameworks are used to support long term credibility. The history of the Indian IP policy illustrates the possibility of maintaining a strong investor response and developmental protection: the development of pharmaceutical research practices, digital innovations, and opportunities in renewable-energy industries have increased at the same time as the firms observe careful upholding of patentability requirements. In this respect, predictability, transparency and constitutional coherence are needed.

---

[71] Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, WTO Doc. IP/C/W/669 (Oct. 2, 2020).

[72] Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 Duke L.J. 1693, 1700–05 (2008).

G. Reframing Global IP Governance

The fact that development justice has been extended to climatic, digital, and AI spheres implies that TRIPS reinterpretation is not limited to the conventional discussion of medicines; it is the figure that helps create the new technological order. The regime developed during the first half of 1990s needs to face the problems of the twenty-first century: global pandemics, the climate crisis, digital monopoly, and paperless rule. The reinterpretation does not include a renegotiation of the treaty: it involves the application to Articles 7 and 8 on constitutional ethics and morality in dialogue with other countries at the multilateral level. The Global South contribution is neither confrontational nor destructive, it is productive, and it promotes a future where innovation and equity support each other and not their partners in crimes.

Reinterpreting TRIPS Through the Vienna Convention: Text, Context, and Purpose

Treaty Interpretation as a Site of Normative Reconstruction

Should TRIPS be developed to be more developmentally just rather than a foreteller of trade discipline, this change should be made within the parameters of the international law. Reinterpretation is justified not by the rhetorical values of politics but rather by adherence to the doctrine. The interpretation paradigm is the Vienna Convention on the Law of Treaties. As much as TRIPS is an annex to the Marrakesh Agreement that made the WTO, the panels of which and the Appellate Body have always affirmed the role of VCLT in treaty interpretation. Article 31(1) of the VCLT states that a treaty is to be read in the good faith and interpreted according to the ordinary meaning of its words, contexts and referring to the object and purpose of a treaty.[73] Article 31 (3 (c) also permits reference to any applicable international law rules that may be applicable in intercourse

[73] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

between parties.[74] These clauses provide space in development justice within the doctrines.

A. Textual Foundations Within TRIPS

The starting point to be used in the interpretation is the text of TRIPS itself, specifically Articles 7 and 8. Article 7 provides that protection and enforcement of intellectual property rights must help fuel technological innovation, transfer and dissemination of technology, mutual benefit of producers and users, social welfare and economic welfare and a balance of rights and rights. Article 8 reaffirms that members have the right to take any measures they consider appropriate to save needless gatherings of people health and food, and to advantage the people in areas thereof of crucial significance, as long as these actions are not conflicting with the TRIPS. These clauses are not recitations; they and express the subject and aim of the contract.[75] According to VCLT approach, interpretation of substantive obligations is directed by object and purpose. In turn, Articles 7 and 8 can be used as contexts when considering patentability under Article 27 or compulsory licensing under Article 31. A development-justice practice never goes over and above the textual commitments but interprets the textual objectives in a harmonious manner with the stated aims.

B. The Doha Declaration as Subsequent Agreement

Article 31(3) (a) of the VCLT acknowledges the fact that any later agreement between the parties with regards to how to interpret the treaty is supposed to be put into consideration. One such interpretation of understanding is the Doha Declaration on the TRIPS Agreement and Public Health adopted in 2001.[76] The declaration confirms that TRIPS is and can be interpreted and enforced in a

[74] Id. art. 31(3)(c).
[75] TRIPS Agreement arts. 7–8.
[76] World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, WTO Doc. WT/MIN(01)/DEC/2 (Nov. 14, 2001).

manner that would enable WTO members to uphold the right to protection of public health. This phrasing is another important piece of evidence that the considerations of public welfare are not mere peripheral exceptions, but justifiable interpretive priorities. According to the WTO principles of VCLT, the subsequent agreements are required to be taken into account by the WTO panels interpreting the TRIPS provisions. Multilateral practice is thus explicitly textually reinforced by development justice.

C. Systemic Integration: Human Rights and Sustainable Development

The concept of systemic integration, which is presented by the article 31(3) (c) of the VCLT, permits interpreters to take into account the rules of the international law which are relevant between parties.[77] Majority of the WTO members also sign international human-rights treaties that acknowledge rights towards health, education and development. The concept of sustainable development has turned out to be a cross-cutting goal of the international-law discourse. Systemic integration does not reduce TRIPS to the human-rights law, but as a matter of fact, it demands harmonisation. An example: in the interpretation of the scope of compulsory licensing, panels can have regard to the public-health provisions of human-rights instruments; in determining the practice of technology-transfer commitments, the principles of sustainable-development are usually contextual. Through such an integrative approach to international law, a greater level of coherence is ensured in the international law and the development justice made consistent with the systematic integration.

D. Proportionality and Regulatory Autonomy

Non-TRIPS WTO jurisprudence common to perhaps all but especially the General Agreement on Tariffs and Trade has developed proportionality-like

[77] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly 279, 280–83 (2005).

arguments to consider domestic regulatory interventions on trade.[78] The question as to whether the measure adopted by a member is optimal in protecting public health or seeking to boost availability of vital goods should not be whether the measure is textually limits, but whether it is used in good faith. In India, Section e.g. 3(d) does not ordinarily disallow patents, but narrows down the conditions of patentability where a definable domain can exist. In Article 31, the procedural safeguards and sufficient compensation are obligatory to compulsory licensing. Under conditions of such satisfaction, development-oriented use is treaty-consistent. There is no therefore the implication of the disregard of discipline in reinterpretation; it involves disciplined balancing.

E. The Limits of TRIPS-Plus Expansion

TRIPS-Plus standards, e.g. full twenty-year data exclusivity or twenty-year or more patent term extensions, are often included in bilateral and regional trade agreements. Although states are free to enter into such agreements, there is a systemic threat of the erosion of the multilateral equilibrium of TRIPS with the proliferation of the TRIPS-plus standard. In development justice, it is vital to have a retention of multilateral interpretive space. Procedural and distributive issues in justice will occur when the dominant economies utilise asymmetrical bargaining positions to institute increased standards. The reluctant attitude by India to TRIPS-Plus commitments represents prudence by the sovereign. India is constitutionally aligned by following the multilateral baselines without expanding beyond them. It is not a confrontational strategy and is sympathetic to negotiated multilateral consensus.

F. Judicial Dialogue and Epistemic Legitimacy

[78] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R (Dec. 11, 2000).

Domestic courts are very important in inculcating the development justice in the international compliance. The approach by the Supreme Court of India in *Novartis* case shows a cautious path to India's obligations and international commitments.[79] In applying the domestic law to rely on the objectives of public health, the court expressly recognised the commitments made through TRIPS. Epistemic legitimacy is achieved by such jurisprudence. It is an indication that Global South countries are not neglecting the treaty law, but they are doing so intelligently. Normative coherence is improved by this judicial dialogue between trade regimes and the domestic constitutional courts on the international trade level.

One of the key dangers of global governance is fragmentation, that is, competing normative regimes that act alone. Development justice aims at balancing and not discontinuity. It is not a proposal of unilateral violation of TRIPS obligations. Rather, it stipulates that interpretation should be unfaithful to object and purpose. Inflexible application neglecting the welfare issues is prone to political backlash, fatigue and loss of legitimacy of the treaty. Varying meaning enhances stability.

G. From Textual Constraint to Normative Evolution

Treaties are dynamic tools working in the dynamic socio-economic realities. TRIPS was also agreed upon prior to the maturation of the digital revolution, prior to the climate crisis escalation and prior to the pandemic exposing global supply vulnerability. Development justice is not revisionism, but is instead adaptive fidelity. The concepts of object and purpose should be interpreted according to the valuables presented in the current scenario under the principle of the VCLT. Social and economic welfare, directly alluded to in Article 7 cannot be entrenched in 1995 notions. Due to the changes in the technological paradigm, interpretive emphasis has to be altered as well.

[79] Novartis, supra.

H. India as Diplomatic Bridge

India is in an intermediate status between the developed and the developing economies[80]. It is significantly engaged in international trade without discrimination towards equity in development. This two-sided identity allows India to formulate proposals of reform on the basis of both rule-based multilateralism and constitutional morality. According to a pro-India diplomatic framing, a focus will be made on: resolution to comply with TRIPS; Global South solidarity leadership and Positive participation in multilateral reform. This normative authority through such positioning improves without an antagonistic posture.

Conclusion

The Agreement on Trade-Related Aspects of Intellectual Property Rights is at a crossroads within the history of its groundbreaking acceptance following the adoption procedure by the WTO Agreement three decades ago. TRIPS gained intellectual property into a regulatory convergence and liberalization framework with rules-based enforcement and dispute settlement and trade retaliation, the first application of intellectual property into a constitutional-level global trade framework.

However, it is not merely that the law of the land can enforce it that legitimacy in international law is rested. This paper is based on the idea that although TRIPS was negotiated as a tool of trade discipline, the seeds of a wider developmental agreement can be found in the text. Article 7 and 8 are a statement of the vision where IP protection would help in the diffusion of technology, social and economic good, and balancing rights and obligations. The Doha Declaration restated that the set of considerations regarding public health does not belong to the periphery of TRIPS but is one of its interpretations. The point is not that there

[80] Amrita Narlikar, *Poverty Narratives and Power Paradoxes in International Trade Negotiations* 145–60 (2020).

is not enough textual content, then. It is that it has an issue with interpretive orientation.

Intellectual property does not exist in the normative vacuum in transformative constitutional democracies of the Global South. It cuts across constitutional rights to equality, dignity, health, education and distributive justice. The case law of the Supreme Court of India displays that statutory interpretation should not prejudice these higher constitutional undertakings. Opponents of the TRIPS agreements can use India as a prime example of the way in which the mandatory aspects of the laws (such as sections 3(d), compulsory licensing and participatory opposition) have been used to show that the compliance with the TRIPS does not entail relinquishing of the public-welfare protection of the law. Instead, it involves principled normative interaction in the allowable space of interpretation of the treaty. The constitutional morality thus does not operate in a rebellious dominance of the responsibility of other countries but rather serves to operate like a balancing force so that international commitments are compatible with national justice.

In this paper, we introduced development justice as a conceptualized theoretical framework of recalibration of the international intellectual-based governance of intellectual property. Through the expression of five pillars which are interrelated, namely corrective, distributive, procedural, intergenerational, and sovereign justice, it illustrates that IP law is to be considered as having incentive, distributive, and developmental impacts. The development justice does not promote a wholesale undermined incentives of innovation. It demands proportionality. The issue of exclusivity to rights is critical in the development of science, but it cannot be used to override the provision of basic goods or the capacity of building technological capacity. The framework places TRIPS in a wider ethical horizon one that is concerned by the historical asymmetry, modern day inequality, and future sustainability.

The case of India shows how a Global South state can maneuver around multilateral commitments to continue to have domestic regulatory room as well as to remain credible internationally. India has been able to operationalize development justice by withstanding TRIPS-Plus pressures and through judicious use of compulsory licensing and maintaining high standards of patentability rules and did not forego rule-based trade participation. Besides, the participation of India in multilateral discourses especially in the face of the world crises in matters concerning public-health is an indicator of moving beyond defensive mentioning of flexibilities to normative leading aspect. Instead of destabilizing, global South solidarity strengthens the multilateral system when it is built not only on the basis of a doctrinal legitimacy, but also on the basis of constitutional coherence as well.

The viability of TRIPS is based on how it is able to react to modern realities pandemic preparedness, climate mitigation, digital concentration, and artificial-intelligence governance. When read literally, TRIPS can be seen as putting itself in a position of being inconsiderate of the welfare demands. Treaty content interpreted purposively in the light of its object and purpose as expressed in Articles7 and8 and with reference to the principles of treaty interpretation provided under the Vienna convention on the law of treaties, may become a system of equal world cooperation. The immediate location of change is not the renegotiation, but interpretation.

The debate is not between protection and abolition. It is between absolutism and equilibrium. Intellectual property is a means—an instrument for encouraging innovation, disseminating knowledge, and fostering technological advancement. When detached from social purpose, it becomes self-referential. When anchored in development justice, it regains legitimacy. The Global South does not seek to dismantle the multilateral trading system. It seeks equilibrium within it. India's constitutional experience demonstrates that such equilibrium is achievable: innovation incentives can coexist with public health safeguards; trade

commitments can align with social justice; global engagement can reinforce domestic welfare.

From trade discipline to development justice is not a rupture-it is an evolution. It is the recognition that global intellectual property governance must serve humanity's shared aspirations: dignity, equality, sustainability, and opportunity. TRIPS, interpreted through constitutional morality and development justice, need not remain a symbol of asymmetry. It can become a framework of cooperative advancement-where innovation thrives not at the expense of welfare, but in partnership with it. Only then will intellectual property fulfill its highest purpose: not merely protecting markets, but empowering societies.

TOWARDS UNDERSTANDING NUANCES OF LEGAL RESEARCH[1]

Dr. Mohammed Aamir Khan, Assistant Professor, Law, MNLU, Mumbai and Dr. Teesta Hans, Visiting Faculty, NMIMS's Kirit P Mehta School of Law, Mumbai

"If we dig in the garden we use a spade. If we search for oil, we employ a rockdrill. In other words, the choice of tools depends on the depth to which we intend to probe."[2]

Abstract- All sciences, including social sciences(jurisprudence), are in reality a culmination of the process of research. It is a continuous process and helps to identify and understand the issues better and find suitable solutions thereto. Research may, however be formal or informal, doctrinal or non-doctrinal, but to be effective it has to be methodical and a researcher should have requisite acquaintance with the problems and technique, failing which the desired goals may not be achieved. The study of law is closely associated with legal research. "Legal research serves as an indispensable foundation for the entire legal community, including practitioners, the judiciary, academic scholars, and students. It is a fundamental skill required to navigate the complexities of the law and ensure that legal arguments and decisions are grounded in sound evidence"[3]. Much has been written on the techniques which researcher in law should follow to achieve both depth and clarity. The aim of this paper is to focus on the essential elements of legal research. The primary objective of this study is

[1] *Dr. Mohammed Aamir Khan, Assistant Professor, Law, MNLU, Mumbai and Dr. Teesta Hans, Visiting Faculty, NMIMS's Kirit P Mehta School of Law, Mumbai

[2] Geroge Schwarzenberger," Reflections on the Law of International Institutions". 13 Current legal Prob. 276 at 289(1960)

[3] Otuturu, Gogo George, Legal Research Methodology: Major Stages in Legal Research

to facilitate the comprehension of legal research techniques to researchers and especially to the students the practical 'know-how' and theoretical insights necessary to understand the complexities of legal methodology.

In general, Research is defined as the systematic collection of information used to test specific assumptions or validate theoretical hypotheses. It functions as a rigorous inquiry aimed at either confirming new theories or expanding existing knowledge by introducing fresh data. Fundamentally, no research is entirely isolated or "new"; instead, all original discoveries represent a continuation of previous investigations, serving to support, challenge, or supplement existing academic work.

Keywords- information, evidence, data collection, enquiry, knowledge

Types of legal research

a. Doctrinal and non- doctrinal legal research

Doctrinal research primarily focuses on the legal rules, doctrines and principles. It is solely library-based research and fundamentally analyzes statues, case laws and legal principles to find out *what is the law?* At the other hand non-doctrinal research is empirical or socio-legal research that focuses the impact of law on the society. The significance of doctrinal research extends beyond the mere categorization and analysis of judicial precedents and institutions; it is a creative force that shapes the law through the application of logic and rational deduction. Historically, even during the era of analytical positivism—when it was argued that the judiciary merely "discovered" rather than "created" law—significant judicial innovation was occurring. The historical development of the common law system serves as a primary example of how judges function as active law-makers. As

mentioned by Justice Cardozo[4], that "law or legal propositions are not final or absolute but are in the state of becoming". He quotes Munroe Smith:

"The rules and principles of case law have never been treated as final truths, but as working hypothesis, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will be eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself ultimately is re-examined." [5]

The two outstanding examples of the creativity of doctrinal research are the law of torts and administrative law. About the latter, for instance, it has been remarked:

"The creation of a body of law where none had hitherto existed is a social achievement. It is an achievement not to be under-estimated. It also serves as a reminder that at particular periods in the history of law the creative working out of legal doctrine is both necessary and critical and justifiably a paramount concern of legal research". [6]

With the emergence of the sociological school. The creative role of lawyers and judges has come to be recognized explicitly. As propounded by Justice Holmes:

[4] . in his work The Nature of the Judicial Process
[5]. Quoted in The Nature of the Judicial Process 23 (1921).
[6] N D Grundstein," Administrative Law and the Behavioral and Management Sciences", 17 J legal Ed

"The life of the law has not been logic: it has been experienced. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconsciousness, even the prejudice s which judges share with their fellowmen, have had a good deal more to do than syllogism in determining the rules by which men should be governed". [7]

"The task of law as that of social engineering has come to be accepted as a dogma by the civilized societies all over the world including India. The chapters on fundamental rights and directive principles o state policy of the Constitution of India embody this philosophy. The concern of law as an instrument of economic and social justice has grown to such an extent that there is hardly any human conduct which has been left untouched by law. Thus, it can be concluded that the Doctrinal legal research has had the practical purpose of providing layers, judges and others with the tools needed to reach decisions on an immense variety of problems, usually with very limited time at disposal". [8] Whereas the non-doctrinal research is concern with the action of law and its impact on the society. To identify the gaps between the law and practice. For e.g. "The Muslim Women (Protection of Rights on Marriage) Act, 2019" criminalized the practice of instant triple talaq the non-doctrinal research will help to find out its impact on the society at large. To examine the fact whether the enactment in real has brought down the practice of instant divorce in India. Hence, we can conclude that the purpose of law is simply not to mirror or adjust to the public opinion when identifiable, but also to guide and transform public opinion.

b. Analytical research

[7] Oliver Wendell Holmes, The Common Law 1(1881)
[8] Vilhem Aubert(Ed), Sociology of Law 9(1969)

This research aims primarily at an exploration of what is the existing law. Where the law to be reformed consists of statute law, this research would mainly means locating the relevant statues. "At the central level, the relevant statutes would generally consist of central legislation, read, of course, with the relevant case law. However, very often state legislation on the particular subject may also have to be consulted".[9] A good research would, therefore, be expected to cultivate reasonable familiarity with the scheme of distribution of legislative powers between the Centre and the states under the Constitution. A good researcher is a person who is also well versed with the exceptions of the Statutes for e.g. both Hindu law and Muslim law, the overriding importance of custom has been well recognized for about a century. "In Hindu law, customs which are at variance with the Shastric law can still override the specific texts (in absence of a statutory provision), if they are valid customs. The Hindu Marriage Act 1955, for example, expressly preserves the validity of custom to a limited extent".[10] On the matters of personal law(these are the maters that very often come up for law reform) the legal researcher is expected to undertake a preliminary enquiry in this regard (i) the extent to which a particular statute on the subject has preserved the customary law, and (ii) the actual content of the customary law relevant to the topic under consideration, assuming that its operation has been preserved.

c. Historical Research

Historical legal inquiry is not merely a task of cataloging past rules for intellectual satisfaction or record-keeping[11]. Instead, it serves as a critical

[9] P.M.Bakshi ,"Legal Research and Law Reforrm".
[10]. Section 29 of the Act
[11] Nasution & Manurung, 2025, Introduction, Function, and Purpose of Legal History: A Conceptual and Practical Review, Journal MUDIMA

analytical tool when contemporary statutes or legal principles present complex queries that require an exploration of their developmental origins[12]. Frequently, investigating historical data reveals the underlying rationale for the specific phrasing or structure of current provisions, which can resolve ambiguities or provide a justification for laws that might otherwise seem obscure.[13]

Furthermore, this method can uncover past debates where certain legal alternatives were considered and subsequently rejected, offering insight into why modern reforms might succeed or fail[14]. It also highlights when a provision that was once justifiable has lost its validity due to shifting social or political contexts. Thus, historical research extends beyond "pure law" to include traditional sources and factual materials that offer a broader perspective on the evolution of legal thought.[15]

d. Comparative Research

Scholars have expressed different view on the definition and scope of comparative law research. As per Professor H.C. Gutteridge[16], “Comparative law denotes a method of study and research and not a distinct branch of department of law”. Some scholars for their convenience have coined an expression “applied comparative law” an expression that was long ago used by eminent criminologist in his study of habitual criminals”. [17] In present

[12] P. Ishwara Bhat, Historical Legal Research: Implications and Applications, Oxford University Press
[13] Nasir Majeed, Doctrinal Research in Law: Meaning, Scope and Methodology, Bulletin of Business and Economics (BBE)
[14] Ibid
[15] Dmitry Pashentsev, Conceptual Foundations of Historical and Legal Science: From Classical Traditions to Modern Innovations, Jounal of Russian Law
[16] Comparative Law (1974 reprint)
[17] Norval Morris, The Habitual Criminal 227(1976 repreint)

day this research has gained a lot of significance and impetus. Legislature across the globe imitate each other while trying to learn from each other's experience. The old name of comparative research method was comparative jurisprudence.

Major steps involved in research

The steps involved in research can broadly be divided into six categories. These are: "(i)A statement of purpose made in the form of formulation of the problem. (ii) A description of the study designs. (iii) Designing of the technique of sampling. (iv) Specification of the methods of data collection. (v) classification and tabulation of data. (vi) Conclusion and interpretation i.e. report writing"[18]

(i).Formulation of the problem- The philosophy of formulation of problem can be understood by an analogy which says, "a problem well put is half solved". A formulation of problem can be done by framing the problems in the form of common-sense questions. The initial phase of any scholarly investigation—the formulation of the research problem—is widely regarded as the most challenging yet critical stage of the entire enterprise. Defining a precise question requires significant intellectual patience, as a poorly articulated problem often leads to insignificant or meaningless results. In many ways, the act of correctly framing a problem is more intellectually demanding than finding its eventual solution.[19]

a. Distinguishing Social Problems from Research Problems-It is essential to differentiate between a "social problem" and a "research problem." While a social problem is defined by the specific values and grievances of a community, a

[18] Alphonse, N. (2023). The Main Stages of the Research Process , *International Journal of Research and Review*, *10*(7), 671–675.
[19] Holweg, WHY THERE IS NO "INSIGNIFICANCE" FOR A RELEVANT QUESTION, Journal of Supply Chain Management

research problem is an academic construct shaped by the investigator's analytical framework. For instance, a phenomenon like an increase in crime may be a practical "social problem" for law enforcement or social workers, but it only becomes a "research problem" when a scholar formulates it to test a specific theory or investigate a particular variable.

b. The Subjective Factor and Intellectual Experience - A common critique in social science research is the reliance on externally assigned problems—such as those given by supervisors or editors—rather than problems emerging from the researcher's own intellectual or lived experience. Selecting a topic based solely on external lists can lead to "bogus" or superficial research. Ideally, a research problem should be rooted in the researcher's inner curiosity and personal goals, as this "touchstone of experience" often yields more meaningful and sustainable academic contributions.[20]

c. Methodological Approaches: Deductive vs. Inductive

There are two primary paradigms used to structure the formulation of a research problem:

The Deductive Approach: Rooted in positivist epistemology, this "top-down" method begins with established theoretical premises. The researcher derives a set of specific hypotheses a priori and then collects empirical evidence to validate or refute them. This approach necessitates a structured research design, including defined variables and representative sampling.

The Inductive Approach: Conversely, the inductive method emphasizes a "naturalistic examination" of the social world. Rather than starting with a

[20] Maxwell, 2009; "Qualitative Analysis and Documentary Method: In International Educational Research," 2010

hypothesis, the researcher enters the field with an open mind to acquire a deep familiarity with the subject. As the inquiry progresses, the focus is sharpened, allowing the research problem and eventual theory to emerge directly from the empirical data

Whereas research questions are the precise and explicit questions that a researcher seeks to find out through his study. These research questions are derived from the formulated problem only. The purpose of problem formulation is to explain and elucidate the issue whereas research questions split that issue into precise inquiries for investigation.

ii. A description of study design or research design

"Broadly speaking research design refers to the visualization of the entire process of conducting empirical research before its commencement. It is possible to design a research project beforehand if the investigator is aware if the major sages and techniques in conducting research and of the purpose of the investigations. Although in its complete formulation every research design is unique, it resembles all other design in the broad outline of conducting research. On the other hand, research design aim at fulfilling different research purposes differs from one another in some of their salient features".[21]

iii. Design of sample

A vital phase in socio-legal studies is the selection of a representative sample[22]. Because it is often physically and financially impossible for a researcher to conduct a census—contacting every individual affected by a social issue—

[21] Victor S . D'Souza, Designs of Study in empirical research
[22] Kalpana V. Jawale, Methods of Sampling Design in the Legal Research: Advantages and Disadvantages, Online International Interdisciplinary Research Journal, 2012

sampling becomes a practical necessity. [23] For instance, a social inquiry into dowry legislation would require an overwhelming investment of time and capital if every citizen were interviewed. [24]

Moreover, identifying every member of a specific population is frequently unfeasible. [25]The primary advantage of utilizing a probability-based sample is its ability to produce highly accurate results while significantly reducing the expenditure of time, money, and labor. [26]

iv. Sources of data collection

The primary tools utilized in social surveys are the schedule and the questionnaire.[27] While these instruments are fundamentally similar in nature, they differ in their administration: a schedule is typically used during direct interviews where the researcher records the answers, whereas a questionnaire is usually distributed to respondents who complete and return it independently. [28]

For qualitative or in-depth studies, researchers often employ an interview guide, which outlines broad thematic headings rather than rigid questions. Regardless of the tool chosen, the objective is to use a standardized format to ensure the data collected remains objective and consistent across the study.

v. Classification and tabulation of data

Before information gathered through interviews or observations can be interpreted, it must be organized into a structured format. In its raw state, data is often

[23] Fricker, Sampling Methods for Web and E-mail Surveys, SAGE Publications Ltd eBooks 2008
[24] Rahman, Sampling Techniques (Probability) for Quantitative Social Science Researchers: A Conceptual Guidelines with Examples, SEEU Review 2022
[25] Ibid
[26] Ibid
[27] Otuturu, Gogo George, Legal Research Methodology: Major Stages in Legal Research
[28] Ibid

disorganized and unsuitable for drawing meaningful inferences. The process of classification involves grouping these raw findings into specific categories based on their similarities or functional relationships, allowing for a coherent analysis the object of the classification are; (a) to express the complex and scattered facts into concise and intelligible form. (b) to make points of similarity and dissimilarity clear;(c) to afford comparative study;(d) last but not the least to clear any ambiguity.

There are two types of classifications: Qualitative classification or classification according to the attributes; and quantitative classification or classification according to the variables.

vi. Report writing

The culminating stage of the research process is the formal preparation of a comprehensive report .[29]This final phase begins only after the gathered data has been systematically analyzed and interpreted—frequently employing statistical methods—to establish broader generalizations and findings. [30]The fundamental objective of this report is to provide stakeholders and interested parties with an in-depth account of the study's outcomes.[31]

Furthermore, the research report serves as a vital tool for the broad dissemination of knowledge, ensuring that the findings are available for wider academic and practical application). Importantly, the documentation of these results acts as a catalyst for future intellectual inquiry; by presenting a clear synthesis of the current findings, the report establishes the necessary framework for formulating new hypotheses and initiating further research into related legal or social issues.

[29] Otuturu, Gogo George, Legal Research Methodology: Major Stages in Legal Research
[30] Nasir Majeed, Doctrinal Research in Law: Meaning, Scope and Methodology
[31] Ibid

The Role of Logical Reasoning in Jurisprudence

Logic is concerned with the general and formal principles of valid reasoning. Logic in the legal field is concerned with the specific principles that ensure sound reasoning and valid decision-making. The existing body of legal materials forms a complex framework used to evaluate legal inferences.[32] However, legal systems are inherently "open-textured," meaning they are not entirely consistent or closed systems; they allow for the creation of new principles and the evolution of old ones.

This flexibility suggests that judges are not merely mechanical tools for deriving conclusions, but active participants who exercise a creative function, especially when competing rules apply to the same facts . The challenge for normative jurisprudence is to establish rational standards that guide this judicial creativity while maintaining the integrity of the legal system.[33]

Conclusion

In the words of Philip Selznick, “the major problem of legal sociology remains the integration of jurisprudence and social research. Unless jurisprudential issues of the nature and functions of law, the rotation of law and morals, the foundations of legality and fairness, and the role of social knowledge in law are addressed by modern investigators the sociology of law can have only peripheral intellectual importance”. Legal research in itself not only benefits the researcher but also to the society at large in the words of Mr. Justice Holmes, “A man may live greatly in the law as elsewhere, that there, as well as elsewhere, he may wreck himself upon

[32] Timoshina, Kraevsky, Law and Logic: E. Bulygin’s Deductive Pattern of Judicial Reasoning, 2021
[33] Baldini, Benedetto, The open texture of ‘algorithm’ in legal language, AI & Society, 2024

life, may drink the bitter cup of heroism, may wear his heart out after the unattainable".[34]

Again, it is research that brings to us the awareness that the law is a flowing river, never standing still though it may have the outward appearance of a placid lake. As Wigmore has pointed out: "To any student, it is an important intellectual stage when he first realizes that all law is in a state of constant motion like kaleidoscope- do not remember when this realization came to me. I know it was not while in the law school; but as I look back, I note a great difference in 'all my opinions about law since the time of that realisation'."[35]

[34] Quoted by Sol M. Linowitz," Our changing society: The Lawyer's Challenge", 54 ABAJ 445, 450(1968)
[35] John H. Wigmore,"Nova Methodus Discendae Decendaeque Jurisprudentiae" XXX Harv L Rev 812 at 823(1917)

TRADE UNIONS AND LABOUR CODE REFORMS IN INDIA: AN ANALYSIS UNDER INDUSTRIAL RELATIONS CODE, 2020.

Vishakha Bagdey, Assistant Professor GWCL law college Nagpur

Abstract

In India, labour unions are essential in safeguarding workers' rights, enhancing working conditions, and guaranteeing negotiations as a group. Unions have a significant impact on people's lives outside of the workplace and provide employees with a voice at work. Trade union laws guarantee their steady expansion, minimise their variety, and foster internal democracy in the economy and industrial organisation. In India, to simplify and modernise employment standards, labour laws were consolidated into four labour codes. The Trade Unions Act of 1926 and the Industrial Disputes Act of 1947 were superseded by the Industrial Relations Code of 2020, one of the most significant codes on trade unions.

This research investigates how changes in labour laws in India affect the operations, entitlements, and acknowledgement of labour unions. It analyses major reforms relating to the recognition of negotiating unions, regulations governing strikes and lockouts, and mechanisms for dispute resolution under the Industrial Relations Code, 2020. The research evaluates whether these reforms strengthen or weaken trade unions' role in safeguarding workers' interests. Furthermore, the study highlights the challenges faced by trade unions in adapting to the new labour codes. By analysing relevant labour law concepts, policy trends, and legislative provisions through a doctrinal and analytical approach, the study examines the impact of labour code reforms in modern India.

It concludes by evaluating whether these reforms achieve an appropriate balance between promoting industrial growth and safeguarding the collective rights of workers.

Key Words: Trade Union, Industrial Relations, Labour Reform, Union Rights, Collective Bargaining.

Introduction

A labour union is an entity created by employees to safeguard their rights and enhance their working environment, among other objectives. Accountable unions are essential in fostering positive relationships between management and workers. Trade unions represent a valid structure for mobilising workers to express their rights, concerns, and grievances.[1] The current trade union environment is fragmented and diverse, and it faces challenges.
An organisation founded by employees to protect their rights and improve working conditions is known as a trade union. Trade unions serve as a legitimate framework for organizing workers to express their rights and concerns. Responsible unions are crucial in fostering positive relationships between management and labour. Smaller unions may encounter challenges in obtaining recognition. Labour unions have been adapting by reaching out to sectors that were previously not well represented, like the informal economy and the growing gig economy. New types of organizations, such as cooperatives, digital projects, and worker groups, have been created to address the needs of workers in unstable situations. The government worked together

[1] The Changing Roles of Trade Unions in India: A Case Study of National Thermal Power Corporation (Ntpc), Unchahar Piyali Ghosh1*, Shefali Nandan1 and Ashish Gupta2 Asian Academy of Management Journal, Vol. 14, No. 1, 37–57, January 2009

with labour unions to create labour laws. Unions grew stronger as a result of this process, and they began to assert themselves by organising numerous strikes at both the national and enterprise levels, rather than contributing to economic performance. The implementation of new labour codes, although presented as a reform, has raised valid concerns about the erosion of worker protections and collective bargaining rights. The Industrial Relations Code consolidated the following three significant laws into a single unit, which is a significant change in labour jurisprudence in India

• *The Industrial Disputes Act, 1947.*

• *The Trade Unions Act of 1926.*

• *The Industrial Employment (Standing Orders) Act, 1946.*

The Industrial Relations Code applies to industrial facilities that satisfy specific conditions:

- Manufacturing plants with 100 or more workers who have been employed at any point in the last year (Mandatory for such plants to establish a Works Committee consisting of both employer and employee representatives).
- Industrial Establishments with a staff of 20 or more employees (Mandatory for these establishments to have one or more Grievance Redressal Committees to handle disputes arising from individual complaints).
- Any labour union with a minimum of 7 members is qualified for registration under the Code.
- A factory with 300 or more employees who have worked within the previous year (Criterion for regulations related to Standing Orders).[2]

The Code, 2020, introduced several changes:

[2] https://www.taxmann.com/analysis-the-industrial-relations-code

- Acknowledgement of Bargaining Union/Council: A union that has 51% backing can be acknowledged as the exclusive negotiating union.
- Striking Rules: Employees are required to provide 14 days' notice before a strike, potentially restricting abrupt industrial action.
- Streamlining the Registration Process: Procedures for registering trade unions are simplified.
- Fixed-term Employment: Employers can employ individuals for a set duration with comparable advantages to those of permanent employees.[3]

After gaining independence in 1947, trade unions became pivotal to India's industrial relations system, particularly within the public sector, influencing wage regulations, labor legislation, and workplace standards. The trade union movement took place in the United Kingdom between 1750 and 1850. Operations in Bombay's textile mills started in 1851, with Calcutta's jute mills following suit in 1854.[4] Mr Lokhandey established an organisation for Bombay Mill Workers in the year 1890. It was known as the Bombay Mill Workers Association, frequently considered the origin of the Indian Labour Movement. It was the initial labour organization in India.[5] In 2015, India had 12,420 officially recognized labor unions, each with an average membership of 1,883 individuals.[6]

[3] FROM COLONIAL RESISTANCE TO CONTEMPORARY CHALLENGES: THE EVOLUTION OF TRADE UNIONS IN INDIA Diksha Patel, Amity University Chhattisgarh Volume V Issue IV | ISSN: 2583-0538

[4] The Role of Trade Unions in India: An analysis Bhawna Hinger1* International Journal of Social Impact ISSN: 2455-670X ISBN: 978-1-365-68610-8 Volume 2, Issue 1, DIP: 18.02.019/20170201 www.ijsi.in |January-March, 2017

[5] Evolution of Trade Unions in India Dr. Sanjay UpadhyayaV.V. GIRI NATIONAL LABOUR INSTITUTESenior Fellow, V.V. Giri National Labour Institute, NOIDA. Printed at: Chandu Press, D-97, Shakarpur, Delhi-110092

[6] Pocket Book of Labour Statistics, Labour Bureau, 2017.

Article 19(1)(c) of the Indian Constitution from 1950 grants citizens the essential freedom of speech and expression, as well as the right to establish or join associations or unions, such as trade unions. [7] The members of the union have the right to assemble, to travel freely, to address their issues and share their opinions, and to own property. This entitlement includes the authority of the State to enforce reasonable limitations.[8]

Following India's initiation of economic liberalization in 1991, there arose an increasing call for extensive labour reforms, commonly known as second-generation reforms, starting from the late 1990s and early 2000s. Nonetheless, despite significant discussion, there was minimal tangible action until 2017, when the Central government presented four labour Codes in Parliament. These labour codes encompass four main areas: wages, industrial relations, social security, and safe and healthy working conditions. They combined 29 existing labour laws, which Parliament approved in 2019 and 2020, but were only announced on 21 November 2025.[9] The law must neither favour one side nor be a pro-labour code; rather, it must balance the interests of both parties. There are several provisions in the IR Code, 2020, that allow both employers and employees to settle disputes amicably. In this research paper, the researcher highlighted Trade Unions and Labour Code Reforms in India with specific reference to the Industrial Relations Code, 2020, by examining the impact of labour code reforms on the functioning, rights, and recognition of trade unions in India, to evaluate whether reforms strengthen or weaken trade unions' role in safeguarding workers' interests and to identify the challenges faced by trade unions in adapting to the new labour codes

[7]Constitution of India, 1950
[8] All India Bank Employees' Association v. N.I.Tribunal, AIR 1962 SC 171
[9] Trade Unions and Collective Bargaining© Nishith Desai Associates 2019

Recently, the new labour code reforms have been introduced, which have a ***positive impact*** on the functioning, rights, and recognition of trade unions in India. Reforms implement a "sole negotiating union" system in which a union that secures 51% worker support obtains exclusive bargaining privileges, likely simplifying negotiations and enhancing recognition for leading unions. Thresholds for standing orders increase to 300 employees (up from 100), simplifying operations while establishing councils to expedite dispute resolution through tribunals. Unions in the gig and unorganised sectors acquire fresh leverage as social security expands to include platform workers, indirectly broadening their advocacy reach.[10] The updated meaning of the term "Strike" in the Industrial Relations Code (IRC), 2020, Section 2(zk) has been broadened to encompass the scenario where "mass casual leave" is taken by at least half of the employees on a particular day. The revision in the definition of a strike aims to deter sudden strikes and foster a positive working environment in industries. The Industrial Relations Code, 2020, includes compulsory guidelines to be followed before a strike is initiated, ensuring a swift resolution of conflicts, minimizing disputes, and preventing sudden work stoppages. Additionally, the code imposes limitations on conducting strikes while conciliation or tribunal procedures are ongoing.

The regulation stipulates that a significant industrial enterprise with 300 or more staff must obtain consent from the appropriate Government agency prior to implementing layoffs, retrenchments, or closures. This threshold has been increased from 100 to 300 employees, and States are permitted to raise this limit even more. To ensure quick resolution of conflicts, a time-bound process has been introduced. Industrial tribunals will now include a judicial and an administrative member, enhancing their expertise and efficiency. Having two members on the Industrial

[10] https://www.isas.nus.edu.sg/papers/indias-new-labour-codes-decline-of-trade-union-influence/

Tribunal will help in swiftly settling labor disputes. This initiative aims to encourage growth by establishing a more consistent, speedy, and efficient method of handling industrial disagreements. If issues are not resolved by the conciliation officer within 90 days, the concerned party can directly seek assistance from the tribunal without needing government referral, which used to be time-consuming. This approach reduces delays in resolving industrial disputes and legal matters. These adjustments emphasise industrial stability by requiring advance notice universally and safeguarding dispute resolution mechanisms from interference, decreasing unexpected halts while maintaining employee rights, such as the legality of subsequent strikes. Basically, the new labour law reform introduces a major impact on the following points;

- Simplification and consolidation of labour laws.
- Clear framework for collective bargaining.
- Recognition of a single negotiating union may reduce inter-union rivalry.

While dealing with ***the negative impacts*** of the new labour code with respect to trade unions, the analysis that the Higher strike notice (14 days) and 75% worker vote requirements dilute unions' protest power, hindering spontaneous action.[11] The IRC strengthens procedural hurdles before a strike can legally proceed, which critics argue “neuters” the strike weapon. Workers must give a 60-day prior notice of strike (up from 14 days under the Industrial Disputes Act), and any conciliation or adjudication process can extend this period to several months. Failure to comply with notice or restrictions can attract heavy penalties (up to ₹50,000 and imprisonment), compared to earlier modest fines. Imposing strict timelines (e.g., 30

[11] https://www.civilsdaily.com/discuss-the-merits-and-demerits-of-four-labour-codes-in-context-of-labour-market-reforms-in-india-what-has-been-the-progress-so-far/

days for grievance committees, 3 months for conciliation, 12 months for tribunals). Enshrining unfair labour practices (ULPs) as a codified list for the first time, with penalties for both employers and unions.[12] Layoff approvals are waived for firms under 300 workers, reducing unions' leverage against retrenchment and favouring employers.[13] This can hamper the trade union movement in India, largely diminished the power of trade unions compared to the period before the reforms, transferring authority to employers via tougher regulations and less bargaining power.

Impact of New Labour Codes on Workers

Although the recently enacted labour laws promise to overhaul the labour market, t hey have serious flaws, including limited collective bargaining rights, insufficient s ocial security benefits, gender inequality, and inadequate minimum wage provision s.

To guarantee adherence to international labour standards, these concerns require a comprehensive reevaluation. In cases where only one trade union operates within an industrial establishment, the employer is required to acknowledge it as the exclusive negotiating union representing the workers. Conversely, in situations where multiple trade unions are present, the union that secures the backing of at least 51% of the workers listed on the muster roll, as confirmed by established verification methods, will be recognised as the negotiating union by either the central or state government. There is a need for clarification to delineate the differences between the floor wage

[12] Sharma, A. (2023). Brief Analysis of the Industrial Relations Code, 2020. IJLRA
[13] https://legacypartners.in/insights-and-research/the-impact-of-indias-new-labour-codes-on-employees-a-new-era-of-rights-and-reforms

and the minimum wage, as well as to elucidate the objectives and criteria for determining the floor wage.[14]

Comparison between Pre- reform and Post-reform of Trade Union

Aspect	Pre-Reforms	Post-Reforms
Union Recognition	Multiple unions per workplace	Single union with 51% support
Strike Ease	Shorter notice, fewer barriers	14-day notice, 75% vote required
Layoff Threshold	100 workers needed approval	300 workers exempt
Membership Trends	Formal sector peak, political clout	Stagnant, informal shift
Overall Influence	Higher militancy, public support	Reduced leverage, employer-favoured

Analyses indicate that the IRC enhances the bargaining power of employers, particularly in larger organisations. The 51% majority requirement for recognition can sideline minority unions and limit diversity, but it also undermines smaller unions that might historically advocate for vulnerable groups (e.g., women, informal workers). Fixed-term employment (FTE) regulations offer statutory benefits to FTE workers but do not change their status to "permanent" employees, allowing employers to maintain a significant portion of the workforce on short-term contracts and reducing long-term union presence.[15]

[14] Analysis of the Industrial Relations Code, 2020. Taxmann 2025.

[15] Rajalakshmi, K. (2020). Imbalancing Act: India's Industrial Relations Code, 2020. PMC.Imbalancing Act: India's Industrial Relations Code, 2020 Aishwarya Bhuta [1,✉] PMCID: PMC9409614 PMID: 36042793

Reforms aim to decrease "regulatory cholesterol" for formal sectors, thereby improving the rights of gig workers and MSMEs to foster goodwill. However, formal unions are confronted with risks of monopoly and potential obsolescence. In India's enterprise sector, trade union membership and density are relatively low in comparison to total employment; as of 2010, over 98% of workers were not affiliated with any trade union, and the scope of collective bargaining was limited. The majority of enterprises in India, particularly small and medium-sized ones, lack trade unions entirely, indicating that the number of firms with even a single union is minimal. If a dominant trade union possesses more than 51% of the membership, smaller unions may effectively become redundant, as employers may cease to acknowledge them. This situation could hinder their growth prospects. Generally, trade unions need time to establish their presence within an organization. The larger trade union, serving as the exclusive bargaining representative, may monopolize trade union rights, even if it does not sufficiently safeguard the rights of workers.

Trade Union Recognition and Bargaining

The IRC establishes a formal negotiating union structure at the establishment level, shifting from the primarily voluntary and state-specific recognition system under the previous Trade Unions Act. When an establishment has only one registered trade union, the employer is required to acknowledge it as the exclusive negotiating union. In cases with several unions, the union that secures at least 51% of workers on the muster roll is designated as the exclusive negotiating union; if not, a negotiating council is established comprising unions that have a minimum of 20% membership.[16] A major concern is that the IRC's emphasis on flexible hiring (via FTE and increased retrenchment limits) might worsen informalization and split the

[16] "Impact of the Industrial Relations Code, 2020 on the Trade Union in India." European Journal of Employment Law and Labour Relations, 2025.

workforce. FTE employees have a right to statutory benefits proportional to their length of service, but they are not automatically "regularized," complicating unions' efforts to establish stable, long-term bargaining groups. The increasing number of contract and fixed-term employees diminishes the percentage of unionizable permanent workers, potentially undermining collective bargaining power as time goes on.[17]

Strikes, Lockouts and Dispute Resolution

The IRC imposes additional procedural obstacles that must be overcome before a strike can legally take place, which critics claim effectively diminishes the effectiveness of the strike as a tool. Workers are now required to provide a 60-day advance notice of their intention to strike (an increase from the previous 14 days mandated by the Industrial Disputes Act), and any processes of conciliation or adjudication may prolong this notice period to several months. Noncompliance with the notice requirements or other restrictions may result in severe penalties (up to ₹50,000 and imprisonment), in contrast to the previously minor fines. However, the Code guarantees faster resolution of disputes by imposing strict timelines (for example, 30 days for grievance committees, 3 months for conciliation, and 12 months for tribunals). It additionally formalises unfair labour practices (ULPs) as an officially acknowledged list for the first time, enforcing penalties on employers and unions alike. In this regulatory context, carrying out legal strikes becomes extremely challenging. The necessity to give notice encourages state participation, and once the state gets involved, the viability of a strike might be jeopardised. These stringent

[17] The Industrial Relations Code, 2020. India Code, Ministry of Law and Justice.

regulations greatly limit the ability of workers and employers to commence strikes and lockouts.[18]

Whether these reforms strengthen or weaken trade unions' role in safeguarding workers' interests?

The Code requires a 14-day notice for any strike and prohibits strikes during conciliation or tribunal processes, effectively making spontaneous walkouts illegal and limiting unions' main negotiating leverage. Additionally, the threshold for implementing standing orders has been raised from 100 to 300 employees. As a result, businesses with fewer than 300 workers can set their own employment terms, reducing union influence over working conditions in smaller workplaces.[19] Moreover, the threshold requiring government approval for layoffs, retrenchments, and plant closures has increased from 100 to 300 workers, simplifying the process for employers. The legislation also restricts the number of non-employees referred to as 'outsiders' who can serve in leadership roles within trade unions, a move that may undermine unions dependent on external support or specialized knowledge.[20]

The Code sets out a clear legal basis for recognising a "Negotiating Union" if it has at least 51% membership, or, where no such union exists, a "Negotiating Council" authorised to conduct formal talks with employers. By requiring unions to reach a 51% membership threshold to gain exclusive bargaining rights, the Code aims to promote the development of larger, more representative unions and minimise the division that arises from having

[18] Sharma, A. (2023). Brief Analysis of the Industrial Relations Code, 2020. IJLRA
[19] Overview of Labour Law Reforms Ministry: Commerce and Industry
[20] Impact of Industrial Relations Code, 2020 on Employers: Fixed Term Employment and Trade Unions Published On - November 1, 2021 Anirudh Articles

numerous smaller ones.[21]. The Code also requires the formation of Grievance Redressal Committees in every workplace that employs 20 or more workers, establishing a formal structure for resolving workplace disputes with the involvement of union representatives. Moreover, the broader definition of "worker" now covers a wider range of employees, which may extend the reach of trade union participation and associated benefits to more individuals.[22]

Challenges faced by trade unions in adapting to the new labour codes

Raising the retrenchment threshold to 300 employees would allow management to restructure more freely, making it harder for unions to thwart plans for layoffs.[23] A sizable portion of the workforce switched to contract or fixed-term positions, which, under the IRC, offer few benefits but no assurance of permanence, making them more difficult to unionise and easily replaceable.[24] Unions were forced to participate in protracted negotiations and arbitration rather than start strikes due to the 60-day notice requirement and the possibility of fines.[25] The changes in labour laws primarily focused on formal units based on establishments, despite a large number of workers remaining migrant, informal, or engaged in gig work, such as construction and logistics. The Code concerning Safety, Health, and Working Conditions imposes stringent standards for fundamental

[21] https://chambers.com/articles/india-s-new-labour-codes-a-comprehensive-overview-for-employers
[22]https://www.jsalaw.com/author/jsa/
[23] Migration Letters Volume: 21, No: S7 (2024), pp. 1965-1970 ISSN: 1741-8984 (Print) ISSN: 1741-8992 (Online) www.migrationletters.com The Impact of the COVID-19 Pandemic on Trade Unions in India: Challenges, Adaptations, and Future Prospects Dr Shweta Sethi
[24] Trade Unions in Contemporary India: Revitalisation Strategies and Migrant Workers Pranita Kulkarni Volume 18, Issue 1 https://doi.org/10.1177/09737030241250113
[25] https://www.drishtiias.com/daily-updates/daily-news-editorials/implementing-labour-reforms-in-india

workplace facilities.[26]

Employers are excused from providing creches, canteens, and welfare officers if th e number of female or total workers falls below set thresholds, essentially forcing s maller enterprises out of compliance. There is now more reliance on contract labour due to labour laws and economic factors. The percentage of temporary workers in factories increased from 26% in 2004–05 to 36% in 2017–18, in contrast to the percentage of permanently hired workers. [27] The IRC presents the idea of a "negotiating trade union" (or negotiating unions in bigger organizations) as the conduit for collective bargaining. Although this decreases competition among unions in theory, in reality, it intensifies competition among unions relying on this recognition and could sideline smaller or recently established unions. This may result in heightened competition, political affiliations, and weak accountability within unions. The IRC does not directly address these structural issues, and without internal reforms, unions could struggle to effectively involve their members, despite the Code formally recognizing their role.[28] The Code favours arbitration and conciliation as primary means for settling industrial disputes, often placing them ahead of rights-based litigation. This preference may reduce the adversarial nature of union strategies and shift power toward employers and specialized dispute resolution authorities.[29] The IRC is part of a larger policy change aiming to improve business conditions and flexibility in the labour market. Some assessments suggest a purposeful effort to diminish the influence of

[26] International Journal for Multidisciplinary Research (IJFMR) E-ISSN: 2582-2160 Challenges Facing Indian Trade Unions in A Changing Labour Market Akriti Shukla1, Ayush Kumar Gupta2, Aryan Shukla3, Ananya Gupta4

[27] Steel Authority of India Limited vs. National Union Water Front Worker's, Supreme Court, AIR 2001 SC 3527.

[28] https://www.scribd.com/document/251456949/Problems-of-Trade-Union#google_vignette

[29] Aishwarya Bhuta, 2022. "Imbalancing Act: India's Industrial Relations Code, 2020," The Indian Journal of Labour Economics, Springer;The Indian Society of Labour Economics (ISLE), vol. 65(3), pages 821-830, September.

opposition-affiliated unions. By favoring its own associated central trade union like Bharatiya Mazdoor Sangh, the government restricts room for dissenting union opinions.[30]

Following the analysis, the paper can suggest the subsequent policy and institutional recommendations:

1. Enhancing Union Representation for Informal Workers

- Promote sector-specific and multi-employer unions to organise informal, contract, and platform employees.

- Provide legal and financial assistance for unionisation efforts in sectors with high levels of informality, such as construction, textiles, and logistics.

2. Improving the 51% Rule and Recognition Process

- Consider a lower minimum recognition threshold for industries with significant labour turnover to prevent situations where bargaining becomes all or nothing.

- Grant minority unions a limited role in grievance committees or multi-union councils.

3. Safeguarding the Right to Strike and Demonstrate

- Uphold procedural protections while avoiding conditions that hinder the practicality of strikes.

- Ensure that penalties for unauthorized strikes are reasonable and do not stifle legitimate labour protests.

4. Extending Code Protection to Informal and Platform Labour

[30] https://www.isas.nus.edu.sg/papers/indias-new-labour-codes-decline-of-trade-union-influence/

- Revise or clarify the Code to offer substantial protection to gig workers, home-based workers, and platform labour.

- Implement mechanisms for setting sectoral minimum wages and conditions that complement negotiations at the enterprise level.

5. Strengthening Trade Unions' Capacities

- Provide support for union education in adhering to labour laws, utilising data analytics, and enhancing negotiation skills.

- Encourage unions to leverage grievance committees and ULP provisions to provide tangible benefits to members, thus boosting retention rates.

Conclusion

The Industrial Relation Code, 2020, modifies labour regulations to simplify adherence requirements and enhance positive employer relationships. It enhances job stability, negotiation between groups of employees, and the resolution of disputes by introducing more reliable and clear procedures. The Code establishes consistent definitions for employees while providing companies with greater flexibility in their operations. Overall, it encourages harmony in the workplace, increases efficiency, and promotes a well-rounded, progress-driven work environment. Prioritizing the improvement of effective representation for freelance and informal workers within future labour policies, alongside enhancing legal understanding, is crucial. The 51% threshold for registration as the Sole Negotiating Union under the Industrial Relations Code, 2020, presents conflicting effects on the strength of collective bargaining. Moreover, it is essential to ensure that bargaining rights encompass more than just formalities and address the shortcomings in administrative units that are reliant on management.

RETHINKING THE LEGAL FICTION OF IRREVOCABLE CONSENT IN INDIA FROM THE LENS OF MARITAL RAPE

Ms. Esha Ukey

Abstract

The term 'consent' is a voluntary and informed agreement of a person choice to participate in an act, relationship or any kind of decision. This paper rethinks the validity of such a legal presumptions in the ray of Constitutional values of dignity, equality, privacy and personal liberty. Free consent should be replaced by outdated legal presumptions to ensure better protection for an individual rights in Indian society as it impacts on women's bodily autonomy and dignity. It argues, that consent is continuous and revocable choice within the matrimonial institution, this signifies the traditional challenges of marriage and contribute to discussion on gender justice and the need to align the Indian criminal laws.

Keywords- Consent, Supreme Court of India, Indian Criminal law, Indian Penal Code, Bharatiya Nyaya Sanhita, Marital Rape, Matrimonial Institution.

Introduction-

The law dissimulates that the consent is "implied" and boundless for every subsequent sexual act. This makes the legal concept of rape within marriage cerebral impossibility under that specific doctrine. There is a historical treatment under exception 2 to section 375 of IPC where, the Indian Penal Code is drafted in 1860,[1] this doctrine is from 18th century an English common law is specifically the legal treatise of Sir Mattew Hale.[2] Here absolute marital immunity exception 2 to section

[1] Indian Penal Code, No. 45 of 1860, § 375 Exception 2 (India).
[2]

375 of IPC states the sexual intercourse by a man with his own wife not being under fifteen years of age, is not a rape. The property status has a historical provision treating a woman as they legally own her as a property of husband. Consent was treated as structural status based and set by marriage, rather than a wide awake. In 2017 the amendment in the landmark case independent thought v/s Union of India, the Supreme Court of India raised the institution to protect minor wives, as it ruled sexual intercourse with a wife under 18 years of age is rape.[3]

A transition to BNS 2023, where India overhauled its penal codes, the exception was perpetuated under section 63 of Bharatiya Nyaya Sanhita exception 2 continues to expressly shield husbands from rape charges involving an adult wife[4]. If we see from a modern legal, medical and psychology perspective consent cannot be permanent there is dynamic modern jurisprudence it establishes that consent must be unambiguous, voluntary and unbroken. Consent is clear to specific time, environment and nature of an individual act, it is true autotomy where a person holds on to the right to withdraw consent at any point before or during a sexual relations treating consent as permanent converts elective choice into a structural obligation.

While Indian prescribed criminal law to continue legal protection of marital immunity, constitutional jurisprudence strongly asserts that marriage does not quench sexual autonomy a constitutional contradiction in legal scholars argue with exception that directly violates article 14 right to equality and article 21 right to life, dignity and integrity of the Indian Constitution[5]. As the judicial precedents are taken by supreme court which repeatedly guaranteed in privacy and bodily autonomy in cases like **K.S Puttaswamy V/S Union of India 2017**, that a woman's body belongs

[3] Independent Thought v. Union of India, (2017) 10 S.C.C. 800 (India).
[4] Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India)
[5] INDIA CONST. arts. 14, 21.

to her alone[6]. Currently, Indian law is highly fragmented the legislature protects the "Institution of Marriage" as it requires civil remedies rather than criminal prosecution vice versa, the rights advocates argue that marriage is a partnership of equals and should never shield a partner from violating an individual bodily agency. The Justice Verma Committee Report 2023,[7] was formed immediately after the brutal case that took place in Delhi, Nirbhaya gang rape case 2012, (NCT)[8] led by the former Chief Justice J.S Verma there was tension over the India with reviewing the Indian laws on sexual assault and recommending speedy trials with harsher punishments. There was abolishment of martial rape exception the committee strongly recommend it should be criminalized it was declared that marriage cannot be "irrevocable consent" to sex and the rapist regardless relationship with the victim. Rape is not a crime of passion or desire but is a violent weapon to control humiliation over women's but unfortunately while, the government adopted many committees the suggestions and recommendation in the criminal law amendment 2013, was rejected to criminalize martial rape[9]. Later, the 272nd Law Commission Report 2017, was established under the title of statutory frameworks of tribunals in India, this report was carried by the law commission of India whose entire focus was on the mechanics of the legal system rather than criminal law[10]. This report tired to fix administrative judiciary but without any implementation the system institution suggested the law commission the struggle to provide timely relief to the survivors.

1) **Evolution of martial rape in India** –

[6] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).
[7] *Justice J.S. Verma, Justice Leila Seth & Gopal Subramanium, Report of the Committee on Amendments to Criminal Law (2013).*
[8] Mukesh v. State (NCT of Delhi), (2017) 6 S.C.C. 1 (India).
[9] IBID of 6
[10] *Law Comm'n of India, Report No. 272, Assessment of Statutory Frameworks of Tribunals in India (2017).*

India has been evolved through Victorian era doctrine of coverture towards disputatious bodily autonomy with courts increasingly restricting the waiver, but not fully criminalizing it. Under section 375 of IPC historically shielded husbands where the landmark judgment holds that the violence against a minor wife under age of 18 years is rape[11], it indicates a slow shift to recognize that a wife is an independent legal person. Viewing in 1860s the colonial roots that framed the "doctrine of coverture"[12] means a wife's body is permanently surrendered to her husband but under IPC where a wife's identity was amalgamated with her husband's exception 2 to section 375 exempted sexual intercourse by a man with his own wife earlier it was 15yrs later, it shifted to 18yrs from the definition of rape. In 1860, Thomas Babington Macaualy's officially codded this doctrine by prioritizing the conjugal rights[13] over a wife's body as there are several factors influencing evolution such as patriarchal norms which are deeply embedded that belief a husband is entitled to his wife's sexual services, remedy for survivors to seek protection under protection of women from domestic violence act, 2005[14] it recognizes sexual abuse but unfortunately, does treat as criminal rape. There is a constitutional validity where the marital exclusion is been challenged under article 14, 15 and 21 of the Indian Constitution[15]. While the legal exemption remains the same on the paper for women over 18, judicial intervention illuminates sexual violence with marriage as a crime under often statues but inevitable change.

[11] Supra of 2
[12] Under the doctrine of coverture, a married woman's legal identity was merged with that of her husband upon marriage. 1 William Blackstone, *Commentaries on the Laws of England 442–45* (1765).
[13] Flavia Agnes, Marriage, Divorce and Matrimonial Litigation in India, 1 *Fam. L. Rev.* 45 (2001).
[14]Protection of Women from Domestic Violence Act, No. 43 of 2005, India Code (2005).
[15] INDIA CONST. art. 14.art, 15, art 21.

The post-independence persistence and modern status in India retained under constitutional continuity article 372[16] even though the statutory amendment cautiously raised the age approach for this exception the core for non- consensual sex within adult marriage remained as we can see the transition from IPC to BNS 2023, in a particular way 300 year old exception under exception 2 of section 63, reclaiming the law to maintain the legal conflict with modern constitutional protections. Despite, constitutional protection martial rape exception continues to exist in criminal law where still the Indian society is largely considering sexual relations within marriage as a private matter due to the legislators who fears that martial rape will sabotage the institution of marriage this results the legal system to continue to provide protection to husbands even when the sexual intercourse was forced. The women's right movement in the 1970s and 1980s had played an significant role to draw the attention of violence against married women although, the activists and scholars argued that forced sexual intercourse within marriage violates a women's body dignity and human rights while this period, other discussions like domestic violence, cruelty against wives, dowry death were more visible so, reforms mainly use to focus on physical violence and cruelty.

Presently, martial rape is still not fully criminalized in India, exceptions are limited to situations where the wife is under 18 years of age or the spouses are living separately under judicial separations as it issues highly debated among lawmakers, courts even the society. The supporters of criminalization believe that marriage cannot be used as a license for sexual violence during the opponents argue the misuse of law and impact on family structure struggle between traditional social values and modern constitutional principles that seek protection for women's rights.

2) Recasting of Consent in Indian Jurisprudence –

[16] INDIA CONST. Art. 372.

There is structural shift in the Indian jurisprudence from where a women's marital or social status is imposing a command within her capacity to choose to a right based frameworks absolutely bodily autonomy. Historically, from passive submission to positive consent Indian court mostly merge but there is lack of defiance with implied consent. The modern jurisprudence rejects the 2013, criminal law amendment as it follows the 2012, Delhi gang rape case under section 357 of IPC was amended to introduce the statutory definition of 'consent' as it defines, an unambiguous voluntary agreement which is communicated through gestures, words or any form of verbal and non- verbal communication. Viewing the rejection submission the amendment adds an explanation stating that a woman who does not physically oppose an act of sexual violence cannot be presumed to have consented to it. The consent is under misconception of fact where, the scope is invalidated consent under section 90 of IPC [17]and now under BNS under section 24[18]. There is false promise of marriage where the courts constantly modify consent in cases where sexual intercourse was obtained and there is impairing standards in cases if a man makes a promise of marriage with no intention of fulfilling it from the very first, the woman's consent is legally treated as non-existent because it was obtained under a misconception of fact.

Focusing on the autonomy and dignity under Article 21 of the Indian Constitution it reveals direct conflict between broad constitutional protections and obsolete statutory provision like the Martial rape exception. While criminal laws like section 63 of BNS maintain the structural presumption of a wife's submission on constitutional jurisprudence it radically expands the right to life of an individual

[17] Indian Penal Code, No. 45 of 1860, § 90 (India).
[18] Bharatiya Nyaya Sanhita § 24.

sovereignty over one's own body. Here, the Supreme Court of India is constantly heading the right to life under Article 21 of the Indian Constitution is not limited merely to animal existence. Looking deep into the case law **Maneka Gandhi v/s Union of India 1978**,[19] the Apex Court has ruled that life shall include the right to live with human dignity where the state enforced laws must be just, fair and reasonable. Dignity within the marriage itself includes constitutional jurists who argue that the martial rape exception is mostly commonly in India and globally the jurisdictions refers legally that exempts husbands from being prosecuted for raping their wives. A woman's dignity is reduced and bound to submit to sexual dignity. The bodily integrity is the fundamental right to have a sheer dominance over one's own body without unapproved physical encroachment. The power to say "no" under Article 21 of the Indian Constitution where sexual freedom means an individual has the exclusive right to choose when, where and with whom to engage in sexual activity. Martial rape exception has legally denied a married woman legal power to revoke consent. The judicial and legislative divided between statutory law and Article 21 core principles which creates significant break within Indian courts. As, the High Court interpretations in the case Aparna Bhattacharya v/s Union of India 2019[20], judges have specifically noted that non- consensual martial sex violates the bodily integrity and dignity which is guaranteed under Article 21, even while split on whether the judiciary has the power to nullify the written exception. There is separation of powers argument which in contrast, the Union government's official bearing in affidavits depends on institutional stability, arguing that while a woman's consent is not annihilate by marriage, criminalizing it as rape is a policy decision that should be given to Parliament to prevent judicial overstepping a boundary. In criminal law valid consent must be having only one possibility which means it shall

[19] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).
[20] Aparna Bhat v. State of Madhya Pradesh, (2021) 3 S.C.C. 247 (India).

be voluntary agreement based on clarity of an act and its consequences. Here are three components that operate under Indian criminal jurisprudence it shall govern under section 90 of IPC and currently under section 29 of BNS. Firstly, if we talk about free consent it is legally not valid if it is withdrawn through pressure, fear or exploitation of power as there is statutory rule under section 90 of IPC and section 29 of BNS that the consent is invalidate if it is given under fear, there is criminal application incases if victim complies with an act because the accused is threatened physically, career failure or the future gets ruined, so the law treats this as submission and not as consent. Secondly, voluntary consent requires a person who shall be spontaneous to choose to participate were consent is void if the individual lacks the cognitive capacity is to exercise their choice it shall include the individual pain and trauma. As, the individual is heavily under the influence of alcohol plus drugs as they legally cannot offer the voluntary agreement since, their capacity to exercise free will is been at a risk. Even the law it set to boundaries at the age limit were a child under 12 years of age cannot give legally voluntary consent for general offences within the limit up to increase in 18 years for sexual offences under POCOS act[21]. Lastly, informed consent is the person who will be aware about the outcomes of the act as the consent is been obtained under a misconception of facts which is wholly invalid if the accused has been knowing or incases if he had a reason to believe, this mostly appears in false promise marriages. In case if, the accused is been caused of an action with someone into a sexual relationship by lying about their identity, intention of marrying, marital status the consent is legally void as it was based on absence of deception. Indian courts often highlight consent v/s coercion within marriage is where every consent involves submission but not every submission is involved consent. When a person gives up due to trauma, anxiety,

[21] Protection of Children from Sexual Offences Act, No. 32 of 2012, INDIA CODE (2012).

exhaustion and psychological paralysis has submitted but unfortunately, they have not legally consented.[22]

Criminal law viewing the consent must be an ongoing state of mind which can be cancelled at any point of time, it is never fixed or permanent. Consent means that an initial yes does not gives the permanent right to an accused to complete as legally consent is not a one- time transaction. Indian courts are highly, ruling in non-marital contexts were along term relationship cannot be use to conclude, permanent consent. Communication of revocation from the standards of criminal liability that attach and later removes the consent so, there should be revocation communication in form of express no means no and implied acts on the situation of affirmative standards in modern jurisprudence.

3) Legislative Framework-

Under criminal law, an enacted definition of rape excludes the non- consensual sexual acts within marriage. Regarding marital rape there is a transition exception from the older IPC to newly BNS is taking the modern legal framework which provides from protection limited to under age 18, The legal consent collapse as the wife is minor. So, the exception 2 to section 63 of the BNS, applies if the wife is not under 18 years of age. There is an absolute barrier if a man has non- consensual sexual relationship with his wife who is under 18 years, he will be prosecuted for rape under BNS and make it worsen penetrative as the sexual assault under the POCSO act, as we see the law withdraws protection from the husband even if the wife is an adult has only one specific condition that is " Judicial Separation". There are challenges taking place under the exception section 63 of BNS which remains

[22] MICHELLE J. ANDERSON, *NEGOTIATING SEXUAL CONSENT* 45–50 (2018).

highly, petition before Supreme Court of India as it creates the age based or the martial status is based on barrier which is fundamentally unconstitutional.

The Constitution of India defining the "violation" under Article 14, 15 and 21 by combining them together they are the 'Golden Triangle' in Indian Constitution as the law jointly say's the need of equality, non- discrimination and liberty are essential. Article 14 shall guarantee equality before law as well as equal protection of the laws, there is an intelligible difference which law creates a division of married and unmarried women. At times there is no rational nexus between a women's marital status and to maintain social order from preventing future wrongdoing as penalties can be achieved through deterrence, retribution, incapacitation, rehabilitation and restoration. In Shayara Bano v/s Union of India 2017[23], the triple talaq case where law is said to be unconstitutional as marriage can't dwindle the physical and psychological trauma of non- consensual sex, treating a wife as permanent sexual property without any consent is arbitrariness. Under, Article 15 (1) strictly prohibits the state from discriminating against the citizens on grounds of sex, caste, race, religion and birth place. Here, male offenders are protected under exception of marital rape while they deny for female victims this gender discrimination and stereotypes, are overboard in case, Kulsum Nisha v/s State of UP 2026[24], as there is reaffirmation by Supreme Court of India, the constitutional interpretation on patriarchal presumptions that a woman's identity ties upon the matrimonial home. Presuming as she enters into this marriage institution, she is permanently in a sexual agency upon a marriage is highly, constitutionally invalid. Looking towards, Article 21 of the Indian Constitution that guarantees the right to life and personal liberty itself it includes, complete authority over one's own body. Affirming the

[23] *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (India).
[24] *Kulsum Nisha*, 2026 INSC 617.

reproductive and sexual choices includes when, how and with whom to engage in sexual activity where a women's dignity should be paramount.

For, decades Indian personal laws were looked into marriage as religious rituals, symbolic pledges or socio status to replace the individual. The evolution of Indian family and laws are defined deeply into the marriage system that the Indian family law primarily prioritizes the matrimonial sector. However, the major judicial shifts began to shut down as the individual privacy, dignity, bodily integrity is ahead of this institution by framing the idea completely dominated individual rights to wedded bliss. The "restitution of conjugal rights" (RCR) under section 9 of the Hindu Marriage Act, 1955[25] there is a similar provision in personal law where RCR is been allowed the spouse to petition the court to constrain the other partner and return to the matrimonial home by this treatment a spouse physical body as a matrimonial asset. The willful and refusal of sexual intercourse without a reasonable cause consists of mental cruelty on such grounds valid separation is institutional framing to transform sex from an act of mutual consent into binding matrimonial duty. Here, is a landmark judgment Saroj Rani v/s Sudarshan Kumar 1984[26], which previously, upheld RCR by stating privacy inside a marriage was different altogether a concept.

A Feminist theory perspective, is designed to maintain patriarchy to reinforce, the society over male and female ownership of bodies. This theory deconstructs the law by bringing the revelation of how patriarchal power is been unique in this legal system. The liberal feminist legal theory focuses on the equality, individuality and their right. It argues, when the marital rape exception is creates the inequality, hierarchical system of citizenship so, when an unmarried woman is been possessed

[25]Hindu Marriage Act, 1955, No. 25 of 1955, § 9 (India).
[26] *Saroj Rani v. Sudarshan Kumar Chadha*, A.I.R. 1984 S.C. 1562 (India).

of full sovereign right over her own body then why married woman should be dismantled of this legal protection.

The spousal exception that guarantees every citizen of marital status enjoys identical protection against bodily violations even the state does not treat a wife as independent as others woman's but as an exception to the law. There is a radical feminist legal theory which is originated by scholars such as, Catharine Mackinnon[27] it says that law is not neutral as there is more male power and dominances by this view the gender is not as a biological difference but as the system, society of dominant nature it been classed. The marital rape exception is the foremost ultimate expression of law as male sexual dominance is legalized a husband's access to a woman's body is transforming to be forced sex from a violent crime within marriage institution. States provides husbands with social, economic, legal power so concept like wife consent becomes a compulsion mask not as choice. Earlier, intersectionality was introduced by Kimberle Crenshaw who adapted the India Dalit and post-colonial feminist theory[28], the state often used to argue that married women need not need criminal laws as there were civil remedies such as, Protection of Women from Domestic Violence Act, 2005. However, marginalized low income, Dalit women in India use to file civil cases, hire lawyer and seek divorce at that period leaving matrimonial home was leading to violence from marital communities with deny to criminal law, there is trap of vulnerabilities of women in an abusive situation as there is lack of socio-economic mobility against them, an unprotected matrimonial home. Feminist legal theory is exposing the double standard of state as

[27] Catharine A. MacKinnon, *Women's Lives, Men's Laws* 245–67 (Harvard Univ. Press 2005).
[28] 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 (1989).

it simply chooses to protect the privacy of the dominant abuser over the safety of the victim. Following are some judicial precedents-

A) **Joseph Shine v/s Union of India 2018**[29]- In this Supreme Court of India decriminalized adultery in India as the court is unanimously unenforceable the 158 years old section 497 of IPC is treated adultery as a crime was unconstitutional, deep patriarchal and discriminatory against women. Adultery is no longer a criminal offence but still remains valid reason for divorce under civil family law. Later, clarification in the year 2023 where the Supreme Court of India noted the military personnel can still face disciplinary action for adultery under specific military laws due to operational disciple requirements.

B) **RIT (Rural Information Technology)2022**[30]- This case was challenging the martial rape exception2 to section 375 of the IPC which shields husbands from prosecution for non-consensual sex within marriage because, the two judges completely disagreed the legal status of martial rape in India remains unchanged the matter was referred to Supreme Court of India for a final decision. There were two different opposing judicial point views to shape this decision. Currently, the case went for deliberation before a larger bench to resolve the constitutionality of the martial rape exception under the Indian criminal law.

4) Social-Legal Realities and Legal Fiction-

[29] Joseph Shine v. Union of India, (2019) 3 S.C.C. 39 (India).
[30] *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404 (Delhi High Court, May 11, 2022).

In India marital consent creates disconnect between antiquated laws and brutally realities lived and still living for a woman but law presumes marriage is a rapport of automatic consent, the socio-legal reality is a system that sideline married woman for her bodily dignity. There are complexities in our ecosystem, cultural, institutional factors, economic which are deeply rooted in patriarchy as it comes from a traditional Indian martial concept like Pati Parmeshwar as in the women needs to see the husbands as a deity. Social stigma and shaming a woman for reporting sexual abuse by her husband is been seen as immersed societal backlashes, there is economic dependences has vast number of women in India there is lack financial independence without independences the income, property ownership or social safety net to leave an abusive husband means facing deprivation and homeless. There is massive under reporting due to economic and cultural because marital rape is so under reported crime in India it's data from successive National Family Health Surveys (NFHS)[31] is consistent and it shows that the domestic and sexual violence within marriage is widely spread as the survivors know that reporting the abuse mostly leads to safety issues, choosing this instead of carrying the trauma to keep their children secure or avoid absolute social life.

Institutional failures due to police, judiciary and the marital system leads to police hostility, who often refuses to register the complaint rather than enforcing justice, it's the most common issue to label sexual violence as "private family disputes" or petty domestic quarrels that should be resolved within themselves. The compromising culture in family courts, community elders where women are been pressurized to return with the abuser husband for societal good will and blackmailing

[31] Ministry of Health & Family Welfare (India), *National Family Health Survey (NFHS-5) 2019–21: India Report* 578–82 (2021).

through children's future. Cases, where a stranger or her partner forces for sex until and unless she is unmarried, it is treated as heinous crime the moment she is married woman the law stops recognizing her consent within the bedroom.

Conclusion-

The current, legal landscape requires to achieve true gender justice in India acquiring, disassembling the legal fiction of irrevocable consent while balancing the overlap between domestic violence, intimate partner violence (IPV)[32] and marital rape. Currently, marital sex is legally been suppressed into civil law remedies such as, Protection of Women from Domestic Act or general criminal provisions example under section 498A cruelty[33]. Combing sexual assault under one violence is highly diluting cruelty the severity of the crime, in cases slapping a spouse and raping a spouse they both are two different fundamental violations. The balance of gender justice needs to specifically categorize criminal with law must take into consideration that domestic violence for physical and emotional abuse, IPV for relationship violence of bodily autonomy. Balancing matrimonial protections with rights and misuse of matrimonial laws in bitter divorces, marital rape prosecutions must be clear with procedural standards under Bharatiya Sakshya Adhiniyam (BSA)[34]. Ensuring the immediate deployment of the Protection of Women from Domestic Violence Act, to secure residence orders, maintenance, child custody so that a woman can report spousal rape is not being impoverished or homeless due to economic dependence. The in process constitutional delays before Supreme Court of India rises tension between legal constraint and dignity, the solution cannot rely on compromising that leaves a wife as property servant. Criminalizing marital rape

[32] Jacquelyn C. Campbell, *Empowering Survivors of Abuse: Health Care for Battered Women and Their Children* 15–18 (2d ed. 2001).
[33] Indian Penal Code, No. 45 of 1860, § 498A (India).
[34] Bharatiya Sakshya Adhiniyam, No. 47 of 2023, INDIA CODE (2023).

will not collapse the marriage institutional structure rather it will establish modern right based stability where the intimacy should be permanently rooted in “mutual consent” and it should recognize that marriage is a partnership of equals not of transaction of ownership.