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ABOUT INDIAN INSTITUTE OF LEGAL STUDIES

The Indian Institute of Legal Studies established in the year 2010 has evolved into a unique system of imparting legal education not only in North Bengal but also as an emerging education and Research Centre in the SAARC region with the establishment of the Centre for SAARC on Environment Study & Research. Acknowledged as one of the best law colleges in India, IIIS is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself. IILS is an institute that promotes holistic study in Law in the form of short-term courses, field work, experiential learning, and Clinical legal classes in addition to the regular undergraduate course. Post Graduate courses and Research Centre are already functional, which will mature into doctrinal courses. The Institution takes pride in hosting workshops for police officers of North Bengal on Human Rights and Cyber Crimes, where the institute was privileged to have the presence of eminent police officers and scholars from different corners of the country.

The Bureau of Police Research & Development, Ministry of Home Affairs, Government of India had approved the organising of a vertical interaction course for IPS officers on Criminal Justice Delivery System which was witnessed by the gracious presence of the Hon'ble Judges of the Supreme Court of India and the various High Courts. The Institution has been organising a series of National and International Seminars, Conferences, Symposiums, Workshops and Inter and Intra Moot Court competitions. The Institute had started with organising a national seminar on the "Civil Justice Delivery System". Today, it has reached the peak of organising international seminars with the SAARC Law Summit & Conclave being the blooming one. Even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that had undertaken the initiative of conducting online classes for the students of both UG and PG courses to reach out to the students through online teaching learning mechanism from the very initial period of lockdown. Also, the college has successfully conducted internal examinations through online mode so that the continuous evaluation of students does not come to a halt. The Institution's vital location, its active participation in imparting knowledge and moulding its students into sensible and responsible individuals has brought to its credit to serve as the nucleus for education in the North Bengal region.

The emphasis in academic development with its adoption of inter-disciplinary and practical approaches has aided its students to gain a deeper understanding of the learning process and value for education. Additionally, it has not merely laid the importance for the value and the need to be educated individuals, or to serve as efficient lawyers, but more essentially, to be reborn as socially viable and responsible beings to construct appropriate mechanisms for building a better society for the coming future.

MESSAGE FROM THE PATRON

SHRI JOYJIT CHOUDHURY

Founder & Chairman

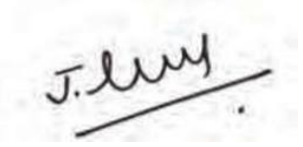
Indian Institute of Legal Studies

As the legal profession evolves in response to global challenges and technological advancement, it is our collective responsibility to ensure that access to justice and the dignity of the law remain paramount. We must strive to not only understand the changing landscape but also to shape it with wisdom and purpose.

The IILS Law Review is a legal journal steadfastly dedicated to advancing legal learning and upholding the values of justice and integrity. This journal stands as a testament to the enduring importance of rigorous analysis and spirited discourse.

It fills me with profound joy and a sense of pride to bear witness to the remarkable journey of our legal journal, crafted by the esteemed members of the Indian Institute of Legal Studies, Siliguri.

I extend my heartfelt appreciation to all those who have contributed tirelessly, transforming invaluable ideas into meticulously crafted pieces of intellectual excellence. Together, we continue to uphold the noble tradition of scholarly inquiry and dissemination of ideas, enriching the legal landscape with our collective wisdom and insight.



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IILS Law Review

MESSAGE FROM EDITOR-IN-CHIEF

Dr. Trishna Gurung
Principal-in-Charge,
Indian Institute of Legal Studies

It is with immense pleasure that I present to you the latest issue of the *IILS Law Review*. This journal remains committed to fostering high-quality academic discourse in the legal field, offering a platform for rigorous analysis, critical evaluation, and thoughtful commentary on contemporary legal issues.

As we continue to steer the evolving legal landscape, this issue echoes our journal's dedication to addressing both traditional and emerging areas of law. From discussions on constitutional and environmental principles to explorations of nuanced legal challenges concerning digital evidences, surrogacy, and socio-economic policy, the *IILS Law Review* strives to provide its readers with thought-provoking scholarship. We take great pride in featuring valuable contributions from academicians, legal scholars, practitioners, and students. Their research not only augments our understanding of law but also sparks evocative debates that shape the future of legal practice and jurisprudence.

I extend my heartfelt gratitude to the authors, reviewers, and the editorial board for their persistent efforts and dedication in maintaining the high standards of this journal. I am assured that the diverse perspectives presented in this edition of the journal will inspire, educate, and challenge our readers.

Thank you for your continued support and engagement with the *IILS Law Review*. We look forward to your feedback and contributions in future editions.

Best Regards,

Dr. Trishna Gurung
Editor-in-Chief
IILS Law Review

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WHEN RIVERS DIE: CRIMINALIZING SYSTEMATIC INDUSTRIAL POLLUTION AS ECOCIDE IN INDIA

Ms. Suji Cheriyan & Dr. Dayana M K.[1]

Abstract

India's systematic destruction of river ecosystems through industrial pollution represents environmental harm transcending regulatory non-compliance, warranting recognition as ecocide deserving criminal sanctions. This article examines the catastrophic degradation of the Ganga, Yamuna, Hindon, and Periyar rivers, arguing for a fundamental legal paradigm shift from civil negligence frameworks to environmental criminality. Through comprehensive analysis of landmark cases including M.C. Mehta v. Union of India, Vellore Citizens Welfare Forum, and National Green Tribunal decisions, this study demonstrates the failure of existing environmental legislation—the Water Pollution Control Act 1974, Environment Protection Act 1986, and NGT Act 2010—to prevent systematic ecological destruction. The research reveals how current regulatory approaches treating pollution as administrative violations have proven inadequate deterrents, enabling continued environmental devastation despite judicial intervention and legislative mandates. Drawing from international experience including EU Environmental Crime Directive, US Clean Water Act criminal provisions, and Brazil's Environmental Crimes Law, this analysis proposes comprehensive reforms including specialized Environmental Crime Investigation Agency establishment, ecocide-specific criminal legislation, and environmental criminal courts. The economic analysis demonstrates that implementation costs ($2-3 billion over five years) are minimal compared to ongoing environmental damage costs exceeding $150 billion annually. The article concludes with detailed policy recommendations for transforming India's environmental law from negligence-based regulation to criminal protection of ecological systems, emphasizing social justice considerations for vulnerable communities and intergenerational equity principles.

Keywords**:** *Ecocide, River Degradation, Environmental Criminal Law, Systematic Environmental Destruction, Environmental Justice*

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1. INTRODUCTION: THE INADEQUACY OF CURRENT LEGAL FRAMEWORKS

The concept of environmental harm as crime represents a fundamental challenge to traditional legal categorizations that separate civil regulatory violations from criminal conduct.[2] In India, industrial pollution of water bodies has historically been addressed through environmental legislation that treats violations as administrative matters subject to fines, closure orders, and compliance mechanisms.[3] However, the persistent and systematic destruction of India's river ecosystems suggests that this regulatory approach has failed to provide adequate deterrence or remediation.

The legal community increasingly recognizes that certain forms of environmental harm transcend traditional notions of negligence or regulatory non-compliance, rising to the level of crimes against nature itself.[4] This article examines how India's most polluted rivers—particularly the Ganga, Yamuna, Hindon, and Periyar—exemplify environmental destruction so severe and systematic that it qualifies as ecocide, warranting criminal rather than merely civil legal responses.

1.1 Conceptual Framework: From Negligence to Ecocide

1.1.1 Traditional Environmental Law Paradigms

Environmental law in India has traditionally operated within a framework that treats pollution as externalities requiring regulation rather than criminal conduct requiring punishment.[5] The Water (Prevention and Control of Pollution) Act, 1974, exemplifies this approach by establishing pollution control boards and prescribing standards without creating strong criminal deterrents.[6] Similarly, the Environment Protection Act, 1986, while comprehensive in scope, primarily relies on administrative mechanisms and civil penalties.[7]

This regulatory paradigm assumes that environmental harm results from inadvertent negligence or cost-benefit calculations by industrial actors, addressable through appropriate incentive structures and compliance mechanisms.[8] However, decades of persistent pollution despite regulatory oversight suggest fundamental flaws in this assumption.

[2] Christopher D. Stone, Should Trees Have Standing? Law, Morality, and the Environment (3d ed. 2010).
[3] Water (Prevention and Control of Pollution) Act, 1974, No. 6, Acts of Parliament, 1974
[4] Polly Higgins, Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet (2010).
[5] Leelakrishnan P., Environmental Law in India (4th ed. 2019).
[6] Water (Prevention and Control of Pollution) Act, 1974, Sec. 25.
[7] Environment Protection Act, 1986, No. 29, Acts of Parliament, 1986 (India).
[8] Richard L. Revesz, Environmental Law and Policy (2d ed. 2015).

1.1.2 The Emergence of Ecocide as a Legal Concept

Ecocide, defined as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment,"[9] represents a paradigmatic shift toward treating severe environmental harm as criminal conduct. Unlike negligence-based frameworks, ecocide recognizes that certain environmental destruction is so systematic and severe that it constitutes a crime against the environment itself, deserving criminal sanctions regardless of specific intent to harm.[10]

The concept gains particular relevance in contexts where environmental destruction is foreseeable, preventable, and systematically perpetuated despite knowledge of consequences.[11] Industrial pollution of India's rivers, characterized by decades of continuous discharge despite known environmental and health impacts, exemplifies conduct that transcends mere negligence to constitute ecocide.

2. CASE STUDY ANALYSIS: RIVERS AS VICTIMS OF ENVIRONMENTAL CRIME

2.1. The Ganga: Sacred River, Criminal Neglect

The Ganga River system, supporting over 400 million people, has suffered systematic industrial and municipal pollution for decades.[12] In *M.C. Mehta v. Union of India*, the Supreme Court recognized the river's pollution as a matter of fundamental rights, noting that "the Ganga is not merely a river but is a symbol of India's cultural and spiritual heritage."[13] Despite court orders and the National River Conservation Plan, industrial discharges continue unabated.

The failure to prevent Ganga pollution despite judicial intervention and legislative mandates suggests that civil enforcement mechanisms are inadequate for addressing systematic environmental destruction.[14] The continued discharge of untreated industrial effluents, particularly from leather tanning industries in Kanpur, demonstrates willful disregard for environmental consequences that transcends negligence.[15]

The Supreme Court's observation in *Vellore Citizens Welfare Forum v. Union of India* that "the traditional concept that development and ecology are opposed to each other is no longer

[9] Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text (2021).
[10] *Id.*
[11] Jojo Mehta, Ecocide: Kill the Corporation Before It Kills Us (2021).
[12] Central Pollution Control Board, Status of Water Quality in India 2018-19 (2020).
[13] M.C. Mehta v. Union of India, (1987) 4 S.C.C. 463 (India).
[14] Gitanjali Nain Gill, Environmental Justice in India: The National Green Tribunal (2017).
[15] Central Pollution Control Board, Assessment of Water Quality of River Ganga (2019).

acceptable" indicates judicial recognition that environmental protection requires stronger legal frameworks.[16] However, continued Ganga pollution despite decades of litigation demonstrates the inadequacy of civil remedies.

2.2 Yamuna: The Capital's Environmental Crime

The Yamuna River's condition in Delhi exemplifies how systematic industrial pollution constitutes environmental criminality. In *Maili Makadwala Ghar v. Union of India*, the Delhi High Court noted that the Yamuna had become "more of a drain than a river."[17] Despite multiple court orders and the establishment of the Yamuna Action Plan, industrial discharges from Delhi's industrial areas continue to render the river ecologically dead.[18]

The systematic nature of Yamuna pollution, involving coordinated discharge from multiple industrial sources over decades, suggests criminal conspiracy rather than isolated negligence.[19] The foreseeable consequences of such discharge—including groundwater contamination, soil degradation, and public health impacts—indicate knowledge of substantial likelihood of severe environmental damage, meeting ecocide criteria.

2.1.3 Hindon River: A Case Study in Environmental Destruction

The Hindon River in Uttar Pradesh represents perhaps the clearest example of industrial ecocide in India. Once a perennial river supporting diverse aquatic life, the Hindon has been rendered completely lifeless through systematic industrial pollution.[20] The Central Pollution Control Board has classified it among India's most polluted rivers, with chemical contamination levels far exceeding permissible limits.[21]

In *Hindon River Pollution Case,* the National Green Tribunal noted that "the river has been converted into a industrial drain," with pollution levels indicating "complete ecological collapse."[22] The systematic destruction of the Hindon ecosystem, involving coordinated discharge from paper mills, distilleries, and chemical industries, demonstrates the inadequacy of treating such destruction as mere regulatory violation.

[16] Vellore Citizens Welfare Forum v. Union of India, (1996) 5 S.C.C. 647, 658 (India).
[17] Maili Makadwala Ghar v. Union of India, 2004 (103) D.L.T. 791 (Delhi).
[18] Delhi Pollution Control Committee, Status Report on Yamuna River (2020).
[19] Michael G. Faure, Environmental Criminal Law in the European Union (2017).
[20] U.P. Pollution Control Board, Comprehensive Study of River Hindon (2018).
[21] Central Pollution Control Board, Water Quality Status of Hindon River (2019).
[22] Hindon River Pollution Case, Original Application No. 673/2018, National Green Tribunal (2019).

The permanent character of Hindon's ecological destruction—with scientific studies indicating irreversible damage to soil and groundwater systems—exemplifies the "long-term damage" criterion of ecocide.[23] Unlike temporary pollution incidents, the Hindon's destruction represents permanent alteration of the regional ecosystem, warranting criminal rather than civil legal response.

2.1.4 Periyar River: Southern India's Environmental Crisis

Kerala's Periyar River faces similar systematic pollution from industrial sources, particularly in the Eloor industrial belt.[24] Studies have documented severe contamination from petrochemical and pharmaceutical industries, with pollution levels linked to increased cancer rates in surrounding communities.[25]

The Kerala High Court in *T.N. Godavarman Thirumulpad v. Union of India* recognized that Periyar pollution constituted a violation of fundamental rights, but civil remedies have proven inadequate.[26] The continued operation of polluting industries despite court orders and health impacts demonstrates the need for criminal sanctions to address systematic environmental destruction.

4. Legislative Failures and the Need for Criminal Framework

4.1. The Water Pollution Control Act: Regulatory Inadequacy

The Water (Prevention and Control of Pollution) Act, 1974, while pioneering in its recognition of water pollution as requiring legal intervention, suffers from fundamental inadequacies in addressing systematic environmental destruction.[27] The act's reliance on state pollution control boards and civil penalties has proven insufficient for deterring large-scale industrial pollution.[28]

Section 24 of the Act provides for imprisonment of up to six years for water pollution violations, but prosecutions remain rare and convictions rarer still.[29] The emphasis on

[23] Scientific assessment by Indian Institute of Technology, Delhi, Environmental Impact of Hindon River Pollution (2020).
[24] Kerala State Pollution Control Board, Environmental Status Report (2019).
[25]Public Health Foundation of India, Health Impact Assessment of Eloor Industrial Area (2018).
[26] T.N. Godavarman Thirumulpad v. Union of India, (2002) 10 S.C.C. 606 (India).
[27] Water (Prevention and Control of Pollution) Act, 1974.
[28] Shibani Ghosh, Water Pollution Laws in India: Implementation and Enforcement Challenges, 12 J. Envtl. L. & Pol'y 45 (2019).
[29] Water (Prevention and Control of Pollution) Act, 1974, Sec.24.

administrative remedies and the requirement for state board consent for prosecution have created enforcement gaps that systematic polluters exploit.[30]

4.1.2 Environment Protection Act: Comprehensive Framework, Limited Enforcement

The Environment Protection Act, 1986, enacted following the Bhopal disaster, provides broader environmental protection authority but suffers similar enforcement limitations.[31] While Section 15 provides for criminal penalties including imprisonment up to five years, the Act's implementation has focused primarily on administrative measures.[32] The Supreme Court's observation in *Indian Council for Enviro-Legal Action v. Union of India* that "the Environment Protection Act is more honored in breach than in compliance" reflects the fundamental enforcement challenges facing India's environmental legislation.[33]

4.1.3 National Green Tribunal Act: Judicial Innovation, Structural Limitations

The National Green Tribunal Act, 2010, represents significant advancement in environmental adjudication by creating specialized courts with both civil and criminal jurisdiction.[34] However, the NGT's focus on compensation and restoration, while important, has not addressed the underlying problem of systematic environmental destruction continuing despite legal intervention.[35]

The NGT's powers under Section 15 to impose environmental compensation up to Rs. 5 crores, while substantial, remain inadequate deterrents for large industrial enterprises where pollution costs are externalized as business expenses.[36] The absence of mandatory criminal referral mechanisms limits the NGT's ability to address systematic environmental destruction as criminal conduct.

[30] Armin Rosencranz & Michael Jackson, The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power, 28 Colum. J. Envtl. L. 223 (2003).
[31] Environment Protection Act, 1986.
[32] Environment Protection Act, 1986, Sec.15.
[33] Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 S.C.C. 212, 240 (India).
[34] National Green Tribunal Act, 2010, No. 19, Acts of Parliament, 2010 (India).
[35] Gitanjali Nain Gill, Environmental Justice in India, supra note 13.
[36] National Green Tribunal Act, 2010, Sec. 15.

5. The Case for Criminal Sanctions: Ecocide as Legal Framework

5.1. *Deterrence Theory and Environmental Crime*

Classical deterrence theory suggests that criminal behavior responds to the certainty and severity of punishment.[37] Environmental crimes, particularly those involving corporate actors, require criminal sanctions that exceed the economic benefits of non-compliance.[38] Current civil penalties and administrative measures fail this deterrence test, as evidenced by continued pollution despite decades of regulatory intervention.

The systematic nature of river pollution in India—involving predictable, repeated conduct despite known environmental consequences—indicates that deterrence requires criminal rather than civil legal responses.[39] Corporate actors engage in cost-benefit analyses where regulatory fines become operating expenses rather than deterrents.[40]

5.1.2 Moral Condemnation and Environmental Values

Criminal law serves an expressive function, reflecting societal values and moral condemnation of prohibited conduct.[41] The continued treatment of severe environmental destruction as civil violation fails to express adequate societal condemnation of conduct that threatens fundamental ecological systems and human health.[42]

The Supreme Court's recognition in *Subhash Kumar v. State of Bihar* that "the right to life includes the right to a clean environment" suggests constitutional recognition of environmental protection as fundamental value requiring criminal protection.[43] However, the disconnect between constitutional principle and criminal law enforcement reflects inadequate legal framework development.

5.1.3 International Legal Development and Ecocide

International legal development increasingly recognizes ecocide as serious crime requiring criminal sanctions.[44] The International Criminal Court's consideration of environmental crimes

[37] Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).
[38] Mark A. Cohen, Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes, 82 J. Crim. L. & Criminology 1054 (1992).
[39] Robert V. Percival, Environmental Criminal Law, in Environmental Law 1041 (Robert V. Percival et al. eds., 8th ed. 2018).
[40] Id.
[41] Joel Feinberg, The Expressive Function of Punishment, 49 Monist 397 (1965).
[42] Christopher Williams, Environmental Victims (1996).
[43] Subhash Kumar v. State of Bihar, (1991) 1 S.C.C. 598
[44] Polly Higgins et al., The Ecocide Project (2013).

within its jurisdiction[45] and the European Union's directive on environmental crimes[46] reflect growing international consensus that severe environmental destruction warrants criminal rather than merely civil legal response.

India's ratification of various international environmental treaties[47] creates obligations to prevent environmental destruction that extend beyond current domestic legal frameworks. The systematic pollution of India's rivers violates international environmental principles and may constitute transboundary environmental harm requiring criminal sanctions.

6.1 Implementation Framework: From Theory to Practice

6.1.1 Legislative Reform Requirements

Implementing ecocide as legal framework requires comprehensive legislative reform addressing both substantive criminal law and procedural enforcement mechanisms.[48] Key reforms should include:

Substantive Criminal Law Amendments: Creating specific criminal offenses for systematic environmental destruction, with penalties reflecting the severity and permanence of ecological harm. Unlike current legislation that treats environmental violations as regulatory matters, ecocide legislation should establish criminal liability for conduct causing severe and widespread environmental damage.[49]

Corporate Criminal Liability: Addressing the challenge of corporate environmental crimes through enhanced liability mechanisms that pierce corporate veils and hold individual decision-makers criminally responsible.[50] Current environmental legislation's focus on corporate entities rather than individual responsibility has limited deterrent effect.

Enforcement Mechanisms: Creating specialized environmental crime investigation units with technical expertise and resources adequate for investigating complex environmental crimes. The current reliance on pollution control boards for investigation and prosecution has proven inadequate for addressing systematic environmental destruction.[51]

[45] International Criminal Court, Policy Paper on Case Selection and Prioritisation (2016).
[46] Directive 2008/99/EC of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law, 2008 O.J. (L 328) 28.
[47] Including Stockholm Declaration, Rio Declaration, and Paris Agreement.
[48] Rob White, Transnational Environmental Crime (2011).
[49] Marie Petersmann, The Criminalization of Environmental Harm (2020).
[50] Kathleen F. Brickey, Corporate Criminal Liability (3d ed. 2019).
[51] Klaus Ulrich et al., Environmental Crime in Europe (2013).

6.1.2 Judicial System Adaptation

Environmental crime prosecution requires judicial system adaptation addressing both procedural and substantive challenges.[52] Specialized environmental courts with criminal jurisdiction, enhanced technical expertise, and streamlined procedures could address current enforcement gaps.[53]

The success of the National Green Tribunal in civil environmental matters suggests that specialized judicial institutions can effectively address complex environmental issues.[54] However, extending this model to criminal environmental matters requires additional resources and procedural adaptations.

6.1.3 International Cooperation and Standards

India's integration into global environmental governance systems requires alignment with international standards for environmental crime prevention and prosecution.[55] This includes cooperation with international criminal law development and adoption of best practices for environmental crime investigation and prosecution.

The transboundary character of many environmental crimes—including river pollution affecting multiple states and countries—requires enhanced interstate and international cooperation mechanisms.[56] Current environmental legislation's focus on state-level enforcement has proven inadequate for addressing pollution crossing jurisdictional boundaries.

7.1 Addressing Counter-Arguments and Implementation Challenges

7.1.1 Economic Development vs. Environmental Protection

Critics argue that criminal sanctions for environmental violations could impede economic development by creating excessive regulatory burdens on industry.[57] However, this argument fails to account for the long-term economic costs of environmental destruction, including healthcare costs, lost agricultural productivity, and ecosystem service degradation.[58]

[52] Robb White, Environmental Crime: A Reader (2009).
[53] George Pring & Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (2009).
[54] Gitanjali Nain Gill, Environmental Justice in India, supra note 13.
[55] Avi Brisman et al., Environmental Crime and Social Conflict (2015).
[56] Rob White, Climate Change from a Criminological Perspective (2012).
[57] Daniel C. Esty & Andrew S. Winston, Green to Gold (2009).
[58] Robert Costanza et al., The Value of the World's Ecosystem Services and Natural Capital, 387 Nature 253 (1997).

The Supreme Court's articulation of sustainable development principles in Vellore Citizens Welfare Forum recognizes that genuine economic development requires environmental protection rather than exploitation.[59] Criminal sanctions for ecocide would promote rather than impede sustainable economic development by internalizing environmental costs currently externalized to society.

7.1.2 Enforcement Capacity and Resource Constraints

Implementation of ecocide legislation faces significant enforcement capacity and resource constraints.[60] However, current enforcement failures reflect not merely resource constraints but fundamental inadequacies in legal framework design.[61] Criminal sanctions for environmental destruction could generate resources for enforcement through penalties and asset forfeiture while creating stronger deterrent effects requiring fewer enforcement actions. The European experience with environmental crime legislation demonstrates that criminal sanctions can enhance rather than burden environmental enforcement by providing stronger investigative tools and deterrent effects.[62]

7.1.3 Burden of Proof and Causation Challenges

Environmental crimes present complex causation and burden of proof challenges, particularly in cases involving multiple pollution sources and long-term environmental damage.[63] However, these challenges exist equally in current civil environmental litigation, where courts regularly address complex causation issues.[64]

Criminal environmental law could benefit from evidentiary innovations, including statistical evidence, expert testimony, and presumptions of causation in cases of systematic pollution.[65] The NGT's experience with environmental evidence and technical assessment could inform criminal procedure development.

[59] Vellore Citizens Welfare Forum v. Union of India, supra note 15.
[60] Tseming Yang, The Emergence of the Environmental Rule of Law, 36 Ecology L.Q. 1 (2009).
[61] *Id.*
[62] European Environment Agency, Environmental Crime and Environmental Security (2016).
[63] David M. Uhlmann, Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Context, 4 Utah L. Rev. 1223 (2009).
[64] Sheila Jasanoff, Science at the Bar (1995).
[65] Michael G. Faure & Marjan Peeters, Climate Change and European Emissions Trading (2008).

8.1 The Bhopal Legacy: From Industrial Accident to Environmental Crime

The Bhopal gas tragedy represents a watershed moment in Indian environmental law, yet its legal legacy reveals the inadequacy of existing frameworks for addressing systematic environmental harm.[66] In Union Carbide Corporation v. Union of India, the Supreme Court's focus on compensation rather than criminal accountability reflected the limitations of treating environmental disasters as civil matters.[67]

The ongoing groundwater contamination around the Bhopal plant site demonstrates how industrial environmental harm extends far beyond immediate accident consequences.[68] The systematic contamination of soil and groundwater, continuing decades after the original disaster, exemplifies the long-term environmental damage characteristic of ecocide.[69]

The failure to achieve adequate criminal accountability for Bhopal—with most responsible parties avoiding serious criminal sanctions—demonstrates the need for stronger criminal frameworks addressing systematic environmental destruction.[70] Treating such destruction as ecocide would provide appropriate legal framework for addressing both immediate harm and long-term environmental consequences.

9.1 Comparative Analysis: Learning from International Experience

9.1.1 European Union's Environmental Crime Directive

The European Union's approach to environmental crime through Directive 2008/99/EC provides valuable insights for India's legal reform efforts.[71] The Directive requires member states to treat serious environmental violations as criminal offenses, establishing minimum standards for environmental crime prosecution.[72] Key provisions include mandatory criminal sanctions for activities causing substantial damage to air, soil, water, animals, or plants.[73]

The EU's experience demonstrates that criminal environmental law can coexist with economic development while providing stronger deterrence than purely regulatory approaches.[74] Studies

[66] Jamie Cassels, The Uncertain Promise of Law: Lessons from Bhopal (1993).
[67] Union Carbide Corporation v. Union of India, (1991) 4 S.C.C. 584
[68] Centre for Science and Environment, Bhopal Gas Tragedy: After 30 Years (2014).
[69] *Id.*
[70] Kim Fortun, Advocacy After Bhopal (2001).
[71] Directive 2008/99/EC of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law, 2008 O.J. (L 328) 28.
[72] *Id*. art. 3.
[73] *Id*. art. 3(a)-(h).
[74] European Commission, Report on the Implementation of Directive 2008/99/EC (2019).

indicate that countries implementing the Directive experienced significant reductions in environmental violations following criminalization.[75] The integration of criminal sanctions with civil remedies created comprehensive enforcement frameworks addressing both deterrence and restoration.

9.1.2 United States Environmental Criminal Law

The United States' development of environmental criminal law through statutes like the Clean Water Act and Resource Conservation and Recovery Act demonstrates effective integration of criminal sanctions with regulatory frameworks.[76] The U.S. approach emphasizes individual criminal responsibility for corporate environmental violations, creating personal liability for corporate decision-makers.[77]

The Environmental Protection Agency's Environmental Crimes Section has achieved significant deterrent effects through high-profile prosecutions resulting in substantial prison sentences for environmental violators.[78] The "responsible corporate officer" doctrine holds individual executives criminally liable for corporate environmental violations, even without direct participation in wrongful conduct.[79]

9.1.3 Brazil's Environmental Criminal Law

Brazil's Environmental Crimes Law (Law 9.605/98) provides another model for comprehensive environmental criminal legislation.[80] The law addresses various environmental crimes including water pollution, with penalties including imprisonment, fines, and restoration obligations.[81] Brazil's experience demonstrates how environmental criminal law can address systematic destruction of natural resources while supporting sustainable development.[82]

The Brazilian approach includes innovative provisions for corporate environmental liability and alternative sanctions focusing on environmental restoration rather than purely punitive

[75] *Id*
[76]Clean Water Act, 33 U.S.C. § 1319(c) (2018); Resource Conservation and Recovery Act, 42 U.S.C. § 6928 (2018).
[77] Kathleen F. Brickey, Environmental Crime: Law, Policy, Prosecution (2d ed. 2017).
[78] U.S. Environmental Protection Agency, Environmental Crimes Annual Report (2020).
[79] United States v. Park, 421 U.S. 658 (1975).
[80] Lei No. 9.605, de 12 de Fevereiro de 1998 (Braz.).
[81] Id. Arts. 33, 54.
[82] Paulo Affonso Leme Machado, Direito Ambiental Brasileiro (27th ed. 2019).

measures.[83] This restorative justice approach could inform India's development of ecocide legislation by combining deterrence with ecological repair.

10. Comprehensive Policy Recommendations and Implementation Strategy

10.1 Legislative Reform Framework

10.1.1.Ecocide Prevention and Punishment Act

India should enact comprehensive ecocide legislation establishing criminal liability for systematic environmental destruction. The proposed Ecocide Prevention and Punishment Act should include:

Definition and Elements: Clear definition of ecocide incorporating widespread, long-term, or severe environmental damage caused by unlawful or wanton conduct. The definition should encompass both immediate environmental destruction and long-term ecological harm, addressing limitations in current environmental legislation.[84]

Criminal Penalties: Graduated criminal penalties reflecting the severity and permanence of environmental harm. Minor environmental crimes should carry penalties comparable to current environmental legislation, while ecocide should carry sentences of 10-25 years imprisonment, reflecting the gravity of ecological destruction.[85]

Corporate Criminal Liability: Enhanced corporate criminal liability provisions addressing the collective nature of environmental crimes. The Act should establish criminal liability for corporations engaging in systematic environmental destruction, with penalties including substantial fines, asset forfeiture, and mandatory environmental restoration.[86]

Individual Responsibility: Personal criminal liability for corporate officers, directors, and managers who authorize or knowingly permit ecocide. The "responsible corporate officer" doctrine should apply to environmental crimes, ensuring individual accountability for corporate environmental destruction.[87]

[83] Lei No. 9.605, de 12 de Fevereiro de 1998, art. 79 (Braz.).
[84] Polly Higgins et al., Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text (2021).
[85] Rob White, Environmental Harm: An Eco-Justice Perspective (2013).
[86] Celia Wells, Corporations and Criminal Responsibility (2d ed. 2001).
[87] *United States v. Park*, 421 U.S. 658 (1975).

10.1.1.2 Environmental Criminal Procedure Code

Specialized procedural legislation should address unique challenges in environmental crime investigation and prosecution:

Investigation Powers: Enhanced investigation powers for environmental crimes, including authority to conduct environmental audits, seize corporate records, and compel technical testimony. Environmental crime investigation requires scientific expertise and technical resources beyond traditional criminal investigation.[88]

Evidence Standards: Specialized evidence rules addressing scientific and technical evidence in environmental criminal cases. The procedural code should establish presumptions of causation in cases of systematic pollution and allow statistical evidence to establish environmental harm.[89]

Jurisdictional Provisions: Clear jurisdictional rules addressing environmental crimes crossing state boundaries. River pollution affecting multiple states requires enhanced interstate cooperation and uniform enforcement standards.[90]

10.1.2 Institutional Development

10.1.2.1 Environmental Crime Investigation Agency

India should establish a specialized Environmental Crime Investigation Agency (ECIA) with nationwide jurisdiction over environmental crimes.[91] The ECIA should combine law enforcement authority with scientific expertise, addressing current enforcement gaps in environmental crime investigation.

Organizational Structure: The ECIA should operate under the Ministry of Environment with operational independence similar to the Central Bureau of Investigation. Regional offices should coordinate with state pollution control boards while maintaining investigative autonomy.[92]

[88] Sally S. Simpson, Corporate Crime, Law, and Social Control (2002).
[89] Sheila Jasanoff, Science at the Bar: Law, Science, and Technology in America (1995).
[90] Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy (8th ed. 2018).
[91] Michael G. Faure, Environmental Criminal Law in the European Union: Challenges, Opportunities and Prospects (2017).
[92] Central Bureau of Investigation Act, 1946 (India).

Personnel and Training: ECIA personnel should include both law enforcement officers and environmental scientists, with specialized training in environmental crime investigation. The agency should develop forensic environmental science capabilities supporting criminal prosecutions.[93]

Resources and Technology: Adequate funding and advanced technology are essential for effective environmental crime investigation. The ECIA should have access to environmental monitoring equipment, forensic laboratories, and scientific analysis capabilities.[94]

10.1.2.2 Specialized Environmental Criminal Courts

Building on the National Green Tribunal's success, India should establish specialized environmental criminal courts with jurisdiction over environmental crimes.[95] These courts should combine criminal law expertise with environmental science knowledge, addressing the technical complexity of environmental criminal cases.

Judicial Training: Judges handling environmental criminal cases require specialized training in environmental science, toxicology, and ecological assessment. Regular training programs should ensure judicial competency in complex environmental issues.[96]

Technical Assessment: Environmental criminal courts should have access to court-appointed scientific experts and technical assessors, similar to the NGT's technical member system. Scientific assessment is crucial for establishing causation and damages in environmental criminal cases.[97]

Sentencing Guidelines: Specialized sentencing guidelines should reflect the unique characteristics of environmental crimes, including long-term ecological harm and intergenerational impacts. Sentences should incorporate both punitive and restorative elements.[98]

[93] National Institute of Justice, Environmental Crime Training for Law Enforcement (2018).
[94] European Environment Agency, Environmental Crime and Enforcement (2019).
[95] George Pring & Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (2009).
[96] United Nations Environment Programme, Training Manual on International Environmental Law (2006).
[97] National Green Tribunal Act, 2010, Sec. 4 (India).
[98] Andrew Ashworth, Sentencing and Criminal Justice (6th ed. 2015).

10.1.3 Enforcement Strategy and Implementation

10.1.3.1 Prioritization and Resource Allocation

Effective environmental crime enforcement requires strategic prioritization and adequate resource allocation:

Case Selection Standards: Clear standards for prioritizing environmental crime prosecutions should focus on cases involving systematic environmental destruction, significant ecological harm, and deterrent value. Priority should be given to cases meeting ecocide criteria.[99]

Resource Allocation: Substantial resources are required for environmental crime enforcement, including scientific analysis, technical assessment, and specialized investigation. The government should allocate adequate funding for environmental crime prevention and prosecution.[100]

Performance Metrics: Success metrics should include not only prosecution rates but also environmental outcomes, including pollution reduction and ecological restoration. Enforcement effectiveness should be measured by environmental protection rather than merely legal process completion.[101]

10.1.3.2 Prevention and Deterrence

Environmental crime prevention requires comprehensive strategies addressing root causes of environmental destruction:

Corporate Compliance Programs: Mandatory environmental compliance programs for high-risk industries should include regular environmental audits, employee training, and reporting requirements. Effective compliance programs could provide limited defenses to criminal liability.[102]

[99] International Criminal Court, Policy Paper on Case Selection and Prioritisation (2016).
[100] Organisation for Economic Co-operation and Development, Environmental Compliance and Enforcement in India (2006).
[101] Clifford Rechtschaffen & David L. Markell, Reinventing Environmental Enforcement (2003).
[102] Christine Parker, The Open Corporation: Effective Self-Regulation and Democracy (2002).

Industry Self-Regulation: Enhanced industry self-regulation through environmental management standards and certification programs could supplement criminal law enforcement. However, self-regulation should complement rather than replace criminal sanctions.[103]

Public Participation: Citizen reporting and public participation in environmental crime prevention should be encouraged through whistleblower protection and citizen suit provisions. Public involvement enhances detection and deterrence of environmental crimes.[104]

10.1.4 International Cooperation and Standards

10.1.4.1 Global Environmental Governance

India's environmental crime legislation should align with international environmental law and global governance initiatives:

International Criminal Court: India should support efforts to include ecocide within the International Criminal Court's jurisdiction, contributing to global environmental protection efforts. Domestic ecocide legislation would demonstrate India's commitment to international environmental governance.[105]

Transboundary Cooperation: Environmental crimes often cross national boundaries, requiring enhanced international cooperation in investigation and prosecution. India should develop bilateral and multilateral agreements addressing transboundary environmental crimes.[106]

Technical Assistance: India could provide technical assistance to other developing countries establishing environmental criminal law frameworks, sharing experience and expertise in environmental crime prevention.[107]

11.1 Economic Analysis and Cost-Benefit Assessment

11.1.1 Economic Costs of Environmental Destruction

The economic case for environmental criminal law rests on comprehensive assessment of environmental destruction costs:

[103] Neil Gunningham & Peter Grabosky, Smart Regulation: Designing Environmental Policy (1998).
[104] Lakshman Guruswamy, International Environmental Law in a Nutshell (5th ed. 2015).
[105] Philippe Sands, Principles of International Environmental Law (4th ed. 2018).
[106] United Nations Environment Programme, Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (2006).
[107] International Network for Environmental Compliance and Enforcement, Principles of Environmental Compliance and Enforcement (2009).

Health Care Costs: Environmental pollution imposes substantial healthcare costs through increased disease rates, reduced life expectancy, and healthcare system burden. Studies estimate that air and water pollution cost India over $80 billion annually in healthcare expenses.[108]

Agricultural Productivity: Water pollution reduces agricultural productivity through soil contamination, reduced crop yields, and livestock mortality. The economic value of agricultural losses from water pollution exceeds $20 billion annually.[109]

Ecosystem Services: Environmental destruction eliminates valuable ecosystem services including water purification, flood control, and biodiversity conservation. The economic value of lost ecosystem services from river pollution is estimated at over $50 billion annually.[110]

11.1.2 Benefits of Criminal Environmental Law

Criminal environmental law provides multiple economic benefits justifying implementation costs:

Deterrence Effects: Criminal sanctions create stronger deterrent effects than civil penalties, reducing overall environmental enforcement costs by preventing violations rather than merely responding to them. Studies indicate that criminal environmental law reduces violation rates by 40-60%.[111]

Innovation Incentives: Criminal liability for environmental destruction incentivizes technological innovation and cleaner production methods. The "Porter Hypothesis" suggests that environmental regulation stimulates innovation that often fully offsets compliance costs.[112]

Investment Attraction: Strong environmental law enforcement attracts investment from environmentally conscious firms and countries. International investors increasingly consider environmental governance in investment decisions.[113]

[108] World Bank, The Cost of Air Pollution in India (2013).
[109] Indian Council of Agricultural Research, Impact of Water Pollution on Agriculture (2018).
[110] The Economics of Ecosystems and Biodiversity, TEEB for Water and Wetlands (2013).
[111] Mark A. Cohen, Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence, 82 J. Crim. L. & Criminology 1054 (1992).
[112] Michael E. Porter & Claas van der Linde, Toward a New Conception of the Environment-Competitiveness Relationship, 9 J. Econ. Perspectives 97 (1995).
[113] United Nations Conference on Trade and Development, World Investment Report 2020 (2020).

12.1 Social Justice and Environmental Equity Considerations

12.1.1 Environmental Justice and Vulnerable Communities

Environmental crimes disproportionately affect marginalized communities, requiring environmental criminal law to address social justice concerns:

Disproportionate Impact: Industrial pollution typically affects low-income communities lacking political influence to resist polluting industries. Environmental criminal law should prioritize protection of vulnerable communities facing disproportionate environmental harm.[114]

Access to Justice: Marginalized communities often lack resources for environmental litigation, requiring enhanced access to justice provisions in environmental criminal law. Public interest litigation and citizen suit provisions should ensure equal access to environmental protection.[115]

Community Participation: Affected communities should participate in environmental crime investigation and prosecution through victim impact statements, community impact assessments, and restorative justice processes.[116]

12.1.2 Intergenerational Equity and Future Generations

Environmental crimes create harm extending across generations, requiring legal frameworks addressing intergenerational equity:

Future Generation Rights: Constitutional environmental rights should be interpreted to include rights of future generations to inherit uncontaminated environments. Environmental criminal law should explicitly recognize intergenerational harm as aggravating factor in sentencing.[117]

Irreversible Harm: Environmental destruction often causes irreversible harm affecting future generations permanently. Criminal penalties should reflect the permanence of ecological destruction and intergenerational impact.[118]

[114] Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (3d ed. 2008).
[115] Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement (2001).
[116] Kristin Shrader-Frechette, Environmental Justice: Creating Equality, Reclaiming Democracy (2002).
[117] Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (1989).
[118] Samuel Scheffler, Justice and Desert in Liberal Theory, 88 Cal. L. Rev. 965 (2000).

Restoration Obligations: Environmental criminals should bear responsibility for long-term restoration and monitoring, ensuring environmental harm does not transfer costs to future generations.[119]

13.1 Conclusion: Toward Environmental Justice through Criminal Law

India's environmental crisis, exemplified by the systematic destruction of its river systems, requires fundamental legal paradigm shifts recognizing severe environmental harm as criminal conduct deserving criminal sanctions. The failure of existing regulatory frameworks to prevent or remediate systematic pollution of the Ganga, Yamuna, Hindon, and Periyar rivers demonstrates the inadequacy of treating environmental destruction as mere civil violation.

The concept of ecocide provides an appropriate legal framework for addressing systematic environmental destruction that transcends individual negligence to constitute crimes against the environment itself. Implementing ecocide as criminal law framework would serve multiple functions: deterring future environmental destruction through meaningful criminal sanctions, expressing societal condemnation of conduct threatening fundamental ecological systems, and providing tools for addressing environmental destruction that exceeds the capacity of civil legal remedies.

The comprehensive policy recommendations outlined in this analysis demonstrate that transitioning from negligence-based regulation to criminal environmental law is both feasible and necessary. The establishment of specialized environmental crime investigation agencies, environmental criminal courts, and comprehensive ecocide legislation would create robust frameworks for environmental protection while supporting sustainable economic development.

The path from negligence to ecocide requires comprehensive legal reform addressing both substantive criminal law and enforcement mechanisms. However, the alternative—continued systematic destruction of India's environmental heritage—represents not merely policy failure but moral abdication of responsibility to future generations.

The recommendations presented here provide a roadmap for transforming India's environmental law from reactive regulation to proactive criminal protection of ecological systems. Key implementation steps include:

[119] Albert C. Lin, The Unifying Role of Harm in Environmental Law, 2006 Wis. L. Rev. 897 (2006).

1. Immediate Legislative Action: Enacting comprehensive ecocide legislation with clear criminal penalties for systematic environmental destruction
2. Institutional Development: Establishing specialized environmental crime investigation and prosecution capabilities
3. Capacity Building: Training law enforcement, judicial, and technical personnel in environmental crime prevention and prosecution
4. International Cooperation: Aligning domestic environmental criminal law with international standards and cooperation mechanisms
5. Resource Investment: Providing adequate funding for environmental crime enforcement while recognizing long-term economic benefits

India's rivers, once symbols of life and spiritual significance, have become monuments to legal inadequacy and environmental destruction. Recognizing their systematic pollution as environmental crime rather than regulatory violation represents not merely legal reform but fundamental commitment to environmental justice and intergenerational equity. The transformation of environmental law from negligence-based regulation to criminal protection of ecological systems offers hope for reversing decades of environmental destruction and preventing future ecocide.

The transition from treating industrial pollution as negligence to recognizing it as ecocide represents more than legal reform—it constitutes a fundamental shift in societal values toward recognizing the environment as deserving criminal law protection. This paradigm shift is essential for addressing the scale and urgency of India's environmental crisis while building legal frameworks adequate for protecting ecological systems for current and future generations.

AN ONGOING DEBATE RELATING TO THE CRIMINALISATION OF MARITAL RAPE IN THE BHARATIYA NYAYA SANHITA [BNS], 2023

Faisal Faish [1]

Abstract

The debate relating to marital rape is whether to penalise it under the existing provisions of rape law or a new provision to be enacted, or the penalisation in the existing non-rape provisions is sufficient punishment. The Karnataka High Court has framed the charge for marital rape in Hrishikesh Sahoo v. State of Karnataka. However, the Delhi High Court has provided a split verdict in the matter relating to the removal of marital rape exemption [MRE] in RIT Foundation v. UOI. The matter is pending before the Apex Court. Apart from the argument of violation of the Fundamental Rights enshrined in Articles 14, 15, and 19, the dominant proposition in favour of removing MRE is based on the ground of obsoleteness. Obsoleteness has been argued on three bases: a) Hale's doctrine, the presumption of permanent consent of sex by wife; b) Unity theory, the identity of husband and wife are merged into a single identity; and c) Property theory, where a woman is considered the husband's property. This note critically analyses the argument for and against criminalisation of marital rape in light of the relevant provisions of law and argues that 'criminalisation of marital rape' and 'removal of MRE' should not be used interchangeably. Moreover, it has been highlighted that an impact assessment study should be undertaken before taking a call on MRE because of its social, economic, cultural and religious ramifications. Moreover, deliberations are required on specific issues such as gender neutrality of marital rape.

Keywords: *MRE, Marital Rape, RIT Foundation, Hrishikesh Sahoo , Fundamental Rights*

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1. INTRODUCTION

The general principle is that violent or non-consensual acts, including marital rape, should not go unpunished. The debate relating to marital rape may be summarised into three arguments. First, the non-consensual sexual act by the husband should be branded as rape under the general provision of rape and punished accordingly. Second, it should not be considered rape, and the existing remedies[2] are sufficient to deal with such cases. The third argument is to enact new provisions for non-consensual sexual acts between spouses. This debate has been ongoing for at least a few decades in India. Nevertheless, the Bharatiya Nyaya Sanhita [BNS], 2023 has retained the marital rape exemption [MRE] by increasing the wife's age from 15 to 18 years.[3] During the time of discussions and consultations on the amendment of the IPC, a matter was referred to the Supreme Court from the Karnataka High Court, wherein the accused was charged with marital rape.[4] In the meantime, the Division Bench of Delhi High Court gave a split verdict on the validity of MRE.[5] A petition was filed against the split verdict. The Supreme Court has clubbed both the petitions, and the matter is pending before the three-judge Bench.[6]

2. TWO MAIN CONTENTIONS AGAINST MRE

The dominant arguments in favour of the removal of MRE are based on obsoleteness and violation of fundamental rights. Obsoleteness of MRE has been argued on three bases: a) Hale's doctrine, the presumption of permanent consent of sex by wife; b) Unity theory, the identity of husband and wife are merged into a single identity; and c) Property theory, where a woman is considered the husband's property.[7] On the point of fundamental rights, it has been argued that MRE infringes the right to equality guaranteed by Articles 14 and 15(3) because it is arbitrary in the sense that there is an absence of any rationale for differentiating between a married man and an unmarried man who subjects a woman to forced sexual intercourse. Therefore, the discrimination is solely based on marital status.[8] Besides, the freedom of expression provided in Article 19(1)(a) of the Constitution has been infringed upon because it takes away the ability

[2] Bharatiya Nyaya Sanhita, 2023 § 75-77, 79-80, 85, 115-118, 123, 125, 131, 133 and 352. See also Domestic Violence Act, 2005.
[3] Bharatiya Nyaya Sanhita, 2023 § 63.
[4] Hrishikesh Sahoo v State of Karnataka [Writ Petition No. 48367 of 2018, Karnataka High Court, Judgement delivered on 23.03.2022]
[5] RIT Foundation vs UOI & Ors. [W.P.(C) 284/2015 & CM Nos.54525-26/2018 [Judgement delivered on 11.05.22] [2022 LiveLaw (Del) 433].
[6] SLP(Crl) No. 004063 - 004064 / 2022 Registered on 27-04-2022.
[7] RIT Foundation vs UOI & Ors. [W.P.(C) 284/2015 & CM Nos.54525-26/2018]
[8] Hrishikesh Sahoo v State of Karnataka [Writ Petition No. 48367 of 2018, Karnataka High Court, Judgement delivered on 23.03.2022]; RIT Foundation vs UOI & Ors. [W.P.(C) 284/2015 & CM Nos.54525-26/2018]

of married women to say "joyful yes" to sexual intercourse.[9] Finally, any restraint on the woman's right to refuse sexual acts would lead to compromising bodily integrity and, consequently, her right under Article 21.[10]

3. COUNTER ARGUMENTS OF THE TWO CONTENTIONS

The arguments of obsoleteness have been countered by highlighting that the legal provisions of rape have undergone several amendments over a period of time.[11] The 167th Report of the Parliamentary Standing Committee is the latest one, which states that the criminalisation of marital rape would put the family system under stress.[12]

In counter to the violation of fundamental rights, in the split verdict of the Delhi High Court, Justice Hari Shankar pointed out that the petitioner failed to distinguish between the etymological and the legal understanding. An analogy has been drawn with the offence of murder. It is as simplistic as the contention that, as per the definition, one person taking the life of another person is always murder. However, we know that every incident of taking life by a person of another person is not murder. Similarly, every incident of non-consensual sex cannot be considered as rape. The non-consensual sexual act must take place under any one of the circumstances mentioned in the provisions of Section 375 of the IPC.[13] Shouldn't differential treatment be extended to sex between married couples and sex between strangers? The same act committed by different persons situated differently *vis-à-vis* the victim can be treated differently. A father slapping a son is not an offence, but the same act by a stranger would qualify as a crime. Besides, the same act committed by different classes of person may be treated differently, like rapes committed by specific categories of people are considered as aggravated forms, entailing a higher punishment.[14] While negating the argument of arbitrariness, Justice Shankar stated that arbitrariness is an abstract concept, and the provision cannot be struck down solely on that basis. Apart from arbitrariness, it is essential to establish constitutional infirmness.[15] A couple of questions demand attention. Suppose a wife refuses to engage in sexual intercourse, and the husband nonetheless has intercourse, irrespective of her disapproval. Can we equate it with the act of ravishing by a stranger? Can we assume that the

[9] RIT Foundation vs UOI & Ors. [W.P.(C) 284/2015 & CM Nos.54525-26/2018
[10] ibid
[11] Amendments were made in 1983, 2012 etc.
[12] Presented to the Rajya Sabha on March 1, 2013.
[13] There are seven circumstances. It includes acts done against the will of the woman, against her consent, consent obtained by coercion or fraud, unable to give or communicate consent due to unsoundness or influences of intoxication, and consent given by a person who is below 18 years.
[14] Indian Penal Code § 376(2) [Bharatiya Nyaya Sanhita § 64].
[15] Re Natural Resources Allocation (2012) 10 SCC 1; State of M.P. v. Rakesh Kohli (2012) 6 SCC 312.

impact on the wife in this situation is the same as the impact on a woman whom a stranger has raped? The answer would be an emphatic "no". There is thus an intelligible differentia. The stranger is a violator, having no right or expectation whatsoever. He disregards the rights of a woman, and therefore, rape is a crime of power rather than a crime of mere lust. On the other hand, in marriage, the woman has entered into a relationship with a man in which sex is an integral part.[16] There is a legitimate expectation of sex in marriage. Therefore, unjustified denial of access to sex by either of the spouses is not justified and furnishes grounds for separation and cruelty.[17]

4. ANALYSIS OF THE ARGUMENTS AND THE WAY FORWARD

The discussion of criminalisation-decriminalisation is a debate of tradition versus modernity.[18] Modernity represents the era of the post-feminist movement, which shifted the focus from 'family or husband's right' to 'woman's dignity' and 'gender equality'.[19] Marriage is recognised as a partnership of equals.[20] Therefore, any violence shall not be tolerated.[21]

There is a consensus among the majority of scholars since the past half century that marital rape is a barbaric act and must be penalised.[22] The Supreme Court of India stated that it is "deathless shame and the gravest crime against human dignity."[23] However, there are handfuls of people who argue that the offence of rape cannot fit within marriage because it would be an excessive interference by the state;[24] and an attack on the marriage, family, and society in general,[25] and in the Indian condition in particular.[26]

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[16] Dastane v. Dastane (1975) 2 SCC 326.
[17] Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511; Vidhya Vishwanathan v. Kartik Balakrishnan (2014) 15 SCC 21.
[18] Agnidipto Tarafder & Adrija Ghosh, *The Unconstitutionality of the Marital Rape Exemption in India*, 3(2) University of Oxford Human Rights Hub Journal (2020)
[19] Debanjan Banerjee & T.S. Sathyanarayana Rao, The Dark Shadow of Marital Rape: Need to Change the Narrative, 4 Journal of Psychosexual Health (2022); Gopika Bansal, *Consent Marital Rape, and Social Acceptability: An Exploration Across Different Cultures*, 5(3) International Journal of Law, Management & Humanities (2022)
[20] R v. R (1991) 4 All ER 48; Vaibhav Yadav, *Criminalizing Marital Rape in India*, 4 Indian Journal of Law & Legal Research 1 (2022).
[21] Nimeshbhai Bharatbhai Desai v. State of Gujarat (2018) SCC Online Guj 732; Jonathan Herring & Michelle Madden Demsey, *Why Sexual Penetration Requires Justification*, 27 Oxford Journal of Legal Studies, 467 (2007)
[22] Michael Freeman, *But If You Can't Rape Your Wife, Who(m) Can You Rape?: The Marital Rape Exemption Re-examined*, 15 Family Law Quarterly (1981).
[23] Bodhissattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 922.
[24] See generally Lisa Featherstone, *'That's What Being a Woman is For': Opposition to Marital Rape Law Reform in Late Twentieth-Century Australia*, 29 Gender & History 87 (2017).
[25] Law Commission of India, *Review of Rape Laws*, Report No. 172, (2000); Rebecca Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 4 Law and Social Inquiry, 941, 1001 (1995).
[26] Deepak Misra, Ex-Chief Justice of the Supreme Court of India, Press Release, Deccan Herald (April 09, 2019, 10.10 p.m.), https://www.deccanherald.com/india/karnataka/bengaluru/marital-rape-shouldn-t-be-crime-in-india-ex-cji-misra-727688.html

The most crucial aspect to consider is that 'criminalisation of marital rape' and 'removal of MRE' should not be used interchangeably. The decriminalisation of marital rape signifies impunity.[27] However, MRE implies mitigation because the act is otherwise punishable under the various provisions of criminal law, including cruelty and physical assault.[28] The only thing to ponder over is why the act of sexual assault by the husband is not branded as 'rape' and whether the punishment under the existing provisions confirms the theory of fair labelling?[29] We must appreciate the difference between 'recognition of right' and 'enforcement of right'. The existing law may not be conducive to enforcing every right recognised in the due course of time.

The impact assessment study of the criminalisation of marital rape and the efficacy of the present law must be undertaken before taking a call on MRE. Since the institution of marriage has social, economic, cultural and religious ramifications,[30] a proper study should be undertaken to assess the impact of the removal of MRE on children, families, and society.[31] One of the severe repercussions of branding the husband as the rapist of his wife is that the child born out of such marriage could be branded as the product of rape because her father, on a particular occasion(s), had non-consensual sex with her mother. There will be a breakdown of families with children suffering from parental alienation syndrome,[32] psychological problems,[33] poor behavioural and cognitive outcome,[34] and may impact their academic pursuit.[35]

The determination of consent is a crucial aspect in the process of assessment of the efficacy of the present provisions of the offence of rape. Consent should be given. It cannot be assumed. The affirmative model ["yes" is "yes" and "no" is "no"] is not of universal acceptance.[36] Studies

[27] Sathyanarayan Rao et al, *Marital Rape in India*, Journal of Psychological Health (2002); Devensh Gupta, *Marital Rape in India*, 2(2) Indian Journal of Law and Legal Research 1 (2021)
[28] Supra note 1
[29] ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLE OF CRIMINAL LAW 25 (7th ed. 2003); State of Karnataka v. Appa Balu Ingale & Ors, (1995) Supp (4) SCC 469 [The public should have sufficient information about the ingredients of the offence and the punishment should reflect the gravity of the offence]
[30] Universal Declaration of Human Rights, 1948, art. 16; International Covenant on Civil and Political Rights, 1996, art. 23; Sivasankaran v. Santhimeenal, 2021 SCC Online SC 702.
[31] Amit Kumar v. Suman Beniwal, 2021 SCC Online SC 1270. Vivek Singh v. Romani Singh, (2017) 3 SCC 231.
[32] Vivek Singh v. Romani Singh (2017) 3 SCC 231.
[33] Glenn Norval & Kathryn Kramer, The Psychological Well-Being of Adult Children of Divorce, 47 Journal of Marriage and Family 905, 905-12 (1985); Timothy Biblarz & Greg Gottainer, Family Structure and Children's Success: A Comparison of Widowed and Divorced Single Mother Families, 62 Journal of Marriage and Family 533, 533-48 (2000).
[34] Wendy Sigle & Sara McLanahan, Father Absence and Child Well-Being: A Critical Review, 116 Future Family 120, 120-2 (2004).
[35] A.K. Donkar, Parental Involvement in Education in Ghana: The Case of a Private Elementary School, 4(1) International Journal of Parents Education 23, 23-38 (2010).
[36] Mahmood Farooqui v. NCT Delhi, 2018 CrLJ 3457.

have revealed that most of the sexual interactions are based on non-verbal communication, and people vary about expressing their feelings. It is also important to consider the gender binary, which emphasises the differences between men and women in initiating and reciprocating consent. In the usual scenario, the man initiates and plays an active role in the sexual interaction, and the woman's expression is non-verbal.[37] Further, it is difficult to decode consent where little or resistance is offered from the side of a woman if the parties are known to each other.[38] The husband has to obtain fresh consent on every occasion.

Explanation 2 of Section 63 of BNS states that "consent means an unequivocal voluntary agreement when a woman by words, gestures or any form of verbal or non-verbal communication, communicates her willingness to participate in the specific sexual act." The proviso clarifies that mere passivity or lack of resistance to a sexual act cannot be construed as consent. The general compatibility between spouses is sufficient for a successful marriage, as perfect compatibility between two persons of different genders is almost impossible in the realistic sense. However, with the removal of MRE, the law demands ideal compatibility every second in the bed. Since consent for a particular sexual act, say penetration, could be withdrawn at any point in time, the difference between consensual sex and rape boils down to an act of just a second if the contemporaneousness element of consent is strictly interpreted.

Further, the court is obliged to raise the presumption of absence of consent if the woman states that she did not consent.[39] The sole testimony of the prosecutrix is sufficient[40] even though studies highlight the incapacity of human memory to present the exact version of any event.[41]

Finally, we have to take a call on a gender-neutral approach towards marital rape. With the removal of MRE, the power to decide the legitimacy of sexual intercourse will solely vest in the hands of the wife. We cannot rule out that a husband can also become a victim in some instances. However, the removal of MRE would keep it gender-specific, hence going with the presumption that only the husband can sexually exploit the wife.[42] However, in marital relationships, the law recognises gender neutrality. For instance, Section 9 of the Hindu Marriage Act provides a remedy to both spouses regarding conjugal rights. The denial of sex by either spouse may be considered cruelty, a ground for divorce.[43]

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[37] Mahmood Farooqui v. NCT Delhi, 2018 CrLJ 3457.
[38] *Id*
[39] Bharatiya Sakshya Adhniyam, 2023, § 120.
[40] State of Punjab v. Gurmeet Singh (1996) 2 SCC 384.
[41] Pragan Singh v. State of Punjab (2014) 14 SCC 619.
[42] Tripaksha Litigation, Marital Rape: An Alternate View (Sept. 7, 2023, 8.45 p.m.) https://tripakshalitigation.com/marital-rape-an-alternate-view/
[43] Vidhya Vishwanathan v. Kartik Balakrishnan (2014) 15 SCC 21.

To put things into perspective, let's consider the hypothetical scenario: Mrs and Mr Gopi, aged around 50, have been happily married for 25 years, having two daughters and two sons out of wedlock, aged 24, 22, 20 and 18, respectively. The couple never had any significant differences. Suddenly, the one-morning altercation took place over issues relating to the household, the education of one of the children, and displeasure with the food the wife served and the like. After the altercation, the husband went to work and returned home in the evening. The wife served food and provided other hospitality. The husband was willing to come close to the wife, but the latter kept pushing the former. However, the husband overpowered the wife and initiated the foreplay, and she submitted. After around 10-15 minutes, the husband wanted to penetrate. At this point, the wife was unwilling. She tried to stop the husband through verbal communication, which the husband, given the experience of 25 years of marital life, interpreted as an expression of shyness and penetrated forcefully. Could the act of the husband qualify for marital rape? Should the court consider the past track of the relationship, where there wasn't a single instance of forceful sexual activity in 25 years? Would the court interpret "contemporaneousness" as strictly confined to only the moment of penetration? Going by the principle of consent approved by the judiciary in various cases, the act of the husband is more likely to qualify for rape. Should we take the tough call of branding a peaceful and obedient husband, into the silver jubilee years of marriage, as the rapist of the wife, due to a single moment of use of force?

The critics contend that criminalisation of marital rape by simply removing MRE could be exploited for personal gain, such as divorce or custody battles like the cases of cruelty under Section 498A of the IPC.[44]

5. CONCLUSION

The removal of MRE would result in the creation of a new offence. The existing law may not be conducive to enforcing every right recognised relatively and reasonably. The provisions of law should be enacted in tune with the nature of the right to make it practically enforceable. The judiciary is not an adequate forum to decide all these issues because it is not a mere matter of interpretation of the law. The consequential impacts should be discussed. An effort should be made to collect public opinion, and a dedicated Parliamentary Session should be set up

[44] Kahkashan Kausar @ Sonam V. State of Bihar [CrA 195 OF 2022, 8 Feb 2022].

rather than just relying on the arguments of a few scholars and legal counsels, who should not be considered representatives of the majoritarian view.

The right of a wife to say no to sexual acts implies that the husband possesses the same right as well. The respective spouse or both spouses may get frustrated, which can potentially destroy the marital relationship and family, negatively impacting society.

POLICING, POWER, AND REFORM: EVALUATING THE EFFECTIVENESS OF BHARATIYA NAGARIK SURAKSHA SANHITA 2023 IN REGULATING ARREST PRACTICES IN INDIA

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Abstract

The Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023 introduces a sweeping reform of India's criminal procedure, particularly concerning the exercise of police powers during arrest. This research critically examines the effectiveness of the BNSS in addressing longstanding issues within India's policing system, such as arbitrary arrest, custodial violence, and systemic discrimination. By situating arrest procedures within the broader context of police accountability and constitutional mandates under Articles 21 and 22, the study explores whether the BNSS genuinely transforms policing practices or merely codifies existing judicial directives without addressing structural failings. Adopting a doctrinal and empirical methodology, the paper analyses key provisions of the BNSS, including mandatory justification for arrests, digital documentation, medical safeguards, and judicial oversight, and evaluates their potential to curtail police discretion and enhance procedural fairness. Drawing on landmark judicial precedents such as D.K. Basu, Joginder Kumar, and Arnesh Kumar, policy reports, and human rights data, the research also investigates the lived realities of marginalised groups who continue to face disproportionate policing and abuse of arrest powers. Through a comparative lens, the paper contrasts the BNSS with the colonial-era Code of Criminal Procedure, 1973, to assess whether the new law reimagines policing as a public service grounded in accountability and human rights. However, the study also identifies formidable implementation challenges rooted in institutional resistance, resource constraints, and entrenched discriminatory practices against women, Dalits, Adivasis, and religious minorities. By mapping both statutory advancement and operational gaps, the research evaluates whether BNSS 2023 constitutes a transformative shift or merely repackages colonial legacies under the guise of reform. This paper contributes to the evolving discourse on policing accountability and procedural justice in India, underscoring the urgency of embedding substantive rights protections in the everyday functioning of law enforcement.

Keywords: *Policing, Arrest, Legal reforms, Human rights violations***,** *Law enforcement*

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1. INTRODUCTION

At the intersection of law and liberty, the authority to arrest constitutes a critical mechanism through which the State exercises its coercive power, directly impinging upon an individual's constitutionally guaranteed right to personal liberty. Situated at the juncture of public interest and private rights, the act of arrest is not merely administrative but a substantive legal action that must be grounded in statutory mandates and constitutional safeguards. In India, the legal foundation for arrest procedures has traditionally been established under the Criminal Procedure Code, 1973 (hereinafter referred to as CrPC 1973), a post-colonial statute that inherited several structural elements from colonial-era policing and criminal justice practices. It has significantly influenced this dynamic for many years, overseeing the procedural elements of arrest, detention, and investigation for decades[2]. However, persistent concerns about arbitrary arrests, custodial violence, and the lack of institutional accountability have fuelled demands for reform[3]. Against this backdrop, the enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as BNSS 2023) represents a landmark attempt to modernise the legal framework governing arrests and align it more closely with constitutional values and international human rights standards.

The BNSS 2023 introduces several substantive changes intended to reduce the abuse of arrest authority. These include provisions for mandatory recording of arrest reasons[4], issuance of notice before arrest for minor offences[5], mandatory medical examinations during custody[6] and increased judicial oversight[7]. The legislation indicates a shift away from mere procedural formalities towards a more rights-oriented perspective in criminal justice. However, the effectiveness of these reforms depends not only on the wording of the statutes but also on their actual implementation and the readiness of law enforcement agencies to adopt systemic changes.

This paper conducts a doctrinal, empirical, and comparative examination of the arrest provisions outlined in the BNSS 2023, assessing their efficacy in rectifying historical shortcomings within the Indian policing framework. It investigates whether the new legal

[2]Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (1974).
[3] National Human Rights Commission, *Annual Report 2021* (2022), https://nhrc.nic.in/sites/default/files/NHRC_AR_2020-2021_English.pdf
[4] Bharatiya Nagarik Suraksha Sanhita, No. 45 of 2023, § 35, INDIA CODE (2023).
[5] *Id.* § 36.
[6] *Id.* § 38.
[7] *Id.* § 48.

framework signifies a meaningful change in the equilibrium between police authority and individual freedom, or if it simply reproduces previous structural inadequacies under the pretence of reform.

1.1 Legislative and Constitutional Dimensions

The concept of arrest represents one of the most significant restrictions a state can impose upon an individual's liberty. It constitutes a formal act through which the state, through its police or authorised agents, exerts control over a person suspected of having violated the law. The legal architecture that governs the power of arrest in India is constructed upon a dual foundation: the Constitution of India and statutory provisions, predominantly those embedded in the CrPC 1973, and subsequently reflected in the BNSS 2023, which forms the subject of detailed analysis in subsequent sections.

From a constitutional standpoint, Article 21 and Article 22 establish the bedrock of protections against arbitrary and unlawful detention. Article 21 ensures that "no person shall be deprived of his life or personal liberty except according to procedure established by law"[8]. The phrase "procedure established by law," as construed in Maneka Gandhi v. Union of India, mandates not merely formal legality but also substantive fairness, reasonableness, and the absence of arbitrariness in any governmental action that affects personal liberty[9]. Therefore, the act of arrest must meet both the letter and spirit of procedural due process, which implies adherence to constitutional values and safeguards against executive excess.

In addition, Article 22 supplements these protections by laying down specific safeguards. When discussing preventive and punitive detention, a range of legal and ethical factors come into play. It mandates that "any person arrested shall be informed, as soon as possible, of the grounds of arrest and shall have the right to consult and be defended by a legal practitioner of their choice[10]. Additionally, it requires the production of the arrested person before a magistrate within 24 hours, failing which, continued detention becomes illegal"[11]. These provisions are not merely procedural niceties but constitutional bulwarks designed to prevent the abuse of police powers.

[8] Indian Const. art. 21.
[9] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[10] Indian Const. art. 22(1).
[11] Indian Const. art. 22(2).

Complementarily, judicial interpretation has played an instrumental role in strengthening these protections and operationalising the constitutional framework pertaining to the arrest. The Apex Court, through a catena of landmark judgements, has emphasised the principle that the authority to arrest must be exercised with great caution and only where strictly necessary. In D.K. Basu v. State of West Bengal, the Court established that "the detailed guidelines to minimise custodial violence and ensure transparency in arrest procedures, including the mandatory preparation of arrest memos, the right of the arrestee to inform a friend or relative, and medical examination of the arrested person at regular intervals"[12].

Viewed through this lens, in the case Joginder Kumar v. State of Uttar Pradesh, the Apex Court clarified that "an arrest is not a mechanical act and should only be exercised if justified by necessity, such as to prevent the accused from absconding, tampering with evidence, or committing further offences"[13]. In a similar vein, in the case of Arnesh Kumar v. State of Bihar, the Court underscored "the misuse of Section 498A of the Indian Penal Code 1860 (referred to as IPC) and imposed additional obligations on police officers to refrain from making automatic arrests for offences punishable with imprisonment up to seven years, unless clear and cogent reasons exist"[14].

The combined impact of these constitutional provisions and judicial precedents establishes a legal framework in which the authority to arrest is neither unrestricted nor total. While arrest serves as a legitimate instrument in criminal investigations, it must consistently meet the criteria of necessity, proportionality, and adherence to procedural standards. The implementation of the BNSS 2023 aims to formalise and clarify these judicially developed protections; however, it remains uncertain whether the new structure adequately resolves previous shortcomings, necessitating thorough academic and practical examination.

1.2 Legislative Shift from Criminal Procedure Code, 1973 to Bharatiya Nagarik Suraksha Sanhita, 2023

The launch of the BNSS 2023 signifies a crucial turning point in the development of criminal procedure in India, symbolising a legislative break from the colonial framework established by the CrPC 1973. The BNSS, along with the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as BNS 2023) and the Bharatiya Sakshya Adhiniyam, 2023 (hereinafter referred to as BSA

[12] D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.
[13] Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 260.
[14] Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.

2023), form a triad of new laws aimed at overhauling India's criminal justice system. These enactments have been positioned as efforts to decolonise Indian criminal law and align it more closely with contemporary realities and constitutional values[15].

The BNSS 2023, which replaces the CrPC 1973 in its entirety, retains much of the procedural structure of its predecessor but introduces key changes in both language and legal substance. Among the notable innovations are provisions that seek to enhance transparency in police investigations, mandate electronic service of summons, prescribe time-bound investigation procedures, and strengthen victim participation in the justice process[16]. The provisions relating to arrest, in particular, reflect an apparent attempt to integrate both judicially mandated safeguards and modern investigative needs.

One of the most significant features of the BNSS 2023 is its deliberate focus on achieving a balance between the requirements of law enforcement and the safeguarding of individual rights. While the CrPC 1973, over decades, had been progressively refined through judicial intervention, the BNSS codifies many of these safeguards directly into the statutory text, attempting to limit the scope for arbitrary state action. For example, the statute formalises the duty of the police to prevent unwarranted arrests for offences that carry a penalty of less than seven years of imprisonment unless specific criteria are met—effectively extending the rationale adopted in Arnesh Kumar v. State of Bihar[17].

Another notable feature is the effort to embed technological and procedural modernisation into the statutory framework. The BNSS 2023 mandates the use of electronic communication for legal notices, digital documentation during arrest and interrogation, and time-bound disclosure obligations to both the courts and the arrestee's family. This modernised approach is in accordance with the constitutional mandate under Article 21, as interpreted in Maneka Gandhi v. Union of India, which requires that the "procedure established by law" should not only be present but must also be equitable, just, and rational[18].

Also, the legislative intent behind the BNSS 2023 reflects a dual objective: first, to sever the lingering colonial undertones of the Indian criminal procedure system, and second, to incorporate principles of accountability, transparency, and technological adaptability into the

[15] Bharatiya Nagrik Suraksha Sanhita, Bill No. 78 of 2023, Statement of Objects and Reasons, Gazette of India, Extra., Part II, Sec. 2 (Aug. 11, 2023) (India).
[16] BNSS, supra note 3, §§, 48, 51, 56, 65.
[17] *Arnesh Kumar*, supra note 13.
[18] *Maneka Gandhi*, supra note 8.

heart of criminal justice administration[19]. The feasibility of effectively implementing these reforms amidst entrenched institutional obstacles, such as police discretion and judicial backlog, is still an unresolved issue that this paper aims to explore in the following sections.

1.3 Research Objectives, Methodology, and Significance of the Study

Critical discussions about the legal architecture that governs arrest in India have resurfaced with the introduction of BNSS 2023, particularly in light of the constitutional emphasis on personal liberty and procedural fairness. Arrest, as an act of state power, strikes at the heart of the individual's fundamental rights, making it imperative for the legal framework to reconcile the demands of public order with the constitutional commitment to human dignity and justice. The main aim of this research is to critically assess the substantive and procedural dimensions of arrest as codified in the BNSS 2023 and to determine whether these provisions represent a genuine advance in India's ongoing journey toward constitutional and human rights compliance.

The specific objectives of this study are threefold:

1. To examine the substantive changes introduced by the BNSS 2023 concerning arrest.
2. To assess the compatibility of the BNSS 2023 arrest provisions with the constitutional mandate.
3. To explore the potential gaps, ambiguities, and challenges in implementing the BNSS framework with particular attention to police discretion, institutional capacity, and the lived realities of marginalised groups, including women, minorities, and economically disadvantaged communities.

The methodology employed in this study is fundamentally doctrinal, based on the analysis of statutory texts, constitutional provisions, parliamentary discussions, and judicial rulings. Furthermore, the research will incorporate secondary empirical studies conducted by academics, governmental publications, and human rights organisations to provide context for the legislative changes within the practical realities of India's criminal justice system. The investigation will also include comparative perspectives from other constitutional democracies

[19] Press Information Bureau, *Union Home Minister Introduces New Criminal Law Bills in Lok Sabha*, Gov't of India (Aug. 11, 2023), https://pib.gov.in/PressReleasePage.aspx?PRID=1948012 (last visited Apr. 20, 2025).

to evaluate whether the BNSS 2023 provisions embody best practices or fail to meet international human rights standards.

The importance of this research is underscored by its potential to enhance legal scholarship and policy formulation. The structuring of arrest provisions transcends a mere technical task; it carries important repercussions for preserving human dignity through the criminal justice system. In light of the historical trends of police misconduct and custodial abuse in India, a thorough analysis of the new legal framework established by the BNSS 2023 is both timely and crucial. This study aims to address a gap in the nascent academic discourse surrounding the BNSS 2023, providing a substantive evaluation of whether the legislative reform fulfils its declared objective of safeguarding citizens' rights while bolstering law enforcement effectiveness.

2. HISTORICAL CONTEXT AND EVOLUTION OF ARREST LAW IN INDIA

The nation's legal system regulating arrest has undergone modifications from its colonial origins to its present constitutional setting, shaped by legislative reforms and judicial interpretation. Understanding this evolution is essential to appreciate the significance of the recent transition from the CrPC 1973 to the BNSS 2023. India's contemporary arrest laws trace their lineage to the criminal justice architecture instituted under British colonial administration. The first comprehensive criminal procedure code was the Criminal Procedure Code of 1861, which largely mirrored British imperial concerns for maintaining public order rather than prioritising individual liberty[20]. The colonial approach conceptualised arrest primarily as an instrument for the maintenance of state authority, often unconstrained by modern constitutional considerations of human rights or procedural fairness.

This legal foundation was only marginally revised with the enactment of the Criminal Procedure Code of 1898, which, until the CrPC, 1973, took front stage in procedural criminal law. The post-independence era ushered in a fundamental shift in the legal understanding of arrest, shaped by the adoption of the Constitution of India in 1950. The framers of the Constitution embedded Article 21, guaranteeing personal liberty, as a non-negotiable restraint on executive power, though early judicial interpretations tended to adopt a literal and formalistic understanding of the phrase "procedure established by law"[21]. In the circumstances at hand, the Indian judiciary only read substantive due process into Article 21 with the historic

[20] The Criminal Procedure Code, Act XXV of 1861 (India).
[21] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

ruling in *Maneka Gandhi v. Union of India*, which held that any law permitting the deprivation of liberty must be "just, fair, and reasonable"[22]. This doctrinal shift triggered an evolving judicial discourse that progressively limited the arbitrary application of police authority, particularly when making an arrest.

To add to this, the Supreme Court, through decisions such *as Joginder Kumar v. State of Uttar Pradesh*[23] *and D.K. Basu v. State of West Bengal*[24], moved to recalibrate "the balance between the needs of criminal investigation and the constitutional imperative of protecting personal liberty". These rulings created procedural and substantive protections for arrests, such as the police's duty to provide a reason for the arrest, to notify the person who has been arrested of the reason for their detention, and to bring the arrested person before a magistrate within twenty-four hours. Despite these safeguards, the implementation of the arrest law in India has long been marred by systemic issues, including over-policing, custodial violence, arbitrary detention, and abuse of discretionary power[25]. The National Crime Records Bureau (referred to as NCRB) data has consistently reflected an alarming rate of custodial deaths and a disproportionate use of arrest for bailable and non-violent offences[26].

In view of the foregoing, the legislative reform culminating in the BNSS 2023 signifies the state's most recent initiative to rationalise, modernise, and constitutionalise the framework for arrests. The BNSS 2023 aims to align judicially developed safeguards with statutory requirements, implement technological solutions for enhanced transparency, and minimise the potential for mechanical or unwarranted arrests. This signifies not merely a procedural transformation but also a possible reconfiguration of the relationship between state power and individual freedom, consistent with the constitutional aspiration of a rights-oriented mechanism for criminal justice. Nevertheless, the evolution of India's arrest provisions over time reveals a recurring tension between executive discretion and judicial oversight, a dynamic that continues to influence the current discussions regarding the legitimacy, extent, and execution of arrest powers as outlined in the BNSS 2023.

[22] Maneka Gandhi, supra note 8.
[23] Joginder Kumar, supra note 12.
[24] *Basu*, supra note 11.
[25] Amnesty Int'l India, *Torture in India: An Analysis of Custodial Violence in Law and Practice* (2018), https://amnesty.org.in/resources/torture-in-india (last visited Apr. 20, 2025).
[26] Nat'l Crime Recs. Bureau, *Crime in India: 2022 Statistics*, Ministry of Home Affs., Gov't of India, https://ncrb.gov.in (last visited Apr. 20, 2025).

2.1 Impact of Landmark Cases on Procedural Reform

Judicial interventions have played a pivotal role in driving procedural reforms within India's criminal justice system, with key decisions such as *D.K. Basu v. State of West Bengal*[27] *and Arnesh Kumar v. State of Bihar*[28] setting crucial precedents for safeguarding individual rights during arrest and custody. These rulings did not merely address isolated instances of abuse but fundamentally reshaped the architecture of arrest law, embedding constitutional values into day-to-day policing practice.

In D.K. Basu, the systemic issues of extrajudicial abuse of power in arrest and detention, as well as custodial violence, were addressed by the Supreme Court. In the given context, the court recognised that "the right to life under Article 21 is not merely a theoretical guarantee but must be reinforced through enforceable procedural norms that deter custodial abuse. To this end, it laid down a set of binding guidelines designed to ensure transparency, accountability, and oversight at every stage of the arrest process. These included, inter alia, the preparation of an arrest memo countersigned by a relative or witness; mandatory medical examinations at regular intervals; the obligation to inform a friend or relative of the detainee; and the requirement for arrest records to be maintained at police stations for judicial scrutiny"[29].

The "D.K. Basu guidelines" were remarkable for converting constitutional ideals into operational procedures, compelling police forces across the country to institutionalise safeguards that limit the scope of arbitrary and coercive practices. In many ways, this decision marked the judiciary's assertion of its role as the constitutional sentinel against the misuse of state authority, particularly when it comes to criminal justice. Additionally, the Court's reasoning in *D.K. Basu* underscored a shift from a purely statutory understanding of procedural compliance to a constitutional one, emphasising that mere adherence to statutory requirements was insufficient unless the procedure itself conformed to the principles of fairness, reasonableness, and justice, as established in Maneka Gandhi v. Union of India[30].

Years later, Arnesh Kumar addressed another persistent problem. It was the mechanical, and often unnecessary, use of arrest, particularly in offences where the statutory punishment did not mandate pre-trial custody. The court noted that "arrest is not an automatic or mandatory consequence of the lodging of an FIR and emphasised that police officers must apply their

[27] Basu, supra note 11.
[28] Arnesh Kumar, supra note 13.
[29] *Id*. at paras 35-36.
[30] Maneka Gandhi, supra note 8.

minds to the necessity and proportionality of arrest in each case[31]. The ruling directed that, for offences punishable with imprisonment of less than seven years, the police must first issue a notice of appearance under Section 41A of the CrPC and only proceed to arrest if the conditions stipulated under Section 41(1)(b) are clearly satisfied".

The judgement in Arnesh Kumar brought clarity and enforceability to earlier judicial cautions against indiscriminate arrests and encouraged the judiciary at the trial and appellate levels to scrutinise police actions through the lens of constitutional proportionality. It sought to harmonise law enforcement objectives with the fundamental right to liberty, reducing unnecessary pre-trial detention, which disproportionately affects marginalised and economically weaker sections of society.

Both D.K. Basu and Arnesh Kumar have directly informed subsequent legislative and procedural reforms. Their principles are now embedded in various police manuals, judicial training modules, and, most recently, in the text of the BNSS 2023. The BNSS codifies the requirement for non-custodial measures, including prior notices for appearance and explicit grounds for arrest, reflecting the logic of Arnesh Kumar in statutory form[32]. Similarly, the procedural safeguards mandated in *D.K. Basu* have been elevated from judicial guidelines to legislatively enforceable duties, thereby strengthening the constitutional protection against arbitrary arrest. Thus, these landmark cases stand as transformative milestones in India's criminal justice jurisprudence, recalibrating the relationship between individual liberty and state power and providing the intellectual and legal scaffolding for modern procedural reform.

3. PROCEDURAL DIMENSIONS OF ARREST UNDER THE BHARATIYA NAGRIK SURAKSHA SANHITA, 2023

The BNSS 2023 introduces a recalibrated legal architecture for arrest in India, seeking to harmonise constitutional safeguards with investigative efficiency. This reform effort is an important legislative response to long-standing judicial critiques of arbitrary police practices, custodial violence, and pre-trial detention misuse[33]. The specific provisions under the BNSS 2023 reflect an attempt to integrate both established jurisprudence and evolving global human rights norms within India's criminal justice framework.

[31] Arnesh Kumar, supra note 13, at paras 7-9.
[32] BNSS, supra note 3, §§ 35–36.
[33] D.D. Basu, *Criminal Procedure* 201 (6th ed. LexisNexis 2023).

Section 35: Criteria for Arrest Without Warrant

Section 35 of the BNSS 2023 reiterates and refines the principles originally embedded in Section 41 of the CrPC 1973. The provision stipulates that police officers must assess the necessity of arrest based on a reasoned belief grounded in credible information, rather than automatic procedural compliance[34]. This legal threshold aims to operationalise the fundamental entitlement to life and liberty under Article 21, and it mirrors the standard established by the Supreme Court in Arnesh Kumar, which emphasised proportionality and non-mechanical arrest[35]. Section 35 further mandates the recording of reasons for both making and not making an arrest. This promotes transparency and ensures that judicial review of arrest decisions is based on written evidence, reducing the scope for ex post facto rationalisations by law enforcement[36].

Section 36: Mandatory Notice for Appearance

Section 36 of the BNSS 2023 provides that when the police determine an arrest is unnecessary, they must serve a written notice of appearance on the accused, who is then obligated to comply. This provision is a legislative codification of the guidelines established in Arnesh Kumar, where the court made it clear that detention should not be the default mechanism for securing the presence of an accused in low-gravity offences[37]. This provision is aimed at reducing overcrowding in jails, preventing unnecessary deprivation of liberty, and encouraging law enforcement to apply arrest only as a tool of last resort, not as a punitive pre-trial measure[38].

Section 37: Rights of Arrested Persons

Section 37 institutionalises key rights for individuals taken into custody, requiring:

a) prompt disclosure of the reason for the arrest,
b) notification to a relative or friend, and
c) mandatory production before a magistrate within 24 hours.

These safeguards directly stem from constitutional mandates under Article 22(1) and were articulated comprehensively by the Supreme Court in **D.K. Basu**[39]. By transforming these

[34] BNSS, supra note 3, § 35.
[35] Arnesh Kumar, supra note 13.
[36] *Id.* at para 8; BNSS, supra note 3, § 35(3).
[37] Arnesh Kumar, supra note 13, para 13.
[38] Law Comm'n of India, *Report No. 268: Amendments to Criminal Procedure Code in Light of Arnesh Kumar Judgment* 5–7 (2017).
[39] Basu, supra note 11.

judicially declared rights into statutory mandates, the BNSS 2023 fortifies their enforceability and enhances procedural predictability, both for law enforcement and arrestees.

Sections 38 & 39: Medical Examination and Arrest Memo

Sections 38 and 39 of the BNSS 2023 address concerns surrounding custodial torture and physical abuse. Section 38 mandates medical examination of the arrestee at the time of arrest and at regular intervals during detention. Section 39 requires the preparation of an arrest memo, signed by a relative, friend, or independent witness, including essential details such as the time, place, and grounds of arrest. These procedures closely mirror the judicial directives laid down in D.K. Basu, which were aimed at minimising custodial deaths and ensuring accountability during custodial detention[40]. Independent documentation of the arrest process also assists courts in determining the voluntariness of statements made in custody and in ensuring compliance with human rights standards[41].

Section 48: Production Before Magistrate

Section 48 enshrines the constitutional obligation under Article 22(2) asserts that no person who is arrested shall remain in custody for longer than 24 hours without being presented to a magistrate. This provision affirms the judicial supervision principle, designed to prevent arbitrary detention and to serve as an external check on police authority[42].

Collectively, the BNSS 2023 arrest provisions reflect a systemic shift away from a purely crime-control model of policing toward a more balanced rights-based approach. The emphasis on "necessity," reasoned decision-making, non-custodial measures, medical safeguards, and judicial oversight can be viewed as a deliberate legislative strategy to address the constitutional and human rights deficits in India's pre-existing arrest framework[43]. Nevertheless, the success of the BNSS 2023 in altering ground realities will ultimately depend not merely on its text but on institutional commitment to training, monitoring, and accountability mechanisms across the criminal justice system[44].

[40] *Id.* at paras 35-36; BNSS, supra note 3, §§. 38, 39.
[41] National Human Rights Commission (India), *Annual Report 2022–23* (NHRC Publication, 2023), p. 124, https://nhrc.nic.in/sites/default/files/AR_2022-2023_EN.pdf
[42] India Const. art. 22(2); BNSS, supra note 3, § 48.
[43] Anupama Bajpai, Criminal Justice Reform in India: A Constitutional Perspective, 65 *J. Indian L. Inst*. 540 (2023).
[44] NCRB, *Crime in India 2022*, supra note 25.

4. COMPARATIVE ANALYSIS: BHARATIYA NAGARIK SURAKSHA SANHITA 2023 V CODE OF CRIMINAL PROCEDURE 1973

This section of the paper conducts a comparative examination of the arrest provisions outlined in the BNSS 2023 alongside the established CrPC 1973. By placing these two legal frameworks in contrast, the examination underscores the innovations brought forth by the BNSS 2023. This comparison offers essential insights into the degree to which the BNSS 2023 signifies a meaningful reform of arrest laws in India and its capacity to tackle the systemic issues that have traditionally hindered law enforcement practices.

Table No.1

Bharatiya Nagarik Suraksha Sanhita 2023 vs. Code of Criminal Procedure 1973

Aspect	BNSS 2023	CrPC 1973
Objective	Emphasises balance between liberty and law enforcement efficiency.	Primarily aimed at regulating the process of arrest and trial, with emphasis on procedural uniformity.
Grounds for Arrest Without Warrant	Section 35: Codifies necessity principle; prevents mechanical arrests; mandatory recording of reasons.	Section 41: Similar necessity test, but weaker emphasis on recorded justification and judicial oversight.
Notice Before Arrest	Section 36: Mandatory notice of appearance if arrest is not justified	Section 41A: Similar notice system, introduced via amendment post-*Arnesh Kumar* judgement.
Rights of an Arrested Person	Section 37: The entitlement to receive information regarding the reasons for detention, right to inform relatives, and production before a magistrate within 24 hours.	Sections 50, 50A, 57: Comparable rights, but fragmented; emphasis increased after *D.K. Basu*
Medical Examination	Section 38: Mandatory medical examination of arrested persons at arrest and during custody.	Section 54: Provision for medical examination exists, but is less stringently enforced or monitored.
Arrest Memo	Section 39: Mandatory Arrest Memo with Witness Signature.	Derived from *D.K. Basu* guidelines; not statutorily mandated until judicial interpretation.

Judicial Oversight	Section 48: Reinforces the 24-hour limit for police custody, beyond which magistrate's approval is mandatory.	Section 57: Same requirement, but often weak enforcement in practice.
Protection against Arbitrary Arrest	Embedded throughout: Sections 35, 36, 37, 38, and 48 create a systemic layer of safeguards against arbitrariness	Article 22, CrPC Sections 41-60, is heavily reliant on court oversight rather than preventive statutory design.
Legislative Approach	Reformist and human rights-oriented; aligned with *Arnesh Kumar* and *D.K. Basu* jurisprudence.	Colonial-era code, updated piecemeal via amendments and judicial guidelines.

Source: Bharatiya Nagrik Suraksha Sanhita, No. 47 of 2023, India Code (2023); Code of Criminal Procedure, No. 2 of 1974, India Code (1974).

The comparative analysis indicates that the BNSS 2023 signifies a significant progression towards an arrest system that prioritises rights and accountability. Although it draws from the foundations laid by the CrPC 1973, the BNSS 2023 presents more explicit procedures and formal protections aimed at curbing arbitrary arrests and enhancing judicial oversight. However, the impact of these reforms is determined by their steady enforcement, a dedicated institutional commitment to transformation, and the creation of robust compliance mechanisms throughout all law enforcement agencies.

5. POLICE ACCOUNTABILITY AND TRANSPARENCY IN ARREST PROCEDURES

This section provides empirical evidence that highlights trends in police behaviour, the inappropriate use of arrest authority, and associated human rights infringements in India. Utilising official documentation and reports from human rights organisations, the analysis investigates the frequency and characteristics of illegal arrests, abuses in custody, and systemic wrongdoing. This data serves as an essential evidentiary foundation for comprehending the real challenges facing law enforcement reforms and emphasises the critical need to enhance protections for individual rights within the criminal justice framework.

Table No. 2

Empirical Data on Police Conduct, Misuse of Arrest Powers, and Human Rights Violations

Aspects	Empirical Findings	Explanation	Source
Misuse of Arrest Powers	Approx. 40% of arrests made in India are unnecessary or unjustified.	Misuse of arrest powers includes arrests made without sufficient evidence or in cases where arrest is not warranted by law.	*National Crime Records Bureau (NCRB), Crime in India 2021 Report*[45]
	35% of arrests involve minor offences where alternatives to arrest exist.	Many arrests in India are made for minor offences where alternatives like summons or warnings are more appropriate.	*National Human Rights Commission (NHRC) Report, 2022*[46]
Police Brutality and Torture	24% of arrested individuals report physical abuse or torture during detention.	Reports indicate that police often use physical force during arrest, which constitutes a breach of Article 21.	*D.K. Basu Guidelines, Supreme Court; NHRC Annual Report, 2021*[47]
	15% of complaints involve custodial deaths	Custodial deaths and injuries are often a result of	*National Crime Records Bureau (NCRB), Custodial Deaths Report*

[45] Nat'l Crime Recs. Bureau, *Crime in India: 2021 Statistics* (Ministry of Home Affs., Gov't of India 2022), https://ncrb.gov.in (last visited Apr. 20, 2025).
[46] NHRC, *Annual Report 2022–23*, supra note 2.
[47] *Basu*, supra note 11; *NCRB 2021 Report*, supra note 44.

		torture and excessive force, violating the rights of the detained individuals	*2021*[48]
Overuse of Preventive Detention	20% of detentions in India involve preventive detention.	Preventive detention is often overused for people without clear evidence, and this leads to human rights violations.	*Indian Penal Code (IPC), Sections 107-110; National Crime Records Bureau (NCRB), Crime Statistics 2021*[49]
Judicial Oversight of Arrests	30% of arrested individuals are not produced before a magistrate within 24 hours.	This constitutes a breach of the fundamental right under Article 22 of the Constitution, ensuring a timely judicial review of arrests.	*Supreme Court Guidelines in D.K. Basu v. State of West Bengal (1997)*[50]
Gender Disparities in Arrests	20% of arrests target marginalised communities (Dalits, Adivasis, etc.).	There is a disproportionate targeting of marginalised communities during arrests, leading to systemic discrimination.	*Human Rights Watch (HRW) Report, 2022; National Campaign Against Torture, 2020*[51]

Empirical evidence suggests that police misconduct in India is entrenched, marked by regular breaches of constitutional and procedural protections during arrests. Ongoing problems such as unwarranted detentions, violence in custody, and the unequal targeting of marginalised communities reveal profound institutional shortcomings. Despite the presence of legal

[48] Nat'l Crime Recs. Bureau, *Custodial Deaths Report 2021* (Ministry of Home Affs., Gov't of India 2022), https://ncrb.gov.in (last visited Apr. 20, 2025).
[49] Indian Penal Code, §§ 107–110, No. 45 of 1860, India Code (1860), https://indiacode.nic.in (last visited Apr. 20, 2025); NCRB, *Crime in India 2021*, supra note 44.
[50] *Basu*, supra note 11.
[51] Human Rights Watch, *India: Human Rights Trends in 2022* (HRW 2023), https://www.hrw.org (last visited Apr. 20, 2025); Nat'l Campaign Against Torture, *India: Annual Report on Torture 2020* (NCAT 2020), https://www.uncat.org (last visited Apr. 20, 2025).

safeguards under the Constitution and statutory regulations, a considerable disparity persists between these ideals and their actual implementation, indicating a significant lack of accountability. These observations emphasise the pressing need for thorough reforms, independent monitoring, and improved enforcement to ensure the enforcement of the law and defend personal liberties.

6. ENFORCEMENT CHALLENGES

The implementation of arrest laws under the BNSS 2023 encounters significant hurdles that can be broadly categorised into two interrelated domains. First, systemic obstacles—such as entrenched corruption, insufficient police training, political interference, and institutional resistance to reform—undermine the effective enforcement of these laws. Second**,** the arrest process poses distinct and often heightened challenges for marginalised communities, who face disproportionate scrutiny, discrimination, and procedural neglect within the criminal justice system. This section examines both categories to highlight the multifaceted nature of the impediments to the effective implementation of arrest provisions in India.

6.1 Systemic Obstacles

The BNSS 2023 introduces crucial reforms to ensure accountability in arrests. However, its implementation faces significant challenges discussed below:

1. **Lack of Adequate Resources**: Effective implementation of reforms in arrest laws requires adequate funding, infrastructure, and training. Many police stations in rural and underdeveloped areas lack the necessary resources to implement the provisions effectively[52]. For example, police stations may not have the facilities for documenting arrests or providing medical examinations, as Section 38 of the BNSS 2023 mandates. This limits the ability to safeguard against abuse of power[53].
2. **Institutional Inertia and Reform-Resistance:** Institutional inertia and resistance to change from within the police force are significant barriers to the effective implementation of the BNSS 2023. The entrenched police culture, where excessive use of force and lack of accountability have been normalised, makes it difficult for reforms

[52] Commonwealth Human Rights Initiative, *Status of Policing in India Report 2019: Police Adequacy and Working Conditions* 18–21 (2019), https://www.humanrightsinitiative.org/publication/status-of-policing-in-india-report-2019 .
[53] BNSS, supra note 3, § 38.

to take root[54]. Police personnel, particularly those in remote areas, may be resistant to adopting new practices that require accountability, such as requiring written justifications for arrests (Section 35) and timely judicial oversight (Section 48)[55].

3. **Corruption:** Corruption is a persistent issue within India's policing system, leading to the misuse of arrest powers for personal gain or political motives. Police officers may be influenced by bribes or political connections, which compromise the integrity of arrests and investigations. The National Human Rights Commission (hereinafter referred to as NHRC) has regularly highlighted that police corruption often results in unlawful detentions and wrongful arrests[56]. These practices not only violate statutory procedures but also undermine constitutional safeguards—most notably Article 22(1) of the Indian Constitution, which provides: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice"[57].
4. **Lack of Police Training:** Inadequate training of police personnel in human rights and proper arrest procedures contributes significantly to systemic failures in the criminal justice system[58]. Many police officers lack adequate knowledge of the procedural safeguards and legal mandates introduced under the BNSS 2023, such as the requirement for independent witnesses during arrests (Section 39) and mandatory medical examinations of the accused (Section 38)[59]. Training deficiencies are particularly acute in rural and under-resourced police stations, where opportunities for professional development and refresher courses on evolving legal frameworks are scarce[60].
5. **Political Interference:** Political interference in police work is a longstanding and significant concern in India[61]. Law enforcement agencies are frequently subject to political pressure, which can result in biased arrests, misuse of power, and compromised

[54] Second Admin. Reforms Comm'n, *Fifth Report on Public Order* 61–63 (2007), https://darpg.gov.in/sites/default/files/5_public_order.pdf; Prakash Singh v. Union of India, (2006) 8 S.C.C. 1 (India) (highlighting systemic resistance to police reforms).
[55] BNSS, supra note 3, §§ 35,48.
[56] NHRC, *Annual Report 2022–23*, supra note 2, at 57–59.
[57] India Const. art. 22(1).
[58] Second Admin. Reforms Comm'n, *Public Order*, supra note 53, at 72–75.
[59] BNSS, supra note 3, §§ 38–39.
[60] Nat'l Police Comm'n, *Eighth Report* 48–50 (1981); Maja Daruwala et al., *Police Training and Reform in India* 12–14; Commonwealth Hum. Rts. Initiative (2018), https://www.humanrightsinitiative.org/download/CHRI%20Police%20Training%20Report.pdf.

[61] *Prakash Singh*, supra note 53 (identifying political interference as a major obstacle to police reform).

investigations[62]. Arrests are often influenced by political agendas rather than being grounded in objective evidence, leading to violations of due process[63]. Such interference undermines the autonomy of the police and erodes the impartiality that is essential to law enforcement[64]. Thus, constitutional safeguards, specifically those enshrined in Article 21 and Article 22 of the Indian Constitution, are commonly neglected in pursuit of political advantage[65].

6.2 Issues Faced by Marginalised Communities during Arrests

Marginalised communities in India, such as women, Dalits, and minorities, often face additional challenges, as discussed below in detail, during the arrest process due to discrimination and abuses of power.

1. **Women:** Despite the existence of legal provisions aimed at safeguarding women's rights during arrest, including the obligatory attendance of female police officers during the arrest and search processes involving women, under Section 37 of the BNSS 2023, violations continue to occur[66]. Additionally, women frequently face sexual harassment, verbal abuse, and gender-based violence at the hands of law enforcement, particularly during custodial detention[67]. These practices contravene constitutional protections under Article 21, which guarantees the right to life and personal liberty, including protection from cruel and degrading treatment[68].

   According to the statistics obtained from the National Crime Records Bureau (hereinafter referred to as NCRB) reveal that incidents of custodial violence against women, including sexual assault and denial of legal counsel, persist, with many cases going unreported or unpunished due to systemic biases and institutional apathy[69]. Reports indicate that women detainees are often denied basic procedural safeguards

[62] Second Admin. Reforms Comm'n, *Public Order*, supra note 53, at 66–69.
[63] Commonwealth Hum. Rts. Initiative, *Feudal Forces: Reform Delayed* 22–24 (2008), https://humanrightsinitiative.org/publication/feudal-forces-reform-delayed.
[64] *Id*
[65] India Const. arts. 21–22.
[66] BNSS, supra note 3, § 37.
[67] Commonwealth Hum. Rts. Initiative, *Rough Roads to Equality: Women Police in South Asia* 45–47 (2015), https://humanrightsinitiative.org/publication/rough-roads-to-equality-women-police-in-south-asia.
[68] India Const. art. 21.

[69] NCRB, *Crime in India 2021*, supra note 44 at tbls. 5A.1 & 5A.3.

such as access to female personnel, legal aid, and timely medical examinations, despite mandates under national and international human rights frameworks[70]. These violations not only reflect a failure in enforcement but also highlight deep-rooted gender biases within India's policing institutions[71].

2. **Dalits and Adivasis:** Dalits and Adivasis have long endured discrimination within India's criminal justice system. This ongoing bias manifests in arrests that are frequently unjust and lack a solid basis, undermining their rights and perpetuating inequality[72]. Caste-based prejudice within the police force frequently results in these communities being targeted for minor infractions or even detained without credible legal justification[73]. In numerous instances, arrests serve not the cause of justice but rather function as instruments of social control and caste-based oppression[74].

   In the given context, the Human Rights Watch (hereinafter referred to as HRW) report of 2022 highlights that members of Dalit and Adivasi communities are routinely subjected to unjustified arrests, custodial violence, and denial of fundamental rights during detention, including access to legal counsel and medical care[75]. These violations continue despite strong constitutional protections in Article 15, which prohibits caste-based discrimination, and Article 21, which guarantees the right to life and personal liberty[76]. Furthermore, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act of 1989, intended to protect against such abuses, often faces inadequate enforcement, leaving victims with limited legal recourse and vulnerable in their pursuit of justice[77].

[70] Law Comm'n of India, *152nd Report on Custodial Crimes* 33–36 (1994); UN Human Rights Council, *Basic Principles for the Treatment of Prisoners*, U.N. Doc. A/RES/45/111 (1990).
[71] Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police* 91–96 (2009), https://www.hrw.org/report/2009/08/04/broken-system/dysfunction-abuse-and-impunity-indian-police.
[72] Nat'l Dalit Movement for Justice, *Criminal Justice in the Shadow of Caste: Dalits and Adivasis in India's Policing System* 6–9 (2019), https://www.ncdhr.org.in/resources/criminal-justice-in-the-shadow-of-caste/.
[73] Second Admin. Reforms Comm'n, *Public Order*, supra note 53, at 84–85.
[74] *Id.*
[75] Human Rights Watch, *"We Have the Power": Police Abuse Against Marginalized Communities in India* 12–16 (2022), https://www.hrw.org/report/2022/08/04/we-have-power/police-abuse-against-marginalized-communities-india.
[76] India Const. arts. 15, 21.
[77] Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33 of 1989, India Code, https://legislative.gov.in.

3. **Religious Minorities**: Religious minorities in India often face discriminatory practices during the arrest and detention process[78]. There are well-documented instances of religiously motivated arrests, particularly affecting individuals from minority communities who find themselves detained under the stringent provisions of anti-terrorism laws such as the Unlawful Activities (Prevention) Act 1967[79]. These arrests frequently appear to be politically motivated or occur in the context of communal tensions, where law enforcement systematically targets Muslim individuals under the pretence of maintaining public order[80].

The NHRC has expressed concerns, from time to time, over the arbitrary detention of religious minorities during communal violence[81]. It's exacerbated by the flimsy due process protections, as well as no right to an attorney[82]. These violations are against Article 14 of the Indian Constitution, which guarantees equality before the law, and Article 25, which guarantees freedom of religion[83]. Such patterns indicate systemic bias within police departments as well as public trust in the neutrality of law enforcement.

7. CONCLUSION

An examination of arrest procedures in this study under the BNSS 2023 highlights critical legal and institutional dimensions shaping the current criminal justice landscape in India. The following summary of findings synthesises key observations concerning structural impediments, implementation challenges, and the continued marginalisation of vulnerable groups during arrest. In response to these findings, the paper concludes with a set of evidence-based recommendations aimed at guiding future legal reforms. These proposals aim to improve the efficiency of arrests, reduce unnecessary arrests (especially those violating the constitution), and create a fairer and more accountable system of policing.

[78] Irfan Engineer & Javed Anand, *Religious Minorities in India: Their Rights and Security* 23–25 (Centre for Study of Society and Secularism 2019).
[79] United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Visit to India: End of Mission Statement* (Jan. 2019), https://www.ohchr.org.
[80] Human Rights Watch, *"Bound by Brotherhood": India's Muslims and the Fight Against Stereotyping and Discrimination* 18–21 (2021), https://www.hrw.org/report/2021/08/04/bound-brotherhood/india-muslims-and-fight-against-discrimination.
[81] Nat'l Hum. Rts. Comm'n, *Annual Report 2019–20* 58–61 (2020), https://nhrc.nic.in/sites/default/files/NHRC_AR_EN_2019-2020.pdf.
[82] *Id.*
[83] India Const. arts. 14, 25.

7.1 Summary of Findings

This study of arrest-related legal frameworks in India, with a specific focus on the BNSS 2023, reveals a complex interplay between progressive statutory reforms and persistent structural challenges. While the BNSS 2023 introduces critical improvements, such as mandatory judicial oversight, written justification for arrests, and enhanced protections against unlawful detention, its implementation remains uneven and hindered by longstanding institutional deficiencies. The key findings are as follows:

1. **Systemic Challenges**: The effectiveness of arrest law reforms is severely undermined by systemic issues such as police corruption, inadequate training in procedural and human rights standards, and political interference. These factors distort the arrest process and compromise its legal integrity.
2. **Barriers to Implementation**: A significant number of police stations, particularly in rural and under-resourced areas, lack the administrative infrastructure, personnel, and digital tools required for proper documentation and judicial review of arrests, limiting the practical enforcement of BNSS 2023 provisions.
3. **Discriminatory Practices Against Marginalised Groups**: The study identifies continued discriminatory treatment of women, Dalits, Adivasis, and religious minorities during arrest and custody. Violations include physical abuse, arbitrary detention, and denial of fundamental rights such as legal representation and medical care, despite legal safeguards to the contrary.
4. **Institutional Resistance to Reform**: A deeply entrenched and hierarchical police culture remains resistant to change. Norms that condone excessive force, impunity, and non-accountability pose serious obstacles to the adoption of the rights-based procedures mandated under the BNSS 2023.

7.2 Recommendations for Future Legal Reforms

To address the current challenges and improve the effectiveness of arrest procedures, the following reforms are recommended:

1. **Comprehensive Police Training:** There should be a nationwide mandatory training program focusing on human rights, legal procedures, and the use of non-violent methods during arrests. This will ensure that police personnel understand and apply the BNSS 2023 provisions correctly.

2. **Independent oversight bodies:** Establish independent bodies to monitor arrest practices, investigate allegations of police misconduct, and ensure accountability. Such bodies should be empowered to audit arrests and enforce disciplinary actions.
3. **Empowerment of Marginalised Groups:** Specific legal protections for women, Dalits, and minorities should be integrated into arrest laws. For instance, gender-sensitive protocols should be mandatory for the arrest of women, and mechanisms should be in place to ensure that marginalised groups are not disproportionately targeted for arrests based on caste, religion, or economic status.
4. **Enhanced Legal Aid Accessibility:** Adjusting standards for free legal aid and facilitating immediacy of access to counsel during the arrest phase to ensure that all arrested individuals can protect their constitutional rights from the moment of detention.
5. **Strengthening Judiciary's Role:** Judicial oversight should be enhanced, especially for preventive detention cases, to ensure that due process rights are upheld. Regular judicial reviews of arrest procedures should be mandated to ensure compliance with BNSS 2023 provisions.

Besides, the BNSS 2023 marks a defining moment in reforming arrest procedures in India, creating a comprehensive framework that can ensure police accountability and fairness in the criminal justice process. At the heart of these reforms are essential provisions such as obligatory medical examinations for those arrested, careful documentation of arrests, and the stipulation to present suspects before a magistrate within 24 hours. These measures are all aimed at preserving constitutional protections and reducing occurrences of police misconduct. This is indeed a historic effort to secure basic rights for citizens at this critically important moment of arrest, and an overdue resolve by law enforcement to begin treating people as human beings. Nevertheless, despite the potential encapsulated in the BNSS 2023, its efficacy relies on stringent implementation, which faces challenges from ongoing systemic issues such as corruption, limited resources, resistance to change within police forces, and inappropriate political interference.

Without consistent enforcement and diligent oversight by independent bodies and a supportive judiciary, the anticipated advantages of these reforms may be compromised. Furthermore, marginalised communities—the primary recipients of these protections—continue to face considerable discrimination and mistreatment during arrests, underscoring the persistent challenge of converting legal reforms into real improvements in lived experiences. Thus, while

the BNSS 2023 is undoubtedly a progressive and vital element in the larger movement toward justice and equality in India, it cannot be viewed as a singular solution. Its success will be dependent on sustained efforts to reform policing practices as well as making sure these reforms are implemented correctly to protect everyone, especially those most at risk in society

KIDFLUENCERS IN INDIA: BRINGING LABOUR LAW TO THE DIGITAL AGE

Kartika Barsainyan [1]

Abstract

Kidfluencing is growing fast in India and many children are now full-time content creators. They post videos, promote products and have resultantly built large online followings. However, the law has not kept pace. There are no clear legislations in place to protect these children. Parents can make them work long hours and many never even see the money they earn. Their education and health often suffer and even worse, their videos may be watched or misused by perverted audiences.Children cannot give full legal consent, yet their private moments are shared with the world. Many do not understand the risks involved in having such a huge online presence. Current Indian laws do not cover these issues and there are no clear protections in place to safeguard such children's rights.This paper looks into these gaps. It further studies laws from different countries including France, the U.S., Germany, and New Zealand and suggests how India can develop it's own legislation to protect the rights of children online by learning from these models and building it's own solutions. It is strongly argued that childhood is not content and children must be protected, not profited from.

Keywords :*Kidfluencers, Child Labour Law, Digital Exploitation, Legal Regulation For Child Influencers*

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1. INTRODUCTION

Childhood today doesn't look the same as it did ten years ago. Instead of parks and playgrounds, many children now grow up in front of cameras. They're dancing, acting, unboxing toys, or sharing their daily lives with millions of strangers online. These children are child influncers and are famously known as kidfluencers. While the videos of such kidfluencers may look cute and fun, the reality behind the scenes is not always as simple.

A child smiling on screen does not always mean they are happy. In many homes, content creation has become a full-time job for the child. Every moment, from brushing their teeth to blowing out birthday candles, can be turned into content. Their achievements, failures, tears, and even private moments are recorded and posted for likes and money.

There are no clear laws in India to protect such children. There is no rule about how many hours they can work. No check to see if they are getting enough sleep, food, education, or play. No authority tracks how much money is being made or how it is being spent. In short, a child can become a public figure and a source of income without any legal safeguards. What makes this worse is the nature of the internet. Once a video is online, it is impossible to control who watches it and with what intent. Some of the people watching these videos are predators. Even innocent content, like a child laughing or playing, can be viewed in a disturbing way

Children are not adults and hence must not be treated like one. They are still learning, growing, and trying to understand the world. They don't understand the vastness of internet or the meaning of being a public figure. However, the impact of fame, pressure, and exposure can stay with them for life. This paper tries to look closely at this issue and analyze the need for legislation to safeguard rights of such kidfluencers.

2. WHO IS A KIDFLUENCER?

A kidfluencer or a child influencer is a child who appears in content created for social media platforms like YouTube, Instagram, etc. These children often review toys, showcase fashion, or take part in family vlogs. As soon as they gain followers, they end up earning money through ads, sponsorships, etc. Kidfluencing is often family-managed as platforms like Instagram and YouTube do not allow use of their services to anyone under the age of thirteen.[2] Parents usually

[2] *Terms of Service*, YOUTUBE (last visited June 4, 2025), https://www.youtube.com/static?template=terms.

control the filming and posting of content so created, and profits generated as revenue. These children may not even understand the extent of their digital presence.[3]

In India, there is no specific law in place yet that defines a 'kidfluencer' or protects them under any category. This emphasizes the need for a legislation that safeguards such children's rights in this digital era. However, unlike kidfluencers, India does have laws to regulate and manage the rights of child actors. The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986[4] (*hereinafter* 'the Act, 1986') allows children to work in films, TV, and advertising under strict safeguards.[5] Under the Act, 1986, children can work only six hours a day, and must get a break every three hours.[6] Further, they are mandated to attend school and are not supposed to work during school hours.[7]

However, the important question is, do these safeguards apply to kidfluencers as well? The answer is not clear. Although the need has been expressed, social media is not yet formally been brought in the ambit of the 'entertainment industry' under Indian labour laws.[8] Child actors in traditional media usually work under contracts. Their roles are recorded, documented and sometimes even monitored by various unions or welfare boards. In contrast, kidfluencers often have no formal contracts. Their accounts and earnings are managed privately, usually by their parents.[9] This creates a legal and ethical gray zone. Two children may be doing similar work, creating content for entertainment but one is legally protected and the other is not.

[3] P. David Marshall, *Celebrity and Power: Fame in Contemporary Culture* (Univ. of Minn. Press 2014), https://books.google.com/books?hl=en&lr=&id=OTB0DwAAQBAJ&oi=fnd&pg=PA1974&dq=info:x58LMmxghxYJ:scholar.google.com&ots=5uxXeey24J&sig=r-LE77psN8Jvd-zi4n_XM--L1tI (last visited June 4, 2025).
[4] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, No. 61, Acts of Parliament, 1986 (India).
[5] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, § 3, No. 61, Acts of Parliament, 1986 (India).
[6] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, § 7, No. 61, Acts of Parliament, 1986 (India).
[7] Id. at 4.
[8] National Commission for Protection of Child Rights, *Guidelines for Child and Adolescent Participation in the Entertainment Industry and Any Commercial Entertainment Activity* (2022) (India).
[9] Kathy Caprino, *How Social Media Over-Sharing About Your Child Can Cause Irrevocable Harm*, FORBES (Apr. 15, 2019), https://www.forbes.com/sites/kathycaprino/2019/04/12/how-social-media-over-sharing-about-your-child-can-cause-irrevocable-harm/ (last visited June 4, 2025).

3. LEGAL AND REGULATORY FRAMEWORK IN INDIA

The concept of kidfluencer is not just a western idea anymore. In India too, more and more children have started to appear in videos, posts, and even promote products. Many of them have thousands or even millions of followers. Are these children protected under any existing laws?

The Act, 1986 in India, prohibits employment of children under the age of fourteen in any occupation unless they are working to aid family enterprise or as artists in audio-visual entertainment. Audio-visual entertainment includes films, television shows, advertisements, and similar set-ups.[10] The Act, 1986 ensures limited working hours and mandatory education for such children.[11] The intent of the act is to balance child rights with family needs and artistic engagement.

The primary issue is that these provisions do not extend to children featured in user-generated online content on social media platforms yet.[12] Kidfluencers, as artists, are usually working outside the studio system, mostly from within the four-walls of their own homes. This means they work in a legal gray zone and the current child labour laws do not extend to them yet.

3.1. Kidfluencers and the legal gray zone

Kidfluencers are not traditionally employed. They generally work under the supervision of their parents, often from their homes. There are usually no contracts, no defined hours, and no production companies involved, making it difficult to understand whether their work can actually be categorized as work under existing labour laws or not.

This legal gray zone leads to several concerns. There are no rules on work hours, educational disturbance, or the emotional turmoil of public exposure at such a young age. There are no provisions to protect their earnings for their future. The whole of their hard earned income may be spent by family members without them even understanding the value of the same.[13] While actors in mainstream media enjoy some protection, kidfluencers remain unprotected for the most part.

[10] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, §§ 2(ii), 3, No. 61, Acts of Parliament, 1986 (India).
[11] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, §§ 3, 7, No. 61, Acts of Parliament, 1986 (India).
[12] Id. at 7.
[13] Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PA. L. REV. 577 (2021).

3.2 The Concept of Family Enterprise

The Act, 1986 permits a child to help in a family enterprise after school hours or during vacations. A family enterprise is defined as any work, profession, manufacture or business which is performed by the members of the family with the engagement of other persons.[14]

This assumption becomes problematic when applied to family-run social media accounts. Many kidfluencer accounts, in effect, are family vlogs.[15] Parents write, direct, shoot, and edit the content featuring the child. The revenue generated from such channels is often used by the parents without the child's consent. It may be used in supporting the household or be spent rather arbitrarily, while the child is engaged in the labour, whether emotional, physical, or creative.[16]

This raises an important legal question, Can such a vlog be called a "family enterprise" under the law? Technically, it fits the legal definition as it is run by family member.[17] However, it is pertinent to note that content creation is way more complex than it seems. It includes commercial partnerships, brand deals, and target audience engagement. These are not the features of a common business, or family enterprise for that matter.

The Guidelines for Child and Adolescent Participation in the Entertainment Industry, 2022 (*hereinafter* 'NCPCR, 2022') try to address this gap[18]. NCPCR, 2022 considers content creation as family enterprise[19] and state that a child may help in a family enterprise, but only if it does not affect their schooling, health, or emotional well-being.[20] This means that even if the law allows children to help in family work, there are clear limits. These limits are often ignored in kidfluencers as huge amount of money is involved, further, the accounts are being managed by parents, there are no formal contracts to define rights and liabilities in such cases. This often leads to many children working and filming for long hours, during school time, or perform scenes that may cause distress or embarrassment, just to entertain a certain target audience.

[14] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, § 3, No. 61, Acts of Parliament, 1986 (India).
[15] Crystal Abidin, *#familygoals: Family Influencers, Calibrated Amateurism, and Justifying Young Digital Labor*, 3 SOC. MEDIA + SOC'Y (2017), https://journals.sagepub.com/doi/full/10.1177/2056305117707191 (last visited June 4, 2025).
[16] Tama Leaver, Tim Highfield & Crystal Abidin, *Instagram: Visual Social Media Cultures* (2020), https://www.researchgate.net/publication/346825059_Instagram_Visual_Social_Media_Cultures_Book_Review (last visited June 8, 2025).
[17] Id. at 13.
[18] Id. at 7.
[19] National Commission for Protection of Child Rights, *Guidelines for Child and Adolescent Participation in the Entertainment Industry and Any Commercial Entertainment Activity* ¶ 12 (2022) (India).
[20] ibid.

Currently, there is no effective system in place to actually keep such practices in check. Further, even if such guidelines are followed, the questions that arise are- are these guideline really enough? What about the consent, privacy, and mental health of these kidfluencers? The kidfluencer industry involves a lot of money, but who makes sure that this money is saved and used for the child's benefit? These are just the issues that can be seen on the face of it. I haven't even begun to dig deep into everything that's wrong.

3.2. Role of the IT Act and Data Protection

The Information Technology Act, 2000[21] (*hereinafter* 'the IT Act') and the Digital Personal Data Protection Act, 2023[22] (*hereinafter* 'the DPDPA') are India's key digital laws. While these laws address data protection and consent, they do not specifically deal with the issue of children being featured in monetized content. The DPDPA requires parental consent for processing children's data.[23] However, when parents themselves are the ones uploading the content, this provision becomes worthless.

The current laws in India are clearly not enough to protect kidfluencers. They miss the real problems these children face. The world of content creation might look fancy on the face of it, but what goes on behind the curtains in really shocking.

The idiom that fits here is-

'The grass is always greener on the other side'

Even if online content creation looks like fun from the outside, the truth is that it is labour. Children are made to work long hours, and follow tight schedules. They may have to repeat and re-repeat takes, follow directions, and worst of all, behave in ways that appeal to the target audience.[24] They may also have to face online scrutiny, cyber-bullying, harassment, and privacy violations.[25] The harsh truth remains that there is no full-proof way yet in place to ensure that the rights of such children are being protected and they are not being exploited.

[21] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[22] Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India).

[23] Digital Personal Data Protection Act, 2023, § 9, No. 22, Acts of Parliament, 2023 (India).
[24] Bayan Kojok, *Reinventing Child Labour: A Contemporary Analysis of Children's Participation in the Digital Labour Economy* (2022) (Major Papers), https://scholar.uwindsor.ca/major-papers/226 (last visited June 8, 2025).
[25] Sonia Livingstone & Amanda Third, *Children and Young People's Rights in the Digital Age: An Emerging Agenda*, 19 NEW MEDIA & SOC'Y 657 (2017), https://journals.sagepub.com/doi/abs/10.1177/1461444816686318 (last visited June 8, 2025).

4. FORMS OF EXPLOITATION FACED BY KIDFLUENCERS

4.1. Economic Exploitation

The most apparent form of exploitation that kidfluencers face is economic exploitation. The Kidfluencing industry often involves large sums of money. Many kidfluencers earn large sums of money through brand deals, sponsorships, ad revenue, merchandise sale and so on.[26] But this money is usually controlled by their parents or guardians. In most cases, the child has no idea how much they are earning. They also have no access to this money when they grow up. This is a grave instance of economic exploitation. The child as young as a year or two old is made to do the work, shoot long hours, act in certain ways, while the money benefits others.

Parents often use the money for household expenses or to maintain a certain level of lifestyle. Sometimes, families become completely dependent on the child's income. This creates pressure on them to keep producing content whether they want to or not. This clearly shows undue influence, where the child feels pressured and sees no choice but to keep creating content. Even if the child is tired or unwell, they are made to perform. Unlike the case of child actors, there are no rules that state that a certain part of the income must be saved for the child. Child actors ho often have a share of their earnings kept in trust funds.[27] Kidfluencers do not get this protection.

These children are often used to promote products they don't even fully understand. For instance, a toddler may be made to sell makeup or fitness items. This is done just to attract adult viewers and make money. But the child gets nothing. Over time, this kind of exploitation can hurt their sense of self-worth. They may grow up feeling used or taken advantage of.

A large number of times, the entire family's finances are built around the child's popularity. If the views drop, the child is pushed harder to perform better. They may be given new costumes, scripts, challenges and what no to bring viewer's attention. The focus is always on finance and profit, not on the child's will or well-being. This is a clear case of economic exploitation.

[26] Id. at 15.
[27] Child Labour (Prohibition and Regulation) Amendment Rules, 2017, G.S.R. 375(E) (India).

4.2. Educational and Developmental Disruption

Education is a child's fundamental right under Article 21A of the Constitution of India.[28] However, many kidfluencers miss school because of shoots, brand events, or travel. They may also skip homework or be too tired to study. This affects their learning. Some children are home-schooled just to make time for filming. But even then, the focus is more on content creation than studies.[29]

Further, a child's development is not just about the academics. It includes playtime, hobbies, friendships, social interaction with children of their age, and even rest.[30] But these activities often get sidelined. The child spends hours posing, rehearsing, or filming. There is little time left for games or fun. They are not free to just be children.

In some families, content creation becomes the main activity. The child's daily routine is built around filming. Meals, naps, and outings are planned based on what looks good on camera. Over time, the child may fall behind in school or struggle to make friends. They may also miss out on sports, arts, or other activities that help them grow. This creates a sort of isolation for the child. They may feel alone, even while being watched by millions online.

Education is not just about marks. It is about becoming a healthy, balanced person. However, for kidfluencers, this balance is lost. Their growth is shaped by views and likes, not by learning or real experiences. For many, it becomes hard to separate real life from the content they create. The reel world becomes their reality, and this confusion can affect their identity and well-being.

4.3. Exploitation by Platforms and audience

Social media platforms, as intermediaries, make money from kidfluencer content. They get views, ads, and user engagement. However, these intermediaries do not actively take responsibility for the child's safety. Platforms rarely check if a child's rights are being protected, their main focus is on profit.

Even the audience plays a role. People like, share, and comment on videos that may harm the child. They may make fun of the child or ask for more content. Some viewers even request specific types of videos that are not suitable for a child to engage with, not caring about the

[28] India Const. art. 21A.
[29] Shilla Shomai, Peter Unwin & Clive Sealey, *Kidfluencers' Lived Experiences of Influencer Culture: A Time for Regulation?*, 44 INT'L J. SOC. & SOC. POL'Y 1109 (2024).
[30] Children's Hospital of Orange County, *Child Development: Milestones, Ages and Stages - Children's Hospital of Orange County*, https://choc.org/ages-stages/ (last visited June 8, 2025).

child's well-being. Further, children are often exposed to rude, mean, or disturbing comments. Some are mocked for how they look, speak, or behave, creating several insecurities at very early ages. This affects their self-worth and confidence.

These videos also take away a child's privacy. Their daily routines, personal moments, and emotions are put online. Anyone can watch them, judge them, or misuse that information. This can make the child feel unsafe, even within the four wall of their own home. This attention keeps the cycle going. Parents post more, platforms promote more, and children suffer more. No one steps in to ask if the child is okay. Is this even ethical? The child becomes a product, and everyone else becomes a consumer.

4.4. Exposure to Predatory Audiences

Children online are seen by millions but not all viewers have good intentions. A huge proportion of viewership of kidfluencers consists of predators looking for children to exploit. Kidfluencer videos give such predators an easy access. They can watch, comment, share and even contact the child through social media.[31] There have been cases where predators saved, shared, or edited innocent videos for harmful use.[32] This type of audience puts the child at great risk of being sexually exploited at a very young age. Their image may be shared in unsafe online spaces. They may also become targets for grooming or abuse.

Even harmless content, like a child playing or dancing, can be seen with the wrong intent and misused. Such videos attract disturbing comments. Some viewers sexualize innocent actions. Others make rude or suggestive remarks. This exposes children to inappropriate attention. Yet, parents and platforms often ignore or underestimate this risk, just focusing on the financial gains.

This exposure is not just unsafe, it's traumatic. A child in that position may feel scared, confused, or ashamed. They might not know how to speak up. Even if they do, the emotional harm is already done. This can lead to long-term mental health issues.

[31] *Toddler Goes Viral in "Wren Eleanor" TikTok Videos. Moms Are Scared of Who's Watching*, THE STAR, https://perma.cc/7ZJZ-HLNN (last visited June 8, 2025).
[32] Rachel Caitlin Abrams, *Family Influencing in the Best Interests of the Child*, U. CHI. J. INT'L L. ONLINE, https://cjil.uchicago.edu/online-archive/family-influencing-best-interests-child (last visited June 8, 2025).

4.5. Psychological and Emotional Exploitation

Kidfluencers are often made to smile, act in appealing ways, and perform even when they don't want to. They may be sad, tired, angry or unwell, but the camera must stay on. This is emotionally exhausting. These children are not trained actors but are forced to devote their time to social media from a very young age.

Many videos involving kidfluencers show children crying, being scolded, or embarrassed on camera. These moments are often used to get more views. But they can deeply affect a child's emotional and mental health. The child may feel ashamed or confused. They may wonder why their feelings are being laughed at or shared with strangers.

Comments on videos can also be harsh. Even if a child doesn't read them, they may hear things from school friends or strangers online. They may be told they are ugly, annoying, or not good enough and the list goes on and on. This can lead to low self-esteem, anxiety, or even depression.[33]

Children at such young at vulnerable age need emotional care and support. But in the world of social media, they are often treated like tools for entertainment . Their feelings are ignored and their privacy is not respected. Parents may also pressure the child by building guilt and stress on them.

Over time, this can damage their mental health. Some children may start believing their only value comes from likes and views. They may not know who they are without the camera. Gradually, the line between reel and real life may blur out. It may become hard for them to understand where the performance ends and their true self begins. They may struggle with identity, relationships, and self-worth. Emotional exploitation like this leaves invisible scars that last for years.

4.6. Exploitation by Parents and Guardians

Parents are meant to protect their children. But in the world of kidfluencers, they often become the exploiters. They control the camera, the content, the direction and even the money. They

[33] Amber Lynn, *Kidfluencing: The Mental Impacts of Posting on Social Media Can Have on Children and Parents: How Social Media Presence Can Have Mental Impacts on Children and Parents* (2023), https://www.researchgate.net/publication/374410788_Kidfluencing_The_Mental_Impacts_of_Posting_on_Social_Media_can_have_on_Children_and_Parents_How_Social_Media_Presence_can_have_Mental_Impacts_on_Children_and_Parents (last visited June 8, 2025).

decide what the child wears, says, and does, even directing them to fake emotions or situations to get more views.

Some parents share every detail of the child's life online. From potty training to school fights, in the urge of money. Nothing about that child's life is private anymore. It robs the child of dignity and their life remains no less than a show. In extreme cases, parents have been seen yelling at children off-camera and pressurizing the child into doing things that they are hesitant about.[34] They are made to smile in front of the camera, but behind it, they may face scolding or worse.

Parents may also ignore the child's wishes. If a child says 'no' to filming, they may be called lazy or selfish, hence putting them in a position where they may see no way out except to keep performing. This emotional pressure is a form of control. This is a clear indication of undue influence. The child may feel trapped. When their home is also their stage, it becomes hard to know what is real and what is not. Parents are supposed to be a safe space. But in such homes, that safety is lost. The child feels watched, judged, and used in their own home. They may believe they are loved only when they perform. This way, they may grow up resenting their parents. This kind of pressure can deeply affect how the child sees love, trust, and themselves as they grow up.

4.7. Consent as a Grey Zone

Consent means agreeing freely and fully. But can a child truly consent to being a public figure? Children do not even understand the concept of consent. They are so young that there perception can be easily clouded by their parent or guardian. Most of them do not understand what it even means to be on the internet. They may say 'yes' because their parents ask them to. But this is not real consent.

In family vlogs, consent is often assumed. Parents decide what to post. They believe they are doing what's best. But the child may not want to be filmed or shared. They may not like how they are shown. As children grow older, their views may change. They may feel embarrassed or angry about past videos. But by then, those videos have been seen by thousands, or even millions.

[34] *Bad Influence: The Dark Side of Kidfluencing: Piper Rockelle, Internet Sensation's Troubling Docu-Series Set to Premier on Netflix*, ECON. TIMES (2025), https://economictimes.indiatimes.com/news/international/new-zealand/piper-rockelle-internet-sensations-troubling-docu-series-set-to-premier-on-netflix/articleshow/120128881.cms (last visited June 8, 2025).

True consent must be ongoing, informed, and respected. If a child says 'no', even once, it must be taken into consideration in front of all the 'yeses'. However, in most kidfluencer setups, it does not. This is a serious problem that needs urgent attention.

Many children also struggle to separate real life from what they perform online. They grow up acting for the camera, so they don't know who they are without it. The line between reel and real blurs. When their entire childhood is content, they may never learn what private life means. Their home, which should be a safe space, becomes a place where they are always watched and judged. They start to normalize the 'completely bizarre'.

5. WAY FORWARD: PROTECTING KIDFLUENCERS IN INDIA

In order to safeguard the rights of kidfluencers and protect them from exploitation, India needs to recognize 'kidfluencers' as an emerging category in the entertainment and content creation world. These children are part of a space where their personal life mixes with stage life all the time, yet there are no legislations in place to oversee this inter-mingle. The Act, 1986[35], covers artistic performances of child actors but doesn't address digital content created by kidfluencers. Either a legislation should be brought into place or atleast an amendment in the Act, 1986 for these digital child creators. Just defining the term 'kidfluencer' legally will make all the difference. There should be provisions to set age limits both on the children creating content and the ones watching it, strictly enforce fixed working hours, and decide what type of content is suitable for children to create. It must also hold parents and platforms responsible for the child's well-being. Without proper laws, children will continue to be exposed to a digital world where they are unprotected.

5.1. Protecting Kid-influencers from Economic Exploitation

Children who work tirelessly to create content online deserve financial protection on their hard earned money. In most cases, parents have control over all their finance. Without clear rules, children may end up with nothing on turning eighteen, despite working hard through out their growing years. A legislation must be brought into place to protect the rights of kidfluencers. It must contain provisions to protect their earnings. Enforcement is the key. Parents must bound to report the child's income every year to concerned authority, for instance, the NCPCR. A certain portion of these earnings must go into a a safe account that a child can access when they turn eighteen. Parents and the social media platforms both must be responsible for the same.

[35] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, No. 61, Acts of Parliament, 1986 (India).

There must be provisions for regular audits by concerned authority and grave penalties must be inflicted in cases of non-compliance.

France brought a system in place in 2020, the *Loi n° 2020-1266*[36], amending the labour Code of France, the *Code du travail* to include digital content creation. Now under *Code du travail* , contracts for kidfluencers must be approved by an administrative authority.[37] Their earnings are kept in a blocked bank account until attaining majority.[38] Further, in the U.S.A, the landmark case of *John Leslie Coogan v. Lillian Coogan Bernstein and Arthur Bernstein*[39] brought in the California Child Actors Act, 1939, famously known as Coogan Laws[40] which mandates 15% of a child's earnings to go into a trust, ensuring future economic stability of the child.[41] India can adopt similar models, with support from the NCPCR in order to protect kindfluencers from economic exploitation.

5.2. Balancing Content Creation with Education and Development

Every child in India has a fundamental right to education guaranteed under Article 21A of the Constitution of India[42] and the Right of Children to Free and Compulsory Education Act, 2009[43] (*hereinafter* 'the RTE Act'). When children work as influencers, their education often suffers. Long shooting hours and travel can lead to missed school days. Some children even drop out to focus only on content creation.

To prevent this, firstly, an upper-cap for the number of working hours must be defined for a kidluencer as in the case of child actors.[44] Further, there must be provisions for parents to inform schools if their child is involved in online content creation. Schools can then monitor the child's attendance and academic progress. If the child is being home-schooled, parents must submit records including information like details of the syllabus, study hours, learning milestones.

[36] Law on Regulation and Protection of Access to Cultural Works in the Digital Age, 2020, Law No. 2020-1266 (France).
[37] Code du travail, art. L7124-1 (Fr.).
[38] Code du travail, art. L7124-9 (Fr.).
[39] John Leslie Coogan v. Lillian Coogan Bernstein & Arthur Bernstein, (L.A. Sup. Ct. 1939) (Cal.).
[40] CAL. FAM. CODE (West 2025).
[41] CAL. FAM. CODE § 6750 (West 2025).
[42] India Const. art. 21A.
[43] Right of Children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament, 2009 (India).
[44] Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, § 7, No. 61, Acts of Parliament, 1986 (India).

In Canada, provinces like British Columbia[45] and Ontario[46] require children in entertainment to get work permits. These permits are given only if the child's school attendance and performance are in order. Regular checks are done to make sure education is not ignored. India can adopt a similar rules to protect these children's right to education.

Further, it cannot be sidelined that playtime is a vital part of childhood. It supports emotional, mental, and social development. The United Nations Convention on the Rights of the Child (*hereinafter* 'UNCRC'), which India has ratified, also states that every child has the right to rest and leisure.[47] To ensure this, Indian law should require parents of kidfluencers to maintain a weekly schedule. This schedule must show time spent on content creation, school, play, rest, and other activities. Such reports must be submitted to concerned authority and checks must be conducted from time to time to ensure authenticity of such schedules. If there is any sign of imbalance, warnings and penalties should follow.

Children must not be made to choose between their career and their childhood. Laws must protect their right to learn, play, and grow. Balancing content creation with overall development must be treated as a child's legal right, not just a parenting choice.

5.3. Responsibility of Social Media Platforms for Safety of Kidfluencers

Social media platforms make huge profits from videos that feature kidfluencers. However, most of them claim that they are only 'hosts' and not responsible for what is uploaded. It's hightime for a change. In India, Under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, (*hereinafter* 'the IT Rules, 2021') platforms are already supposed to act fast when harmful content is reported.[48] However, these rules should go further. They must make it a legal duty for platforms to protect children. Platforms must pin the content featuring kidfluencers and monitor the views and comments thereunder. Regular safety audits must be made compulsory. Platforms must publish reports in fixed intervals to ensure safety of children. If platforms make money from children's content, they must also spend money to protect those children. The law must make this spending a legal requirement.

In the U.S.A, the Children's Online Privacy Protection Act (*hereinafter* 'COPPA'), directs that platforms must protect personal data of children under 13, and failing to do so may lead to

[45] Employment Standards Regulation, B.C. Reg. 396/95, pt. 7.1, div. 2, § 45.8 (Can.).
[46] Protecting Child Performers Act, 2015, S.O. 2015, c. 2, sched. 2, §§ 4–6 (Can.).
[47] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 31.
[48] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3 (India).

imposition of fines.[49] For instance, in 2019, YouTube was fined $170 million by the Federal Trade Commission for collecting data from children without parental consent.[50] India can bring a similar law to protect digital privacy of minors.

France gives children a legal 'right to be forgotten'. Under *Loi n° 2020-1266*, if a kidfluencer grows up and no longer wants their videos online, the platform must delete them on the child's request.[51] India can also give children this right. It can be added to the IT Act, 2000, or included in a new legislation just for digital child creators. These measures will help ensure kidfluencer's safety and privacy online.

5.4. Protecting Kidfluencers from predatory Audience

One of the biggest dangers that kidfluencers face online is predatory audience. Even an innocent video, like a child dancing, eating, or playing,may be perceived in a wrong and harmful way. A study shows that platforms such as YouTube's algorithm recommends videos of children to users with a history of watching sexualized content.[52] Further, n *Doe v. YouTube LLC*, the court examined how algorithms can harm children by pushing their content to risky viewers.[53] Platforms must change their algorithm to protect these children's safety.

Kidfluencer videos often go viral because the platform's algorithm pushes them to more users who have similar viewing habits. This happens without the child or the parents knowledge. Once it starts, the video can spread fast, and the wrong audience keeps growing. Indian laws do not yet stop this kind of algorithmic promotion. Under Rule 3(2)(b) of the IT Rules, 2021, platforms must remove harmful content on a complaint basis,[54] but by then, the damage is often already done.

This calls for stronger laws to prevent such misuse of minor's content and violation of their safety and privacy. Platforms must track who is watching a minor's content and how often. If an adult watches too many videos of minors, their account must be flagged. India could also ban algorithmic promotion of content featuring children under 13, except to viewers of similar age group as that of the creator. This means such videos should not appear in 'recommended'

[49] Children's Online Privacy Protection Act, 15 U.S.C. § 6502 (2023).
[50] United States v. Google LLC & YouTube LLC, No. 1:19-cv-2642 (D.D.C.).
[51] Protection of Child Performers in the Digital Environment, Law No. 2020-1266, art. 6 (Fr.).
[52] *On YouTube's Digital Playground, an Open Gate for Pedophiles*, N.Y. TIMES, https://www.nytimes.com/2019/06/03/world/americas/youtube-pedophiles.html (last visited June 8, 2025).
[53] Doe v. YouTube LLC, No. 20-CIV-04023 (N.D. Cal. 2021).
[54] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, r. 3(2)(b) (India).

or 'for you' feeds of adults. If someone wants to see them, they must search directly. Actions like Sharing, duets, and reactions must also be blocked for videos featuring minors.This will limit how far such content can spread to unknown adults, limiting it's access to predatory audience.

5.5. Protecting Mental and Emotional Health of Kidfluencers

Children who work as influencers often have to act happy or excited even when they are tired or unwell. Sometimes they are forced to repeat scenes again and again. They may also be asked to smile or cry on command. This is not healthy and can hurt their mental and emotional well-being over time. Further, emotional stress in childhood can lead to depression and other long-term issues. Early emotional trauma can affect brain development and behavior well into adulthood.[55] To keep this in check, regular mental health check-ups could be made compulsory for all kidfluencers in India.

Some videos show children being scolded, tricked, or embarrassed for views. This content is harmful to the metal haelth of the child and can cause trust issues. If a parent uploads such a video, it should be treated as emotional abuse. The Juvenile Justice Act, 2015, protects children from mental cruelty and neglect.[56] Such videos must be reported in the same way and taken down immediately.

Being in front of the camera should never come at the cost of a child's happiness. Laws must make sure that kidfluencers are treated like children first, and not as content creators.

5.6. Preventing Exploitation by Parents and Family Members

Its is a preconceived notion that parents always act in the best interest of their child. However, this is not always true. In the world of kidfluencing, some parents force children to into content creation without considering their will, in pursuit of fame and money.

In the United States, in the case of *Sawyer S. et al. v Tiffany Rockelle Smith et al.*[57] the child's mother was accused of emotional abuse, pressuring the child, and controlling her earnings. She allegedly forced her daughter to keep filming even when she was uncomfortable. This case shows that this is a serious issue that must be addressed urgently.

[55] A. Singh & M. M., Early Trauma Experiences, Parenting Styles, and Personality Patterns in Individuals with Depression from India, 11(2) INT'L J. CULTURE & MENTAL HEALTH 146 (2018).
[56] Juvenile Justice (Care and Protection of Children) Act, 2015, § 75, No. 2, Acts of Parliament, 2016 (India).
[57] Sawyer S. et al. v. Tiffany Rockelle Smith et al., Case No. 22STCV01351 (Cal. Super. Ct. Los Angeles County Jan. 12, 2022).

To prevent this from happening, following in the footsteps of France,[58] India can introduce a rule dictating that parents need some sort of government-issued digital work license before including children in any online content. Such license should only be granted after interviewing the child and checking the child's school records, health reports, etc. There can be a provision for renewal of this license on a yearly basis ensuring regular checks.

A national record of all kidfluencer channels can also be maintained. This database should include details like the child's name, age, channel name, parent or manager names, etc. This will help bring transparency. Authorities can then carry out unprecedented checks and audits. If any signs of abuse or overwork are found, action must be taken.

There must be provisions for parents to submit a yearly report to concerned authority, for instance, NCPCR. This report may consist of the number of videos made, the time spent on shoots, income earned, proof of school attendance, mental health check reports, etc. This will ensure parents' accountability accountable.

If parents break these rules or are found exploiting the child, strict punishment must follow. The law must protect the kidfluencers, even from those closest to them.

5.7. Understanding Consent

Children are often made to appear in videos without truly understanding the meaning of online presence. It is widely perceived that a smiling child means a consenting child. However, that is not always the case. Legally, minors cannot give a valid and informed consent.

The Supreme Court of India in *Independent Thought v. Union of India*[59] held that a child's consent does not count as a valid consent when rights are involved because of their lack of understanding due to young age. The same reasoning should apply to online content creation, just because a child is filmed does not mean they want to be. Their rights must be protected no matter what. Before featuring any child in content creation, it can be made a legal requirement that a child psychologist must speak with the child. The psychologist must ensure that the child is not being pressured or tricked. Only if the child understands and agrees freely should filming be allowed. A parent's permission is not enough when the child's dignity is at stake, especially because of parent. This idea supports the child's right to informed consent.

[58] Regulating the Commercial Exploitation of Images of Children under Sixteen on Online Platforms, Law No. 2020-1266, art. 1 (Fr.).
[59] Independent Thought v. Union of India, (2017) 10 SCC 800 (India).

Consent must also be ongoing. A child should have the right to say 'no' at any time. If a child changes their mind after a video is posted, they should be allowed to ask for it to be removed. This must be treated as a legal right. Platforms and parents must delete the content on child's discretion. This would protect the child's right to privacy under Article 21 of the Constitution of India.[60]

Respecting a child's consent is about respecting their dignity. Consent should not be a one-time thing. It should be asked for again and again as the child grows. Just like in any job, a person should have the right to stop working as per their will. Children deserve the same freedom.

6. CONCLUSION

The world loves to watch children, their laughter, their honesty, their chaos because it feels pure. However, when millions of views are on stake, and huge amount of money is involved, that purity doesn't stay untouched. Somewhere between cute moments and viral trends, a line gets crossed and more often than not, no one notices, until it's too late. What we see as content is someone's childhood, a child's home turns into a film set. Their emotions turn into brand deals. Their privacy is sacrificed for likes. Gradually, the child begins to believe that their worth lies in how well they perform, and that love must be earned through attention.

This is not just about bad parenting or greedy platforms but about a system that does not yet recognize the child in the influencer. A system that allows endless content but gives no space for consent. That lets the world consume children while offering them no safety, no pause, and no protection.

India needs to act, not with gentle suggestions, but with clear laws. Laws that make space for rest, laws that punish misuse, laws that treat children as people and not products. Let children grow without being watched, let them say no without guilt, let them be kids, not performers, not brands, not content. Most important of all let them be protected.

[60] India Const. art. 21.

THE ARTIFICIAL EVIDENCE: AI-DRIVEN CRIME SCENE RECONSTRUCTION AND INVESTIGATION

Sambhav Chhabra[1]

Abstract

Conviction in a criminal case in India requires evidence to be present in an unbroken chain, which in turn requires a diligent investigation. Crime-scene reconstruction and investigation are certain imperative tools which ensure the integrity of a sound investigation. The integration of AI (Artificial Intelligence) into crime scene investigation promises to revolutionize forensic science by enhancing accuracy and efficiency. AI has seeped into almost every discipline and its integration in investigation sounds to be a promising partnership in furtherance of justice. However, rapid adoption outpaces legal and scientific scrutiny, particularly regarding evidentiary reliability and ethical implications.

The paper aims to comprehend the might of AI in reconstruction and investigation of crime scenes with the objective of gauging its reliability and legal admissibility as evidence in the court of law. Through a systematic review of case studies and academic knowledge, the study analyses the various AI tools and its application in crime scene analysis (VR reconstruction, blood stain pattern recognition etc.), laws governing AI-derived evidence, its reliability, convenience and dilemmas revolving it.

Though the implementation of AI tools reduces human bias and errors to a minimum while giving a boost to efficiency and effectiveness of the investigation, courts demand stricter validation protocols, echoing the Bharatiya Sakshya Adhiniyam's emphasis on scientific rigour. The findings give policy-makers an insight into AI integration with investigation and urge them to balance innovation with safeguards against miscarriage of justice.

Keywords- *Artificial Intelligence, Crime scene investigation, Crime scene reconstruction, Digital evidence, Forensic Investigation*

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1. INTRODUCTION

Forensic science has grown cardinal to a sound investigation and has gained credibility over time. The National Institute of Standards and Technology defines forensic science as a systematic application of scientific methods or expertise to investigate crimes, examine evidence, answering questions of legal importance to aid investigation[2]. In Indian context, credibility is palpable by the new law codes that give due weight to forensic sciences and its findings. The Bhartiya Nyaya Sanhita under section 176 (3)[3] necessitates engagement of forensics expert for collection of forensic evidence. The statement of objects and reasons of the bill states unequivocally that the bill aims to put forensics to adequate use and provide for its employment in criminal investigation.

Forensics has had a significant impact on investigation and has been utilised in several ways. Forensics may be employed in reconstruction of events, identification of suspects, exoneration of innocents, putting facts under judicial scrutiny using DNA profiling and fingerprint analysis, ballistic analysis, toxicological analysis, digital forensics etc. With the mushrooming of advancement in science, the toolkit of a forensic expert and its credibility is steadily improving.

Artificial intelligence in a span of very few years, has snowballed into a common newspaper title being integrated into almost every discipline. It is that branch of technological science that creates intelligent machines which function like human intelligence[4]. AI has been highly utilised currently through chat-bots like Deepseek and Chat-GPT, data analysts, content generator, aid in web searches, personal assistants, smart homes, cities, cars, cybersecurity, etcT. AI can be integrated into almost every field making it more accurate, efficient and economical.

1.1 How does AI work?

With the advancement of technology, AI has altered its way of functioning and how it can be taught things. It would be apposite to define all the pertinent terms and evolution of AI to set the tune for the research. The first wave of AI entailed ‘expert systems’ and ‘fuzzy logic’ as the

[2] Nitin Kumar Gupta & Sweksha Bhaduria, Role of Forensic Science in Criminal Investigation, 6 International Journal for Multidisciplinary Research 1–7 (2024).
3 The Bhartiya Nyaya Sanhita, 2023, S. 176, sub-sec (3).
4 PK, FATHIMA ANJILA. "What is artificial intelligence?" Success is no accident. It is hard work, perseverance, learning, studying, sacrifice and most of all, love of what you are doing or learning to do 65 (1984).

primary ways of teaching an AI model. The expert system model utilises mirroring of a human expert by him creating precise rules for a computer to follow. It uses an 'if-then-else' which means rules were coded in such way that 'if' a certain condition occurs 'then' the said result is to be displayed. This correctly mirrors how a human expert's mind works as for instance If an expert lawyer is faced with a case, he would see 'if' the case pertains to a criminal matter and that too if a bail matter 'then' he would find the relevant evidence. This system is best suited for constrained environments since a more dynamic environment would use a high number of rules which becomes perplexing[5].

The second wave of AI learning ensued data-driven machine learning which has to be constantly fed data to function. Parting from the fulcrum of the former models which has to be manned, these models taught themselves using the available data. To aid the same there exists Artificial Neural Networks (ANN), which as the name suggests, is a device which mirrors neural network of human brain. Artificial neurons called units are arranged in systematic layers which identifies the hidden patterns in the data set. The more of these layers through which data can travel the more would be learnt from the dataset. Deep learning is when big ANNs are used with at least two layers and a decent network of neurons. Once a model is arrived at, it has to be trained which is a continuous process.

At the fulcrum of all of this is the Machine Learning (ML) which is an AI subset involved in deploying algorithms to discover complex variables and relations from large dataset and producing output based on the ideas they have learnt from data presented[6]. This is what enables all AI models to function so effortlessly performing tasks to the extent human imagination goes. The primary job for ML is to identify patterns from the dataset and learn, which means the more data fed more accurate the output would be. The learnings so made can then be utilised to give refined and creative outputs.

Another relevant concept to understand at the outset is generative AI and the branch of image generation whose job is to make all the gears in the form of ML, Deep Learning, and ANN move to give output as images. All of the furnished information would make sense once we are in the next section, integrating AI and crime-scene reconstruction.

[5] Boucher, Philip. "*How artificial intelligence works.*" EPRS–European Parliamentary Research Service, In: europarl. europa 2 (2019).
[6] Baloglu, Orkun, Samir Q. Latifi, and Aziz Nazha. "*What is machine learning?*" Archives of Disease in Childhood-Education and Practice 107.5 (2022): 386-388.

1.2 Crime-Scene Recreation and Reconstruction

A wise step in AI integration into forensic investigation is understanding the meaning, process and significance of crime-scene recreation and reconstruction. The Forensic Reconstruction is a widely used process in criminal investigation wherein events and actions on crime scenes are determined or eliminated by placing reliance upon the placement of evidence, location, crime scene pattern and laboratory examination[7]. It also includes reenactment of the act by the suspect on the cleaned crime scene which in countries like Denmark is highly used in judicial process[8]. This facilitates the actual determination of what happened creating an unbroken chain of events which is integral to proving the guilt.

The following case study stresses the importance and methodology entailed in Crime-scene reconstruction. An 18-year-old decomposed male body was found at the eastern side of a tamarind tree while blood was found on the western side Fig.1.

[7] Morgan, Ruth M., et al. "*Crime reconstruction and the role of trace materials from crime scene to court.*" *Wiley Interdisciplinary Reviews: Forensic Science* 2.1 (2020): e1364.
[8] Maksymowicz, K.; Tunikowski, W.; Kosciuk, J. "*Crime event 3D reconstruction based on incomplete or fragmentary evidence material—Case report". Forensic Sci. Int.* **2014**, *242*, e6–e11.

Fig.1

Source: The Egyptian Journal of Forensic Sciences and Applied Toxicology

A creeper plant cord was tied to the neck of the corpse pointing to a homicide. The crime scene was reconstructed by the forensics team engaged, as shown in Fig. 2. Once the crime scene was reconstructed and inference were drawn, it was concluded that what was thought to be a homicide was nothing but a suicide.

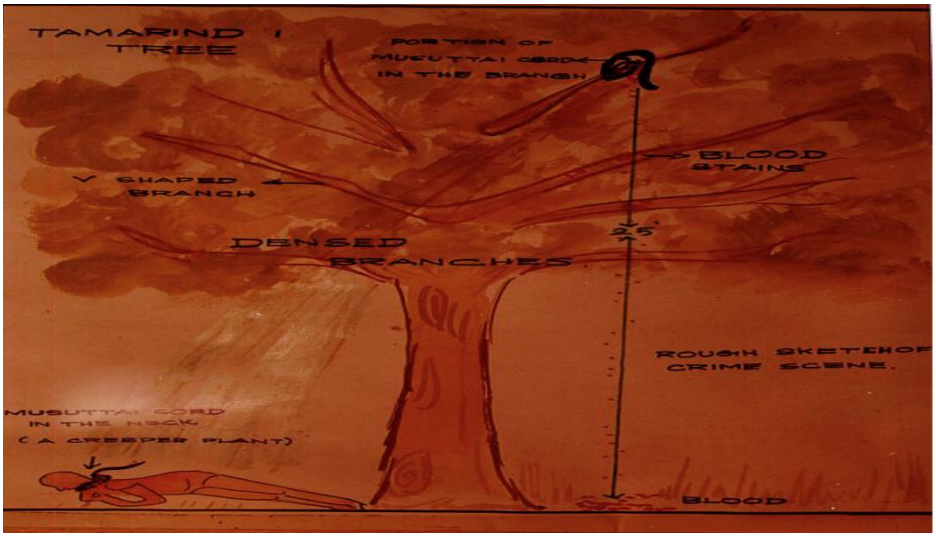

Fig.2 Source: The Egyptian Journal of Forensic Sciences and Applied Toxicology

On forensic perusal aided by crime-scene reconstruction it was discovered that the boy committed suicide by hanging from the creeper plant cord, a part of which was tied to the top-most part of the tree and remaining tied to the neck. Still the presence of the body on the eastern side of the tree was not justified. The team suggested that the decomposed body was hanging from the tree for a long time, blood dripping from nose, mouth and other holes which led to the cord breaking after a few days. When the body fell it hit a V-shaped branch and fell to the eastern side[9].

This case would be consistently employed to gauge effectiveness of the AI tools used in crime-scene reconstruction.

1.3 Research Problems

With the basic conceptual framework discussed, the researcher will now put forward the research problems.

1) Can AI be successfully integrated in forensic investigation and that too crime-scene reconstruction?
2) If yes, what are the legal, scientific and ethical implications?
3) How reliable artificially made evidence are?
4) Can AI reconstructions support live investigations, or are they only post-event tools?

[9] Moorthy, T., and T. Natraja N. Moorthy. *"Crime Reconstruction, A Tool To Solve Mystery And Achieve Justice-An Interesting Crime Scene Report."* The Egyptian Journal of Forensic Sciences and Applied Toxicology 20.4 (2020): 85-89.

5) Are Indian judicial and investigative members trained to assess AI forensic methods?

The paper will be a bid to give satisfactory answer to the above questions while delving into the compatibility of AI in investigation.

2. AI TECHNOLOGY IN CRIME SCENE RECONSTRUCTION AND INVESTIGATION

2.1 3D Crime Scene Mapping and Virtual & Augmented Reality in Crime Scene Reconstruction

The latest academic papers are vehemently advocating for 3D or VR vizualisation of crime scenes. Three-dimensional imaging involves production of high resolution, detailed, accurate and non-invasive production of precise 3D models[10] which can be used for visualisation or input to another AI model. There are certain key 3D mapping models already heavily employed, such as Post-Mortem CT scanning (PMCT) which is continuously replacing traditional autopsy methods in technologically developed nations. Research has extensively assailed such mapping and has upheld credibility in accurately detecting gas, blood and bone fractures. It enables the rapid identification of atherosclerosis, fat deposition in organs, hemorrhages, some tumors and bowel obstructions as well as indicates lung pathologies[11].

[10] Thali, M.J.; Braun, M.; Buck, U.; Aghayev, E.; Jackowski, C.; Vock, P.; Sonnenschein, M.; Dirnhofer, R. VIRTOPSY "*scientific documentation, reconstruction and animation in forensic: Individual and real 3D data based geo-metric approach including optical body/object surface and radiological CT/MRI scanning." J. Forensic Sci.* **2005**, *50*, 428–442.

[11] Villa, C.; Lynnerup, N.; Jacobsen, C. *A Virtual, 3D Multimodal Approach to Victim and Crime Scene Reconstruction*. *Diagnostics* **2023**, *13*, 2764. https://doi.org/10.3390/diagnostics13172764

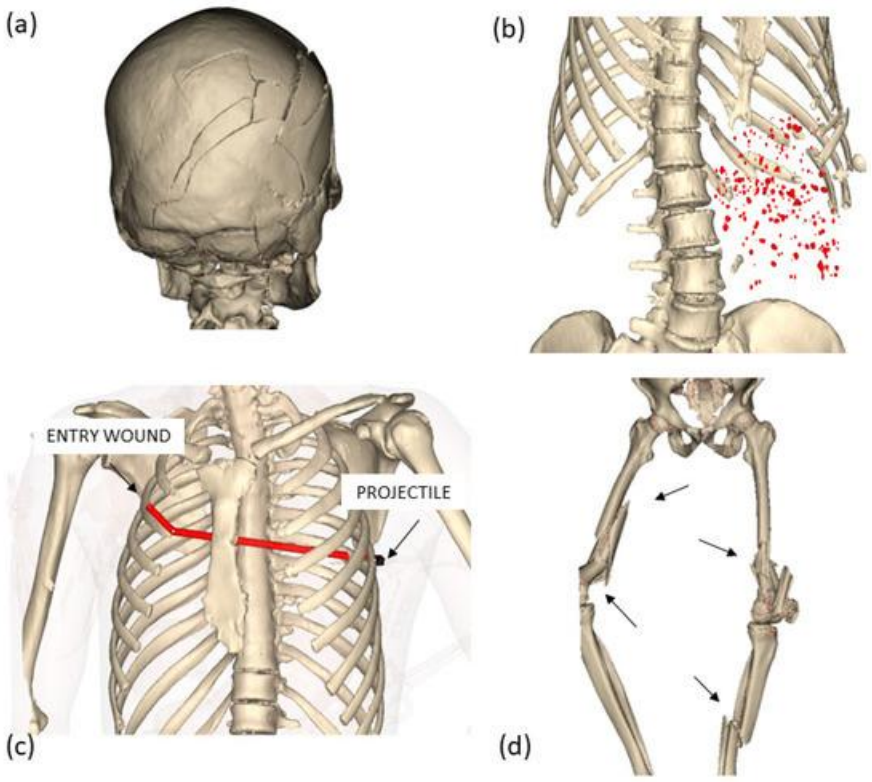

Fig. 3 Source: **https://www.materialise.com/en/healthcare/mimics-innovation-suite**

Fig. 3 is the 3D construction of the PMCT, which gives insight to the investigation agency about the anatomy and disturbances in it.

Prevalent scientific method in 3D mapping and central to AI integration and this study is Photogrammetry which is an instrument to create precise colored 3D model from 2D images ranging from fingerprints to the whole crime scene[12]. The presence of AI has made this process nothing less than a tap of a magic wand. This is where the AI Picture Generation 3D models come into the picture by converting 2D pictures into 3D models[13]. The model employs large neural networks trained with Terabytes of data, the Deep Learning mechanism then from the input images predicts 3D structure of the target image. This ensues a considered mixture of Generative AI, ML and other models.

If employed in crime-scene reconstruction, it would revolutionize the whole system of evidence finding and crime scene investigation. With a few images of the crime scene, the 3D generation model can make an unbiased and non-interfered 3D model out of it which can be utilised in a

[12] Villa, C.; Jacobsen, C. *The Application of Photogrammetry for Forensic 3D Recording of Crime Scenes, Evidence and People*. In *Essentials of Autopsy Practice*; Rutty, G., Ed.; Springer: Cham, Switzerland, 2019.
[13] Ma, Ke, and Jeanhun Chung. "A *research on AI generated 2D image to 3D modeling technology.*" Int. J. Internet Broadcast. Commun 16.2 (2024): 81-86.

number of ways. Going into the intricacies of the proposed way of integration, surface scanning is the precursor step to making an observable 3D model right from the crime scene. Surface scanning refers to the practice of scanning the target object or area to make raw convertible data to be fed into the system done by primary two methods: a) laser scanners b) structural light scanners. The common ground between these methods is that these models scan the area/object in terms of its distance, height, girth to make raw data to be made into 3D models.

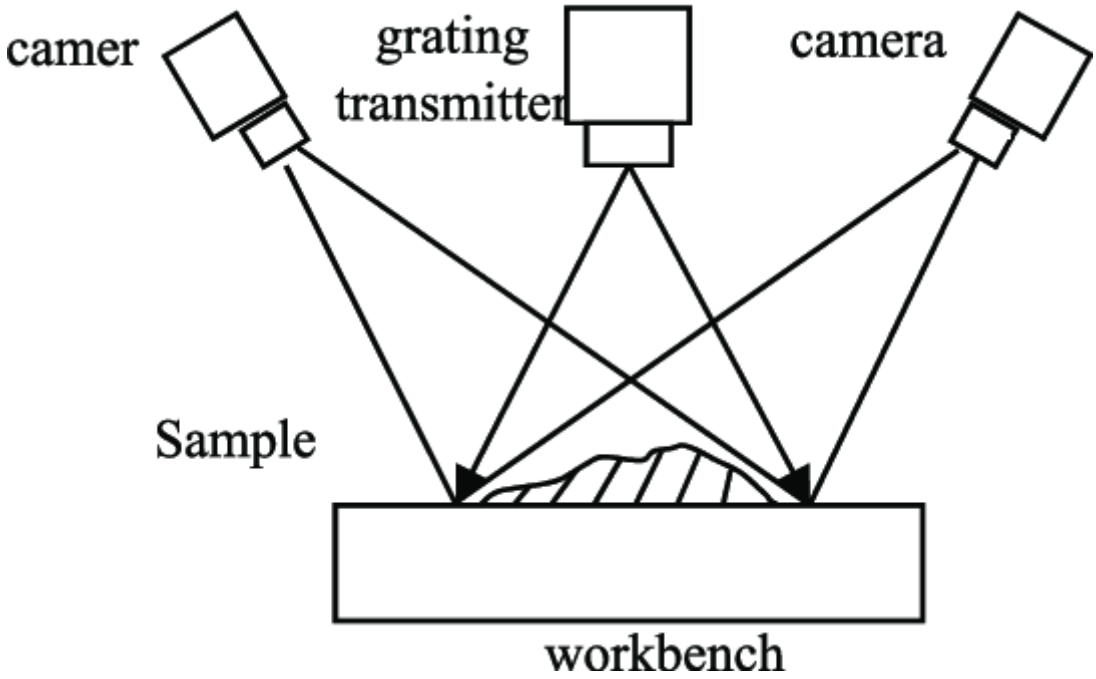

Fig. 4 Source: IEEE[14]

Fig.4 Shows surface scanners making a 3D models out of the subject, an innovative mind elicits one to go as far as making a 3D model of fingerprints, murder weapons, internal organs, dead body, etc. In the case study mentioned earlier, such a mechanism would have easily produced high resolution 3D model of the crime scene from a few images with accuracy for easy visualisation and facilitated meticulous inspection of details[15]. These 3D technologies offer high levels of accuracy and enable the creation of a permanent record of the crime scene as in Figure 5.

[13] Ren, Yujuan, et al. "*Overall filtering algorithm for multiscale noise removal from point cloud data.*" IEEE Access 9 (2021): 110723-110734.
[15] Supra Note 11

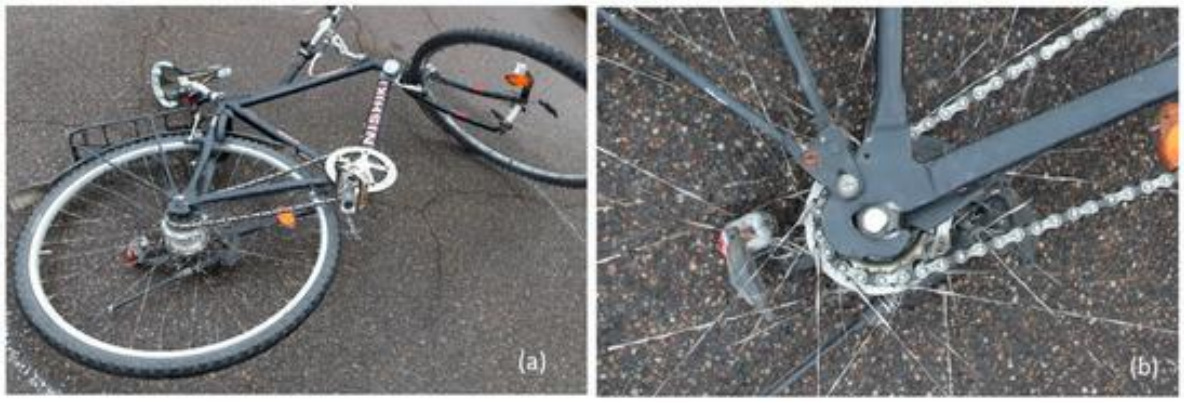

Fig. 5: A 3D model (mesh surface) of a bicycle obtained with photogrammetry: (**a**) overview of the bicycle; (**b**) a detailed view of the same bicycle. A canon 5Ds-r with a 24 primer was used for the photographs and the software 3DF Zephyr, version 6.507 was used for creating the 3D model[16].

The figure 5 backs the quality of AI based 3D models and how even a close-up scrutiny of the bicycle gears maintains the integrity of the model. This speaks high of the credibility of 3D model-based crime-scene reconstruction.

By combining 3D models of the victims, perpetrators and the crime scene, a single virtual 3D environment can be created and visualized[17]. There exists an EU funded project named RISEN which is dedicated to such upcoming technology. RISEN aims to develop a real-time contactless sensor for optimizing on-site trace detection, visualization, identification and interpretation. Augmented reality techniques are used to combine sensor data, gathered evidence, and identified places of interest into a scene's recreated 3D model. Similarly, the REVEAL project has carried out work in virtual environments with emphasis on crime scene reconstruction. This enables extremely detailed investigations by giving investigators a realistic and captivating visual environment[18].

Once a 3D model is ready, AI could further help in the presentation process of the 3D model wherein Virtual reality (VR), Augmented reality (AR) tools, 3D printers, interactive PDFs may be used[19]. Research has led to the notion that Augmented reality is the new way forward in

[16] Available online: **https://www.3dflow.net/3df-zephyr-photogrammetry-software/** (accessed on 22 May 2025).
[17] Supra Note 11.
[18] Available online: **https://www.risen-h2020.eu/** (accessed on 23 May 2025).
[19] Kettner, M.; Schmidt, P.; Potente, S.; Ramsthaler, F.; Schrodt, *M. Reverse engineering--rapid prototyping of the skull in forensic trauma analysis*. *J. Forensic Sci.* **2011**, *56*, 1015–1017.

forensic investigations of crime[20]. AR is more accessible than VR as it can function even using a mobile set, it morphs the real-world surroundings into a visual one by projecting objects like tree, weapons lying, blood spat etc. Which can be easily viewed in a mobile screen. VR on the other hand requires a special headset bringing the user into an entirely computer-generated simulation which may be interactive.

Imagine in the case of the 18-year-old boy's suicide, if the investigative agencies could see via AR and VR the details of the crime-scene, then not only it would be easier to see that the V-shaped branch which caused the body to fall to the other side but there would be no need to go to the scene again and again for some left out detail.

Studies suggest following potential ways of employing the VR & AI toolset in crime scene reconstruction[21]:

i. Scenario-testing

The VR visualisation of crime scene may be integrated with an AI model dealing with physics and the surroundings of the crime scene. This would infuse the 3D model with the real-life physics mechanisms like friction, velocity, weight etc. In the cited example of the 18-year-old, this system would enable testing whether a body falling from such a height could really end up on the other side of the tree because of a branch. This is a powerful tool which could be key to several cold cases helping not only in discovering the cause or testing a theory.

ii. Intelligent Agent

This would incorporate an AI with expert knowledge base in virtual environments to provide specialist information of the object being referred to in crime scenes. The AI model can give information relating to the ballistic, DNA or other forensic evidence for a better perusal and comprehension of the evidence.

2.2 Unbiased and speedy interpretation of forensic evidence and crime scenes

Researchers at University College London have attempted to teach AI models of how experts view and interpret a crime scene so that the AI model can mimic it with an unbiased approach. For the study a special eyewear was made which tracks eye movement and is recorded. Eye

[20] Tolstolutsky, Vladimir, Galina Kuzenkova, and Victor Malichenko. "*The experience of using augmented reality in the reconstruction of the crime scene committed in transport.*" *International Scientific Siberian Transport Forum*. Cham: Springer International Publishing, 2021.
[21] Robey, Donna, et al. "*From crime scene to computer screen: the use of virtual reality in crime scene investigation.*" Proceedings of the 7th UK VR-SIG Conference. 2000.

tracking experts coupled with asking how they reached at a decision, is converted into raw data fed into AI models to train upon. AI therefore rises in as an integral tool in crime scene and forensic evidence interpretation such as pattern recognition, facial recognition, predictive policing and forensic odontology[22].

Crime scenes are riddled with pattern whose recognition can be key for cracking a case such as fingerprints, ballistic analysis, blood spatter analysis etc. where AI is making its place[23]. Studies show that AI especially in fingerprint recognition can identify subtle patterns that may be overlooked by human expert and display a superior efficiency[24]. By providing objectivity, AI systems lessen the impact of human prejudices in forensic analyses. Their sophisticated pattern recognition skills might disclose important evidence in complex situations by spotting tiny linkages and patterns that human analysts might overlook[25].

There exist toolkits like Applied Biosystems™ 3500 Genetic Analyzer and the PowerPlex® Fusion System, which analyze DNA samples found at crime scenes. These models make the process of identification of genetic material, identification of the perpetrator and interpretation of forensic evidence more efficient and less time-consuming.

A study[26] was conducted to gauge the efficiency of AI Large Language Models (LLM) as a decision support tool in forensic investigation, which was fed 30 images of varying crime scenes. A panel of experts were summoned to analyse AI's performance in a) accuracy of observation b) evidence identification c) comprehensiveness d) logical inference e) overall reliability. Experts remarked that AI had caught those details that the human eye missed at first glance, it was more efficient, meticulous and comprehensive. However, even though human experts took almost 41 times more time, experts remarked it may only be used for initial time sensitive investigation as there was still a minor error rate in terms of misidentification of objects, missing critical evidences, error in size estimation etc.

[22] Arthanari, Abirami, S. Shaan Raj, and Vignesh Ravindran. "*A Narrative Review in Application of Artificial Intelligence in Forensic Science: Enhancing Accuracy in Crime Scene Analysis and Evidence Interpretation.*" Journal of International Oral Health 17.1 (2025): 15-22.
[23] Tuncer, Turker, Sengul Dogan, and Abdulhamit Subasi. "*LEDPatNet19: Automated emotion recognition model based on nonlinear LED pattern feature extraction function using EEG signals.*" Cognitive Neurodynamics (2022): 1-12.
[24] Lu, Longbin, Xinman Zhang, and Xuebin Xu. "*Hypercomplex extreme learning machine with its application in multispectral palmprint recognition.*" PloS one 14.4 (2019): e0209083.
[25] Jain AK, Jain A. *Biometric technology for human identification*. Boca Raton, FL: CRC Press; 2020.
[26] Farber S. *AI as a decision support tool in forensic image analysis: A pilot study on integrating large language models into crime scene investigation workflows. J Forensic Sci*. 2025; 70: 932–943. https://doi.org/10.1111/1556-4029.70035

The study used LLM models for the study like Gemini and Chat GPT, however, the technology this paper enunciates promises an accurate description and decoding of the crime scene with minimal error rate.

2.3 Perpetrator identification via gait analysis, facial recognition and voice analysis

Gait analysis refers to assessing the manner in which a person is walking. If a suspect is seen walking out of a crime scene but cannot be accurately identified, AI can effectively analyze their gait using CCTV footage to help identify the perpetrator. AI is rampantly being used in face recognition for various tasks[27]. The job for AI is to see whether the faces in the two images are same or not. The AI is first trained with multiple photos of the suspect from different angles, lighting condition, resolution etc and is then shown the CCTV footage to match whether the two faces are same or not. One prominent instance of the use of AI-based facial recognition is the identification of suspects following the terrorist events in Christchurch in 2019[28]. The technology quickly identified the people involved by matching faces from CCTV footage with database entries using AI algorithms. the spectrum of AI's possible uses goes as far as human imagination treads. A 2016 study revolved around a deep learning algorithm which concluded criminality from facial traits[29]. The authors purported 95% accuracy, but it could not be trusted for ethical dilemmas and non-reliance on only empirical evidence. There are AI tools like Amped FIVE and Cognitech video investigator, which allow enhancement of image quality and advanced analysis of visual evidence[30]. AI is also being rampantly used in finding the perpetrator via speaker analyses, which compares the sample voice with the voice of the suspect to ascertain guilt.

3. LEGAL ADMISSIBILITY OF AI EVIDENCE & POLICY RECOMMENDATION

The new Bhartiya Sakhsaya Adhiniyam, 2023, replacing the Indian Evidence Act does not expressly admit or rejects AI evidence however, it takes a lenient approach in regard of electronic evidence. Under section 63 it is provided that "any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic

[27] Morrison, Geoffrey Stewart. "*Advancing a paradigm shift in evaluation of forensic evidence: The rise of forensic data science.*" Forensic Science International: Synergy 5 (2022): 100270.
[28] Li, Shuangyan, et al. "*Facial length and angle feature recognition for digital libraries.*" Plos one 19.7 (2024): e0306250.
[29] Wu, Xiaolin, and Xi Zhang. "*Responses to critiques on machine learning of criminality perceptions (Addendum of arXiv: 1611.04135).*" arXiv preprint arXiv:1611.04135 (2016).
[30] Amped Software. Amped FIVE. 2023 Accessed May 29, 2025. http://www.ampedsoftware.com/five; Cognitech. Cognitech video investigator. 2025 Accessed May 29, 2024. http://www.cognitech.com/video-investigator/.

media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document ...shall be admissible[31]". Admissibility here means the judicial approval to using the evidence as a substantial document in deciding the issue. The provision further states certain conditions prerequisite to electronic evidence being admissible:

a) The device used for creating information is regularly used for such purpose by a person having such legal authority;
b) During the said period, such information is regularly fed into the device;
c) The device was operating properly not affecting the quality of information so created;
d) the information contained in the electronic record reproduces or is derived from such information fed into the computer or communication device in the ordinary course of the said activities.

Along with the above considerations, AI-generated evidence must also satisfy conditions of being reliable and not self-incriminating in consonance with article 20 (3)[32].

The author believes that only if the AI model used is a government-approved model based upon reliability and accuracy backed by both ethical and constitutional considerations would AI generated evidence be admissible. It is not enough that the empirical evidence shows high accuracy to bank trust in the AI models, it will have to be a flawless process while at the same time being ethical. A Canadian precedent on AI evidence in R vs L.K. (2020) stressed upon efficiency and utility of AI in investigation, which was dependent upon model's accuracy, transparency which has been thoroughly vetted which was reiterated in AI vs State of California (2023)[33].

Therefore, admissibility of AI generated evidence is a pertinent topic of research and has to be ultimately answered by judicial minds. The evidence weight depends directly upon the model used, the reliability of the model and other factors. Courts have to lay down rules as to how much faith to bank in such evidence. The integrity of such evidence may also be compromised after AI application, in maintenance and storage.

[31] The Bharitya Sakshaya Adhiniyam, 2023, S. 63.
[32] INDIA CONST. 1950, Art. 20, cl (3).
[33] C. Anderson, *The Role of Bias and Data Representation in AI Systems*, Harvard Law Review (2022), 112-118.

Countries like Austria, Canada, Denmark, Greece, USA, Germany etc. conducts international Police Conference Photogrammetry/ Laser Scanning with the aim to acquaint investigative authorities of the upcoming technology and facilitate understanding the use and effectiveness of such tools. India can follow a similar strategy forming alliance with technologically advanced and experienced countries to lay hands onto such information and its appropriate use.

4. SCIENTIFIC AND ETHICAL CONSIDERATIONS

Scientifically speaking, the more advanced AI becomes, the more neural networks it involves and the lesser the makers know how it arrived at its decision. The AI models that this paper revolves around require large neural networks and has to be fed large amount of data, this results into the decision making so complex that the humans cannot comprehend it which may cause a perverse ripple effect[34], this is called the 'black-box' nature of AI tools. It has further been found that even though AI eliminates any kind of human biases in forensic interpretation, AI systems have the potential to unintentionally reinforce and magnify preexisting prejudices in the data they are trained on, which could result in discriminatory actions, especially against under-represented groups[35]. In early developmental stage of AI image generation, when it was asked to develop a picture of an Asian person, most of the images were pornographic. This bias was picked up from google search results and was amplified by the AI model. If this were to take place in a sensitive matter as crime scene investigation on which lives are at stake, it would be disastrous[36].

AI integration is further riddled with ethical dilemmas since there are a lot of privacy concerns surrounding the AI crime scene reconstructions. In rape cases a lot of sensitive information and the dignity of the victim is at stake which would be ethically unsound to view through VR or AR reconstruction. In area-specific use of AI such as dental forensics, the AI has to tap into personal records to train itself for accuracy and efficiency which entails requirement of consent for using personal data.

Policy measures must follow a training mechanism for judges and investigative agencies. If the very gears of the mechanism are not well versed in generation, maintenance, flaws, etc of AI-

[34] Arthanari, Abirami, S. Shaan Raj, and Vignesh Ravindran. "*A Narrative Review in Application of Artificial Intelligence in Forensic Science: Enhancing Accuracy in Crime Scene Analysis and Evidence Interpretation.*" Journal of International Oral Health 17.1 (2025): 15-22.
[35] Vaswani, Vina, Luciana Caenazzo, and Derek Congram. "*Corpse identification in mass disasters and other violence: the ethical challenges of a humanitarian approach.*" Forensic sciences research 9.1 (2024): owad048.
[36] Campbell, Rebecca, et al. "*"This Time It Was Different:" Creating a Multidisciplinary, Trauma-Informed, Victim-Centered Approach to Sexual Assault Cold Case Investigations and Prosecutions.*" Journal of Interpersonal Violence (2024): 08862605241284068.

driven evidence, the integrity is bound to be compromised. Detractors may cry the sound of a lack of transparency in AI tools, which is to some extent true. This can be tackled by a robust legislative and executive exercise stressing upon making the process of administration of AI-driven evidence transparent. The rules so made must be victim-centric taking into consideration sensitive cases like rape and sexual assaults. The baton must not be handed to AI directly and rather a human-AI investigation teams must be vouched for to evade overreliance upon technology.

5. CONCLUSION

Rutty and Morgan stated in 2013, "the field is young and the evidence incomplete"[37] which is nothing less than true. Proving the reliability of AI evidence would dog a lot of experimentation, collection of evidence and extensive research. The paper succinctly portrayed ways in which AI could play a pivotal role in forensic investigation, crime scene reconstruction and interpretation of evidence. The paper then dealt in detail with the ethical and scientific implications of integrating AI with such a delicate process and ripple effect causing process.

The research questions presented at the start challenged the reliability of AI evidence, which the paper was unable to ascertain completely, but gave a path for upcoming research to tread upon. There are a lot of experiments and development to be done before completely ascertaining the accuracy and reliability of the AI models talked about.

Further, AI is concluded to be both a live investigation and a post-investigation tool. While conducting the initial scrutiny of a crime scene, an AI model like photogommetry and 3D models can be utilised. At the same time, after the event, the forensic evidence so collected can be interpreted and used by the AI. In the Indian context, even electronic evidence are viewed at with skepticism. Before AI evidence can gain admissibility and acceptance before the court of law, it has a long way to go for its novelty and unfamiliarity with the functioning of AI models. Indian judges, lawyers and investigative agencies has to be trained and informed about upcoming technology mirroring European nations who are already a few miles ahead of India in the context. India has to take a proactive approach lest it want to lag behind on such technology which is an inevitable future.

AI is the future and its integration with various disciplines is not merely necessary but inevitable. India and the world has to accept it and improve upon AI models to get the best out

[37] Rutty, G.N.; Morgan, B. *Virtual autopsy*. *Forensic Sci. Med. Pathol.* **2013**, *9*, 433–434.

of it. All AI models responses and result is directly dependent upon the human prompt given to it, therefore, both human and machines has to collaborate for furtherance of disciplines. A symbiotic collaboration of human and artificial mind can promise a future with myriad opportunities and betterment of the criminal justice system.

NAVIGATING THE FUTURE OF WORK: AI-DRIVEN TRANSFORMATION AND THE EVOLUTION OF LABOUR LAW

Ankisha Vandana[1] *& Simran Choudhury* [2]

Abstract

Over the time, with the rapid advancement there has been integration of Artificial Intelligence (AI) into the workplace. AI in workplace has been fundamentally transforming the nature of employment and posing significant challenges for the existing labour laws. In this note there is a critical examination of the impact of AI on aspects like, employment structure, job displacement, skill shift and rise of algorithmic management in both traditional form and gig economy sectors. AI- driven automation is leading to the displacement of low- skilled jobs while simultaneously creating new job opportunities in technology- driven fields., which will deepen the skill- based inequalities. The note analyses the legal implication of such changes, which maylead to redefining the employer- employee relationships, address the algorithmic bias, while protecting workers' autonomy and privacy. With a comparative analysis in regulatory responses in European Union and India, the study explores the effectiveness of current policies and legislations, such as European Union Artificial Intelligence Act and India's 2020 Labour Codes, in safeguarding worker rights and ensuring transparency and accountability in AI- driven decision- making. The discussion extends to global policy recommendations, emphasising the importance of AI impact assessments, expanded social safety nets, and transnational cooperation to harmonize standards and prevent regulatory arbitrage. This concludes by advocating for adaptive, rights- based legal reforms, robust stakeholders' collaboration, and proactive scenario planning to balance innovation with equity in the evolving world of work. Judicial developments and landmark cases, such as Uber BV v. Aslam and Mobley v. Workday, are cited to illustrate the growing recognition of AI on labours and their rights.

Keywords: *Artificial Intelligence, Labour Law, Job Displacement, Algorithmic Management, Regulatory Frameworks*

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1. INTRODUCTION:

Artificial intelligence (AI) is reshaping global labour markets, the projections are indicating that 85 million jobs could be displaced by automation by 2025.[3] This transformation extends beyond mere task automation. The AI increasingly influences decision-making processes traditionally reserved for humans-such as hiring, performance evaluations, and task allocation.[4] For instance, AI-driven tools now manage gig workers through algorithmic intermediaries, redefining employer-employee relationships in platforms like Uber and Upwork.[5] Hence, these shifts necessitates urgent scrutiny of labour laws, which were designed for industrial-era workplaces and now struggle to address AI's ethical, legal, and socioeconomic complexities.

1.1 Labour Rights in the AI Era

AI's inclusion exacerbates vulnerabilities in worker protections. Algorithmic bias in hiring-and firing tools risks amplifying gender, racial and social disparities, while surveillance technologies infringe on privacy rights under frameworks like India's Digital Personal Data Protection Act (DPDP).[6] In the EU, the AI Act mandates transparency in high-risk systems-such as those used for hiring-and bans emotionally manipulative workplace surveillance.[7] Conversely, India's 2020 Labour Codes remain nascent in addressing AI-specific challenges, though proposed amendments emphasize human oversight in layoff decisions and anti-discrimination clauses for AI-driven employment practices.

1.2 Employer-Employee Dynamics

The rise of algorithmic management blurs traditional hierarchies. Middle managers, once pivotal in administrative oversight, face obsolescence as AI automates their roles, pushing organizations toward flatter, self-managing structures. Gig workers, meanwhile, navigate

[3] *Automation and the Implications for Job Market*, https://psico-smart.com/en/blogs/blog-automation-and-the-implications-for-job-market-12568 (last visited May 13, 2025).
[4] Utkarsh Upadhayay , *The Impact of Artificial Intelligence on Employment Law and Worker Protections in India. - The Amikus Qriae*, https://theamikusqriae.com/the-impact-of-artificial-intelligence-on-employment-law-and-worker-protections-in-india/ (last visited May 13, 2025).
[5] Timothy Papandreau ,*AI And The Gig Economy Is Reshaping the Workforce. Here's How*, https://www.forbes.com/sites/timothypapandreou/2024/10/03/ai-and-the-gig-economy-is-reshaping-the-workforce-heres-how/ (last visited May 13, 2025).
[6] Digital Personal and Data Protection Act, 2023, (India).
[7] *Artificial Intelligence Act: MEPs Adopt Landmark Law, News, European Parliament*, (Mar. 13, 2024), https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law.

opaque AI systems that dictate task allocation and performance metrics without recourse to human accountability. This erosion of direct employer relationships challenges collective bargaining frameworks, as unions grapple with negotiating terms set by algorithms rather than human stakeholders.

1.3. AI Driven Transformation of Employment

AI's dual impact on employment-displacing traditional roles while creating new opportunities-has redefined labour markets, with low-skilled sectors bearing disproportionate risks and high-skilled industries leveraging AI-driven growth.

1.4 Job Displacement and Creation

Automation is projected to displace 85 million jobs by 2025, primarily in manufacturing, retail, and administrative roles, while generating 97 million new positions in tech, healthcare, and data analytics.[8] For instance, Foxconn replaced 60% of its workforce with robotic arms, exemplifying the vulnerability of routine manual labor. Conversely, AI-driven sectors like predictive maintenance and robotics engineering are expanding, with McKinsey forecasting 20–50 million new jobs globally by 2030.[9] This bifurcation reflects a U-shaped relationship between AI adoption and employment: short-term displacement in low-skilled roles gives way to long-term creation in AI-centric fields, as evidenced by China's manufacturing sector (2011–2020).[10]

The gig economy, powered by algorithmic management, amplifies precarity. Platforms like Uber use AI to assign tasks, set dynamic pay rates, and evaluate performance, often obscuring decision-making processes. In Italy, Foodinho faced a €2.6 million fine for algorithmic discrimination and lack of transparency, highlighting systemic worker vulnerability.[11] Similarly, Uber drivers in Kerala reported diminished autonomy due to opaque route optimization and rating systems.

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[8] *Over 97 Million Jobs Set to Be Created by AI*, EDISON & BLACK (Dec. 21, 2023), https://edisonandblack.com/pages/over-97-million-jobs-set-to-be-created-by-ai.html.
[9] Robert Farrell , *The Impact of AI on Job Roles, Workforce, and Employment: What You Need to Know Innopharma Education*, https://www.innopharmaeducation.com/blog/the-impact-of-ai-on-job-roles-workforce-and-employment-what-you-need-to-know (last visited May 13, 2025).
[10] Qingqing Huo, Jing Ruan ,Yan Cui ,*Machine Replacement" or "Job Creation": How Does Artificial Intelligence Impact Employment Patterns in China's Manufacturing Industry? - PMC*, https://pmc.ncbi.nlm.nih.gov/articles/PMC10956096/ (last visited May 13, 2025).
[11] Jonathan Keane , *Courts Crackdown on Gig Economy Algorithms*, SIFTED, https://sifted.eu/articles/gig-economy-algorithms/ (last visited May 13, 2025).

1.4 Skill Shifts and Worker Vulnerability

AI literacy has become a critical determinant of employability, yet reskilling initiatives lag. The World Economic Forum notes that 50% of workers will require upskilling by 2025, but access to training remains unequal, particularly in low-income regions. For example, India's manufacturing sector shows a growing divide: high-skilled roles in AI maintenance surged by 22%, while low-skilled positions declined by 15%.[12]

This skills gap exacerbates socioeconomic disparities. Rural workers in developing economies, often lacking digital infrastructure, face exclusion from AI-driven job markets. Meanwhile, roles like AI ethics specialists and human-machine teaming managers emerge, demanding advanced technical and critical thinking skills.[13]

1.5 Mental Health Impacts

AI surveillance tools, such as Amazon's productivity trackers and Starbucks' sentiment analysis systems, intensify workplace stress. Uber drivers in Kerala reported heightened anxiety due to constant performance monitoring and algorithmic unpredictability.[14] A 2023 study linked AI surveillance to a 34% increase in burnout rates among gig workers, driven by fears of sudden deactivation or pay cuts.

Legal responses are nascent but evolving. The UK Supreme Court's ruling in Uber BV v Aslam[15] (2021) reclassified drivers as employees, mandating benefits and transparency in algorithmic decisions.[16] In the U.S., Mobley v Workday[17] set a precedent for holding AI vendors liable for discriminatory hiring algorithms, emphasizing accountability in automated systems.

[12] "Machine replacement" or "job creation": How does artificial intelligence impact employment patterns in China's manufacturing industry? - PMC, *supra* note 9.
[13] The Impact of AI on Job Roles, Workforce, and Employment: What You Need to Know | Innopharma Education, *supra* note 8.
[14] Sri Hari T M, *Algorithmic Management: Impacts on Labour Autonomy in Gig Platforms with Special Reference to Uber* (2023), https://zenodo.org/doi/10.5281/zenodo.10537360.
[15] Uber BV v. Aslam, [2021] UKSC 5.
[16] *LinkedIn*, https://www.linkedin.com/pulse/ai-employment-law-emerging-challenges-workforce-raja-sengupta-i8onf (last visited May 13, 2025).
[17] Mobley v Workday, 2024 U.S. Lexis Nexis 126336.

2. LEGAL IMPLICATION OF LABOUR RIGHTS

The integration of AI into workplaces challenges foundational labour law principles, necessitating reforms to address accountability gaps, eroded worker autonomy, and systemic biases.

2.1 Redefining Employer-Employee Relationships

Proposals to expand legal definitions now consider AI systems as de facto employers, particularly in gig platforms where algorithms dictate task allocation, pay rates, and performance evaluations. For instance, Italy's 2022 ruling against Foodinho imposed a €2.6 million fine for algorithmic discrimination, establishing precedent for holding platforms accountable for opaque AI decisions.[18] In India, proposed amendments to labour laws advocate redefining "employer" to include entities controlling AI systems, ensuring liability for wrongful dismissals or biased promotions.[19]

Various termination safeguards have been evolving lately to address AI-driven layoffs. India's 2020 Labour Codes mandates 30-day prior notice for dismissals on technological grounds, though there exists exemptions, for sectors like IT where rapid AI adoption outpaces regulatory clarity. However, gaps persist: manufacturing units with 100+ workers still require government approval for layoffs, creating inconsistencies in enforcement.[20]

2.2 Collective Bargaining and Worker Autonomy

AI chip away the traditional collective bargaining mechanisms. The UK Supreme Court's Uber BV v Aslam (2021) reclassified gig workers as employees of big giants labelling themselves as mere intermediaries, by compelling transparency in algorithmic decision-making a landmark step toward restoring worker agency.[21] Yet, unions struggle to negotiate with AI systems that autonomously adjust workloads or pay. The OECD highlights how AI's "self-improving"

[18] K Sriya Manasa, *The Impact Of Ai And Technology On Indian Labour Laws*, INTERNATIONAL JOURNAL OF NOVEL RESEARCH AND DEVELOPMENT (2023).https://ijnrd.org/papers/IJNRD2311389.pdf

[19] Ishani Mishra ,*Rethinking Indian Labour Law and Policy in the Age of Artificial Intelligence: A Futuristic Analysis*, INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION, https://ijlsi.com/paper/rethinking-indian-labour-law-and-policy-in-the-age-of-artificial-intelligence-a-futuristic-analysis/ (last visited May 13, 2025).

[20] *A Guide to Terminating Employment in India - India Guide | Doing Business in India*, https://www.india-briefing.com/doing-business-guide/india/human-resources-and-payroll/a-guide-to-terminating-employment-in-india (last visited May 13, 2025).

[21] Rethinking Indian Labour Law and Policy in the Age of Artificial Intelligence, *supra* note 18.

nature complicates social dialogue, requiring continuous renegotiation of terms rather than fixed agreements.[22]

The right to explanation, inspired by the EU's GDPR, is gaining traction. India's proposed DPDP Act mandates transparency in AI-driven decisions affecting promotions or task allocation, though enforcement mechanisms remain underdeveloped.[23] Conversely, the EU's AI Act mandates human oversight in high-risk systems, ensuring workers contest automated decisions.

2.3 Discrimination and Privacy Violations

Algorithmic bias in hiring tools perpetuates disparities. A 2023 study revealed AI recruitment systems downgrading resumes with non-Western names or gender-neutral pronouns, amplifying racial and gender biases. India has proposed amendments to the Industrial Relations Code include anti-discrimination clauses for AI-driven recruitment (not explicitly), though such implementation lags behind the EU's stringent AI Act standards.

Surveillance technologies, like Amazon's productivity trackers, which violates privacy norms under India's DPDP Act and the EU's AI Act, are banning emotionally manipulative monitoring. In Mobley v Workday[24] (2023), a U.S. court held AI vendors liable for discriminatory hiring algorithms, signaling a shift toward third-party accountability.

3. REGULATORY RESPONSES AND POLICY FRAMEWORK:

EU's Risk-Based Approach

The EU AI Act classifies AI systems used in recruitment, performance evaluation, and worker monitoring as high-risk, mandating transparency, human oversight, and bias mitigation.[25] For example, Article 14 requires deployers to ensure human intervention in decisions like promotions or dismissals, preventing unchecked algorithmic autonomy.[26] However, Article 6(3) introduces a loophole by allowing companies to self-assess whether their systems qualify as high-risk, undermining accountability. Over 100 organizations, including Amnesty

[22] *Social Dialogue and Collective Bargaining in the Age of Artificial Intelligence | OECD*, https://www.oecd.org/en/publications/oecd-employment-outlook-2023_08785bba-en/full-report/social-dialogue-and-collective-bargaining-in-the-age-of-artificial-intelligence_5828691a.html (last visited May 13, 2025).
[23] *Id.*
[24] *Supra* note 16.
[25] *Artificial Intelligence – Q&As*, EUROPEAN COMMISSION - EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1683 (last visited May 13, 2025).
[26] *Article 14: Human Oversight | EU Artificial Intelligence Act*, https://artificialintelligenceact.eu/article/14/ (last visited May 13, 2025).

International, critiqued this provision for enabling employers to evade scrutiny, risking fragmentation of enforcement across member states.[27] The Act also bans emotion recognition systems in workplaces unless for medical or safety reasons, though guidelines permit narrow exceptions for crowd-control scenarios.[28]

India's Labour Law Reforms

India's **2020 Labour Codes** address AI-induced layoffs by mandating 30-day prior notice and requiring employers to explore alternative employment or compensation.[29] Proposed amendments go further, advocating:

Human oversight in collective bargaining: Ensuring human representatives retain decision-making authority over AI systems during negotiations.[30]

Anti-discrimination clauses: Prohibiting AI recruitment tools from filtering candidates based on gender, caste, or disability, aligning with the *Equal Remuneration Act (1976)* and *Transgender Persons Act (2019)*.[31]

Despite these steps, enforcement remains inconsistent. For instance, IT sectors often bypass layoff approvals due to ambiguous classifications under the Industrial Disputes Act.

Global Policy Recommendations

1. **AI Impact Assessments**: Mandating employers to evaluate displacement risks before deploying AI, as seen in the EU's requirement for Data Protection Impact Assessments (DPIAs) under the GDPR.[32]
2. **Social Safety Nets**: Expanding unemployment benefits and reskilling subsidies, inspired by Germany's vocational training programs and Finland's Universal Basic Income trials. The World Economic Forum estimates 50% of workers will require

[27] *EU Legislators Must Close Dangerous Loophole in AI Act*, EUROPEAN INSTITUTIONS OFFICE (Sep. 7, 2023), https://www.amnesty.eu/news/eu-legislators-must-close-dangerous-loophole-in-ai-act/.
[28] Laura Lazaro Cabrera & Magdalena Maier, *EU AI Act Brief - Pt. 4, AI at Work*, CENTER FOR DEMOCRACY AND TECHNOLOGY (Apr. 14, 2025), https://cdt.org/insights/eu-ai-act-brief-pt-4-ai-at-work/.
[29] Industrial Relation Code, 2020, Ch, X (India).
[30] *Rethinking Indian Labour Law and Policy in The Age of Artificial Intelligence | PDF | Labour Law | Employment*, SCRIBD, https://www.scribd.com/document/658477740/Rethinking-Indian-Labour-Law-and-Policy-in-the-Age-of-Artificial-Intelligence (last visited May 13, 2025).
[31] *India | Paul Hastings LLP*, https://www.paulhastings.com/insights/practice-area-articles/india (last visited May 13, 2025).
[32] *The Impact of the EU AI Act on Human Resources Activities*, (Nov. 26, 2024), https://www.hunton.com/insights/legal/the-impact-of-the-eu-ai-act-on-human-resources-activities.

upskilling by 2025, yet low-income regions like rural India lack access to AI literacy programs.

3. **Transnational Collaboration**: Harmonizing standards to prevent regulatory arbitrage, exemplified by the OECD's guidelines on AI ethics and the EU's push for global AI governance. [33]

4.FUTURE DIRECTIONS AND CONCLUSION

The increasing integration of artificial intelligence into the workplace compels a proactive and collaborative approach to labour law reform. As AI continues to reshape the nature of employment, the challenge for policymakers is to foster innovation while ensuring that equity and worker protections remain at the forefront.

Balancing Innovation and Equity

A central pillar for the future of labour law is stakeholder collaboration. Governments, employers, and trade unions must work together to co-design adaptive legal frameworks that address the unique challenges posed by AI-driven management and automation.[34] The European Union's tripartite consultations during the drafting of the AI Act exemplify how inclusive dialogue can lead to more robust and balanced regulation.[35] Similarly, India's engagement with the Standing Labour Committee in revising the Labour Codes highlights the importance of participatory lawmaking to anticipate technological disruption.[36]

Scenario planning is essential for preparing for both optimistic and pessimistic employment outcomes. The World Economic Forum projects that while 85 million jobs may be displaced by automation by 2025, 97 million new roles could emerge in technology-driven sectors.[37] However, the experience of mass layoffs at Foxconn, where tens of thousands of workers were replaced by robots, underscores the risk of large-scale displacement without adequate policy

[33] *The Impact of AI on the Labour Market*, https://institute.global/insights/economic-prosperity/the-impact-of-ai-on-the-labour-market (last visited May 13, 2025).
[34] International Labour Organization, *World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work* 1 (2021).
[35] European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)* COM (2021) 206 final (Apr. 21, 2021).
[36] Ministry of Labour & Employment, Government of India, The Code on Social Security, No. 36 of 2020, Gazette of India, Extraordinary, Part II, Section 1 (Sept. 29, 2020).
[37] World Economic Forum, The Future of Jobs Report 2020 (2020).

safeguards.[38] Conversely, countries like Singapore have demonstrated how proactive reskilling initiatives, such as SkillsFuture, can help workers transition into new roles created by AI.[39]

Call to Action

Urgent legal reforms are required to ensure that employment contracts and workplace policies reflect the realities of AI-driven decision-making. This includes explicit provisions for algorithmic accountability, transparency in automated decisions, and workers' rights to explanation and contestation.[40] Judicial recognition of these issues is growing: in Uber BV v Aslam[41], the UK Supreme Court held that gig workers managed by algorithms are entitled to employment protections, setting a precedent for AI-mediated work relationships. In the United States, Mobley v Workday[42] saw a court hold an AI vendor liable for discriminatory hiring practices, emphasizing the need for enforceable anti-bias audits and regular impact assessments.

Transnational cooperation is vital to prevent regulatory arbitrage, where multinational employers exploit weaker legal regimes. The OECD's AI Principles and the EU's advocacy for global AI governance provide a blueprint for harmonizing standards and ensuring that fundamental labour rights are protected across borders[43]. Without such alignment, there is a risk that workers in less regulated jurisdictions will bear the brunt of AI-driven disruption.

In conclusion, the future of labour law in the age of AI hinges on the willingness of all stakeholders to embrace adaptive, rights-based regulation. Through sustained collaboration, rigorous oversight, and a commitment to social justice, societies can harness the benefits of AI while safeguarding the dignity and security of work. The path forward requires vigilance, innovation, and a shared resolve to ensure that the transformation of employment by AI leads to inclusive and equitable outcomes for all.

[38] BBC News, Foxconn Replaces *60,000 Factory Workers with Robots*, BBC News (May 25, 2016), https://www.bbc.com/news/technology-36376966.
[39] Organisation for Economic Co-operation and Development, Skills Outlook 2022: The Digital Transformation of Adult Learning (2022).
[40] Matthew T. Bodie et al., *The Law and Policy of People Analytics*, 88 U. Chi. L. Rev. 981 (2021).
[41] *Supra* note 14.
[42] *Supra* note 16.
[43] Organisation for Economic Co-operation and Development, Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449 (May 22, 2019).

DIGITAL PRIVACY AS A FUNDAMENTAL RIGHT: REVISITING PUTTASWAMY IN THE AGE OF AI & SURVEILLANCE

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Abstract

In an era where our digital footprints reveal more about us than our closest confidants might know, the question of privacy isn't just a legal issue anymore; it is one of the biggest challenges faced by democracy in the 21st century. Privacy has emerged as a principal framework for modern democracy. In the Supreme Court of India case of K.S. Puttaswamy (Retd.) v. Union of India (2017)[3], the apex court declared that the Constitution guarantees the "fundamental right to privacy" under Article 21 (right to life and personal liberty). Justice Chandrachud laid focus on the idea that privacy is carried to another level of human dignity and personal autonomy.[4] The Court overruled certain precedents, which were in contradiction to this proposition, including the MP Sharma v. Satish Chandra[5] and the Kharak Singh v. State of Uttar Pradesh[6], and also traced precedents such as R. Rajagopal v. State of T.N.[7] and PUCL v. Union of India[8], in which some privacy norms had found recognition. Further, the Court also noted that international instruments like Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR) uphold the norm of privacy as a legitimate right. The Puttaswamy judgment thus spun out the concept of privacy into a fundamental right under the articles of the Indian Constitution. This landmark redefinition created a very strict standard of judicial review for laws and state action in the domain of data privacy and surveillance.

Key Words **:** *Privacy, Digital Rights, Consent, Fundamental Rights, Puttaswamy Case*

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[3] K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1
[4] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1, AIR 2017 SC 4161 (India), available at https://translaw.clpr.org.in/case-law/justice-k-s-puttaswamy-anr-vs-union-of-india-ors-privacy/#:~:text=The%20Court%20held%20that%20privacy (last visited June 15, 2025)
[5] MP Sharma v. Satish ChandraA.I.R. 1954 S.C. 300 (India).
[6] Kharak Singh v. State of Uttar PradeshAIR 1963 SC 1295
[7] R. Rajagopal v. State of T.N(1994) 6 SCC 632
[8] PUCL v. Union of India(1997) 1 SCC 301

1. INTRODUCTION: FOUNDATIONS OF THE PRIVACY RIGHTS IN INDIA

"Privacy is not about something to hide. Privacy is about something to protect." — Edward Snowden

Before *Puttaswamy*, Indian courts had given only limited protection to privacy. Early rulings like *M.P. Sharma v. Satish Chandra* (1954) and *Kharak Singh v. UP* (1963)[9] held that no distinct privacy right existed under Article 21. However, later precedents began recognizing facets of privacy, for instance, in the *Rajagopal* and *PUCL* cases, the Court acknowledged informational and telephone privacy as part of Article 21. *Puttaswamy* ultimately harmonized these strands: the nine-judge Bench unanimously held that every individual's privacy is constitutionally guaranteed. The Court anchored privacy in the Indian Constitution on multiple grounds: dignity, autonomy, and the very right to be let alone. As noted above, the majority opined that the Constitution enshrines natural rights (life and liberty) into positive law, and privacy is a "sacrosanct facet" of Article 21, the judgment also stressed that privacy is not an isolated concept but intersects other fundamental guarantees, for instance, it safeguards the core of personal relationships e.g. marriage, procreation, family life and identity issues. In this vein, the Court highlighted how privacy was "at the intersection of Articles 15 and 21," recognizing that aspects like sexual orientation and gender identity implicate both dignity and equality. Thus, by Indian standards, privacy is now as fundamental as life and liberty. *Puttaswamy* explicitly overturned past resistance, declaring that even the colonial-era *Olmstead* "trespass doctrine" approach was obsolete, what matters is protecting people, not just places.[10] In practical terms, this means any state action encroaching on individual privacy must face strict judicial review

1.1 Puttaswamy – Judicial Reasoning and Standards

The *Puttaswamy* judgment involved a careful balance of competing interests. Although arising from a challenge to the Aadhaar biometric ID scheme, the nine-judge Bench addressed privacy in broad strokes. Justice Chandrachud's opinion laid out key legal principles: first, any infringement of privacy must be backed by law i.e. it must satisfy Article 21's basic requirement of being "just, fair and reasonable." Second, the state's action must serve a legitimate and compelling public interest. Third, the intrusion must be proportionate and necessary to that objective. In other words, *Puttaswamy* adopted a three-part proportionality

[9] M.P. Sharma v. Satish Chandra (1954) and Kharak Singh v. UP (1963A.I.R. 1963 S.C. 1295 (India).
[10] Katz v. United States, 389 U.S. 347 (1967), available at https://tile.loc.gov/storage-services/service/ll/usrep/usrep389/usrep389347/usrep389347.pdf (last visited June 15, 2025)

framework: legality, necessity, and proportionality. The Court explained that each restriction must be authorized by clear statute and carefully tailored; sweeping or vague powers would violate Article 21. This tripartite test ensures that the State must show a pressing need and that any invasion of privacy is narrowly circumscribed and the least intrusive available measure.

Under this test, the Court advanced a rich theory of privacy. It described privacy as enveloping not just "secrecy" but also "control" and "autonomy" over personal information and choices. Importantly, the Court stressed that privacy protects personhood and identity, not a cause of privilege or elitism. Thus, privacy rights extend to intimate matters and to informational privacy. Justice Chandrachud observed that "personal intimacies like marriage, procreation, and family, including sexual orientation, are at the core of an individual's dignity", cementing privacy's link to equality (Article 15) and non-discrimination. Indeed, *Puttaswamy* explicitly struck down the logic of *Suresh Koushal v. Naz Foundation*[11], wherein Section 377 IPC (the colonial sodomy law) was upheld because it affected only a "minuscule fraction" of citizens. The Court rejected that majoritarian argument and remitted *Koushal*, paving the way for *Navtej Johar* (2018) to decriminalize homosexuality under Articles 14, 19, and 21. In doing so, *Puttaswamy* underscored that privacy protects even minority rights and identities.

The Bench also paid heed to international standards. Citing Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), it noted that India's constitutional regime should harmonize with prevailing human rights principles. The judgment thus reads as part of a global movement: similar to how the US Supreme Court has invoked the Fourth Amendment's "reasonable expectation" test to guard against intrusive surveillance, *Puttaswamy* embeds privacy in the rule of law for Indian citizens.

In summary, *Puttaswamy* combined natural rights theory (dignity, autonomy) with a rigorous proportionality standard. It held that any infringement of privacy **"must meet the criteria of legality, necessity, and proportionality".** Notably, the Court insisted that "any restriction on fundamental rights must be based on clear, accessible laws". This means ad-hoc executive orders or broad administrative guidelines would be insufficient to justify privacy intrusions – the law must specifically authorize the measure with intelligibility. By framing privacy as an inseparable part of "life and personal liberty" and insisting on exacting scrutiny for digital surveillance, *Puttaswamy* set a high bar for all future laws and policies touching personal data.

[11] Suresh Koushal v. Naz Foundation 2014 (1) SCC 1,

1.2 Post-*Puttaswamy* Developments in India

India's legislation and jurisprudence have grown under the shadow of the Puttaswamy judgment post 2017. Multiple cases have invoked privacy rights, like *Navtej Johar v. Union of India* (2018),[12] wherein the Court struck down the criminalization of consensual same-sex relations, drawing explicitly on privacy, equality, and dignity from *Puttaswamy*.[13] Similarly, *Joseph Shine v. Union of India* (2018)[14] ruled down the marital rape exception, holding that a married woman's autonomy and privacy must be respected in her sexual life. In each case, the Court stressed that personal liberty under Article 21 now protects individual choices that were once considered private matters. Indeed, privacy jurisprudence began to touch diverse areas, from reproductive rights to confidentiality of correspondence. In every instance, *Puttaswamy* loomed large: as SC Observer notes, since 2017 the fundamental right to privacy has been cited as precedent in various landmark judgments, such as *Navtej Johar* and *Joseph Shine*.[15]

The Aadhaar case became a direct challenge to the landmark decision in Puttaswamy. The 5-judge Bench in *Justice K.S. Puttaswamy v. UOI (Aadhaar-II, 2018)* largely upheld the constitutionality of the Aadhaar Act with regard to mandatory ID for welfare and tax purposes, but with a steep set of safeguards: The Court said that Aadhaar data must be confined to being used only for public welfare schemes and not private services. It went on to set down data security standards and privacy guidelines. On a more pragmatic level, the Court tried to balance the State's administrative interests with individual privacy interests. Following the Aadhaar judgment, some state interests in identity infrastructure were recognized, but the Puttaswamy case had constrained such interests: For instance, any further expansion of the Aadhaar linkage for, say, private banks, would have to pass the proportionality test, which is very much alive today. In essence, however, even in the upholding of the Aadhaar regime, the Court emphasized data protection: personal data, including biometric data, cannot be used prima facie.

Legislatively, India has now enacted its first comprehensive data protection law. After years of debate, the ***Digital Personal Data Protection Act, 2023*** *(DPDP Act)*[16] was promulgated in August 2023. This Act marks a major step: as commentators observe, "*Six years after the Indian Supreme Court recognized a fundamental right to privacy, the country finally has*

[12] Navtej Johar v. Union of India (2018) 10 SCC 1
[13] Fundamental Right to Privacy – Supreme Court Observer, *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (Aug. 24, 2017), available at https://www.scobserver.in/cases/puttaswamy-v-union-of-india-fundamental-right-to-privacy-case-background/#:~:text=In%20a%20historic%20decision%20delivered (last visited June 15, 2025).
[14] Joseph Shine v. Union of India 2019) 3 SCC 39
[15] Id
[16] Digital Personal Data Protection Act, No. 22 of 2023, *India Code* (2023)

comprehensive data protection legislation". The DPDP Act sets out obligations for data collection and processing, introduces rights like data access and correction, and creates a Data Protection Board. However, critics note its imperfections. Some scholars argue the Act is *"more about the processing of personal data than…about the right to privacy."* They point out that it grants sweeping powers to government agencies and contains broad exemptions under vague terms like "national security" or "public order," potentially enabling mass surveillance. For example, Section 17 allows state bodies to process any data without consent for public order, but without clear oversight.[17] This has raised concerns that the law falls short of *Puttaswamy*'s requirements: indeed, the IAPP notes that many of India's surveillance tools operate under outdated statutes with no statutory clarity or accountability, in stark contrast to the "stringent adherence to principles of legality, necessity and proportionality" demanded by *Puttaswamy*.[18]

On the ground, India's digital surveillance apparatus has grown rapidly. Secretive programs like "NETRA" (internet traffic analysis), CMS (Central Monitoring System for phone taps), and police facial-recognition projects operate under broad executive orders. High-profile incidents have kept privacy in the spotlight: for instance, the 2021 **Pegasus spyware** revelations showed how journalists and activists could be covertly surveilled via phone hacking. The Pegasus leaks *"shocked the nation,"* revealing the misuse of sophisticated spyware and highlighting the "vulnerability of India's surveillance framework to misuse and lack of accountability".[19] Similarly, a 2019 breach of the Aadhaar database demonstrated the risks of huge centralized personal databases: one analysis noted that such breaches pose threats not only to privacy but even to national security. These events underscore that in India's largely unregulated digital environment, privacy can be easily undermined unless robust legal guardrails are built around technology.

India's regulatory response remains uneven. On one hand, the Supreme Court itself has acknowledged the need for judicial oversight. For example, following the Pegasus scandal, the Court formed a technical committee (led by Justice Chandrachud) to examine digital surveillance practices. In speeches and judgments, some justices have stressed that *Puttaswamy* requires an independent review of hacking and surveillance warrants. On the other hand, legislative initiatives on cyber surveillance and data protection have lagged. The IT Act (2000)

[17] Digital Personal Data Protection Act, No. 22 of 2023, § 17, *Gazette of India*, Aug. 11, 2023 (India).
[18] Pameela George, *India's Surveillance Landscape After the DPDPA*, *IAPP* (Feb. 6, 2025), available at https://iapp.org/news/a/india-s-surveillance-landscape-after-the-dpdpa (last visited June 15, 2025).
[19] Ibid.

and the Telegraph Act (1885), under which such interception is authorized, were never designed with digital privacy in mind. The IAPP report aptly notes these legislative gaps: our surveillance programs still run on "outdated laws…designed for simpler times," with little transparency. The DPDP Act, while new, has yet to be tested against *Puttaswamy*'s proportionality lens. In short, Indian law post-*Puttaswamy* is a work in progress – affirming privacy in theory, but still calibrating how far to limit surveillance in practice.[20]

1.3 Global Perspectives and Emerging Technologies

Privacy now signifies much more than mere juridical jargon, it underlines our very basic human right to dignity, autonomy, and the liberty to be ourselves without surveillance. India's constitutional journey to the Puttaswamy judgment marks a wider global consciousness of these deeply human issues. Globally, legal frameworks recognize that privacy is to be protected is all about upholding human dignity in the age of the internet. The General Data Protection Regulation, 2018 of the European Union, doesn't just control data but provides people with real choices regarding their own information. The regulations like "right to be forgotten" recognize that individuals do deserve second chances, that earlier errors should not make them who they are for the rest of their lives.[21]

Similarly, California's Consumer Privacy Act accepts that an actual human is behind each data point who has dreams, nightmares, and the right to define their digital presence. Such models demonstrate the relevance of the Puttaswamy judgment's central argument: technology must serve humanity, not the other way around. The United States illustrates how legal thought can develop to address human need. Although the Constitution says nothing of privacy, the Fourth Amendment safeguard against unreasonable searches has expanded with our knowledge of human vulnerability. The *Katz v. United States* case ruled that privacy is not a matter of physical places but rather of people having reasonable expectations of solitude.[22] Recent pronouncements, including Riley v. California and Carpenter v. United States, underscore how courts struggle with new technology revealing our deepest thoughts and connections. These incidents are relevant examples that our devices know us better than our closest beings.[23]

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[20]Pameela George, *Id*

[21] T. Saroja Devi, *Digital Privacy – A New Frontier for Fundamental Rights*, *Indian Journal of Integrated Research in Law*, Vol. V Iss. II, at 1751 (Apr. 2025), available at https://ijirl.com/wp-content/uploads/2025/04/DIGITAL-PRIVACY-A-NEW-FRONTIER-FOR-FUNDAMENTAL-RIGHTS.pdf (last visited June 15, 2025).

[22] Carpenter v. United States, 585 U.S. 296 (2018), available at https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf (last visited June 15, 2025).

[23]Riley v. California, 573 U.S. 373 (2014), available at https://supreme.justia.com/cases/federal/us/573/373/ (last visited June 15, 2025).

Around the globe, countries weigh privacy and security in different ways for instance, Canada synthesizes privacy into life and security rights, considering these as mutually entwined human necessities[24], while Brazil's law on data protection is influenced by European models, with individual empowerment at its core. China's surveillance networks, social credit scoring, etc. are the grim example of how technology can reduce human agency and foster climates of permanent self-censorship.[25]

Supreme Court in Puttaswamy learned from these international experiences that privacy protection involves learning from the rich variety of human experience across societies and legal orders. The field of AI, big data, networked devices, and other such technologies promised to actually transform human life beyond what has traditionally been imagined. AI will help doctors diagnose illnesses in their early stages, smart cities may be used in reducing traffic jams, and predictive models are being developed to avoid accidents. Yet, these same technologies also act as abusers since they can cynically reduce individuals to data points and issue life-changing decisions without clarity or compassion. The Puttaswamy judgment, with its focus on the cols of legality, necessity, and proportionality, will therefore constitute the juridical tool that can ensure that technological progress tends towards human welfare rather than its diminution.

As we move further into a more digital world, the question isn't whether to choose technology or privacy, it's how to make technological progress strengthen, not debase, human dignity. India's constitutional enshrinement of privacy in Puttaswamy gives us a start, but its real test is in implementation. The intent behind it is to honour human agency, retain personal autonomy, and sustain the rich fabric of human experience that gives life its value with technological growth and advancements. Protection of privacy is, in the end, a matter of keeping room for human development, innovation, and the inherent right to be faulty, complicated, and beautifully human.

1.4 The Way Forward: Securing Digital Privacy In India's Constitutional Framework

The Puttaswamy ruling is a constitutional turning point that radically re-configures privacy from mere legal doctrine to the underlying structure of democratic government in the increasingly digitalized world, but the true test lies in implementing this pioneering precedent

[24] Office of the Privacy Commissioner of Can., Privacy Laws in Canada, *Office of the Privacy Commissioner of Canada*, https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/ (last visited June 25, 2025).

[25] Genia Kostka, *China's Social Credit Systems and Public Opinion: Explaining High Levels of Approval*, SSRN Elec. J., https://doi.org/10.2139/ssrn.3215138 (2018).

in practical, meaningful ways through comprehensive institutional change in capability across judicial, legislative, regulatory, and democratic accountability. Courts need to establish specialized technical competencies in new technologies while crafting a digital privacy jurisprudence which is cybernetically self-calibrating. Courts must ensure this jurisprudence applies its three-pronged test of legality, necessity, and proportionality on a stricter basis to contemporary challenges posed by artificial intelligence surveillance systems, algorithmic decision-making systems, and large-scale data aggregation practices that put a wanton pressure on an individual's autonomous will. Concurrently, India requires immediate legislative reform through comprehensive surveillance oversight legislation that replaces outdated colonial-era statutes with robust frameworks specifically designed for digital realities, while strengthening the Digital Personal Data Protection Act through clearer exemption criteria and genuinely independent oversight mechanisms that honour *Puttaswamy's* proportionality requirements rather than providing governmental agencies with expansive discretionary powers. Besides, what regulatory bodies must do is develop sophisticated technical competences to sift through the various ingredients of complex surveillance technologies, with the hope of keeping legal oversight on pace with rapid technological advancement, by way of having independent privacy commissioners vested with a lot of legal power and with enough technical expertise to afford meaningful oversight. Lastly, there has to be a transparent democratic accountability mechanism for every surveillance program, thereby providing meaningful public oversight over technologies that directly impinge upon fundamental rights; in its absence, every unconstitutional phrase found in Puttaswamy would be a mere aspirational rhetoric, with Indian citizens trying to make it a lived reality in a landscape increasingly full of surveillance-because in the final analysis, privacy stands as not just a technical challenge but a fundamental democratic imperative that calls for sustained institutional commitment to constitutional values in our interconnected world.

THE SECULAR CLASSROOM:NAVIGATING THROUGH THE CROSSROADS OF FAITH AND FREEDOM IN EDUCATIONAL INSTITUTIONS

Essa Aggarwal [1]& Rakshit Aggarwal[2]

Abstract

The guiding values of India's educational system draw inspiration from the constitutional vision articulated in the Preamble. The enshrined ideals of justice, equality, and fraternity constitute India into a secular nation against the backdrop of constitutional values. It shapes the character of the nation in both an inclusive and diverse space. This paper examines the paramount importance of faith and freedom in educational institutions. The varied secular philosophies and spectrum of religious accommodations in public schools have highlighted issues among citizens of society. The social attributes also impact the enforcement of uniform policies and have a disproportionate impact on religious minorities. This paper navigates numerous municipal jurisdictions through the comparative lens of secular democracy. The international discourse among nations has distinguished secular mandate in public educational settings to safeguard religious identity and individual autonomy. It also critiques the Essential Religious Practices test developed by the apex court in India and highlights the scope of constitutional principles in maintaining a secular classroom. The balanced approach between secularity and liberty gives rise to the democratic consciousness. This paper delves into the realm of educational space where faith and freedom play a crucial role in upholding the constitutional values. The crossroads between faith and freedom elements will shed light on the navigation of the future paths for such secular classrooms.

Keywords: *equality, dignity, discrimination, constitutional morality, inclusivity, secularism*.

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1. INTRODUCTION

"School is a public place, and it is essential to ensure discipline in schools. But discipline not at the cost of freedom, not at the cost of dignity."

- **Hon'ble Mr. Sudhanshu Dhulia, J.**[3]

The classroom has long been regarded as a crucible where young minds are nurtured not only in knowledge but also in values that shape democratic citizenship[4]. Educational institutions, particularly schools and pre-university colleges, play a critical role in realizing the right to education. It provides a structured environment for academic growth, and at the same time, it helps in shaping young minds at an impressionable age, offering them their first deep exposure to the country's rich diversity. These are the spaces where students must be guided and supported to embrace the constitutional values of tolerance and inclusivity, encouraging respect for those who may speak different languages, have varied cuisines, or wear distinct clothing. This period of their lives presents an ideal opportunity to cultivate empathy, understanding, and sensitivity towards varied cultures, ethnic groups, and religions and to not only recognize diversity but to celebrate it[5]. However, as institutions of authority, these educational institutions may also place certain individuals, particularly those from religious minorities, in situations of heightened vulnerability. In pluralistic societies like India, where diversity of religion, belief, and practice is both a strength and a challenge, the question of how secularism is to be lived out in educational spaces becomes deeply significant. This inherent tension within the environment underscores the need for robust safeguards that uphold individuals' rights to freedom of religion, fostering an educational atmosphere that respects diversity and supports every student's dignity and identity, thereby advocating secularism in educational institutions. The concern regarding restrictions on religious symbols, like headscarves, turbans, or crosses, has often ignited passionate discussions, legal battles, and societal divisions. The above instances highlight a challenging dilemma, i.e., how can educational institutions uphold the essential preambular perception of secularism while respecting students' right to religion and to express their faith?[6] In diverse societies like ours, where religious beliefs are deeply woven into the societal fabric so much as they form part of the personal identity, this balancing

[3] Aishat Shifa v. State of Karnataka, (2022) 5 SCR 426.
[4] *Bijoe Emmanuel v. State of Kerala*, 1986 SCR (3) 518 (recognizing schools as formative spaces for constitutional values and holding that compulsion to sing the national anthem violated religious freedom under Article 25).
[5] National Council of Educational Research and Training, *National Curriculum Framework* 4–5 (2005), https://ncert.nic.in/pdf/nc-framework/nf2005-english.pdf.
[6] Rajeev Bhargava, *The Distinctiveness of Indian Secularism*, in Secularism and Its Critics 20–25 (Rajeev Bhargava ed., 1998).

act requires careful consideration of both legal spirits and the social impacts of such policies. Ever since the hijab controversy broke out in India, it garnered national and transnational attention as young female Muslim students were barred from wearing hijabs in classrooms, which raised questions about religious expression and rights within the arena of the educational environment. The public discourse within India and even internationally has largely framed this issue as one kind of discrimination against a specific religious minority community that overlooks the specific context and nuances of the situation[7]. The legal framework governing such restrictions varies significantly across different jurisdictions. It can be said that countries like India and the United States adopt more nuanced approaches that allow for religious expression in educational settings, as long as it does not disrupt the educational process. These countries' policies are nowhere close to or even remotely comparable to France's hijab ban, wherein the nation's strict adherence to *laïcité* (state secularism) has resulted in a comprehensive prohibition on the public display of religious symbols.

This article explores the complex and often debated intersection of secularism and religious freedom within educational institutions, particularly focusing on how these constitutional principles are interpreted and implemented in schools and pre-university settings. The inquiry becomes especially complicated in pluralistic societies, where religion is not just a personal belief system but a deeply ingrained part of culture, community, and identity. Through a critical examination of landmark judicial decisions such as Bijoe Emmanuel and the Karnataka hijab case in India, along with similar cases from jurisdictions like France, the United States, and Canada, this article aims to understand how legal systems navigate the perceived tension between institutional secularism and individual rights to religious expression. The broader implications for social cohesion, identity, and inclusive education will also be explored, offering a nuanced understanding of how secularism and religious freedom coexist or particularly clash within the educational environment.

[7] Tarunabh Khaitan, *A Theory of Discrimination Law* 139–41 (Oxford Univ. Press 2015).

2. THE SCALES OF JUSTICE: NAVIGATING SECULARISM AND RELIGIOUS FREEDOM

The philosophy of secularism is not new to India, as "*sarva dharma sambhava"*, i.e., the principle of tolerance for all religions, has deep historical roots in our country[8]. This idea finds expression in ancient scriptures such as the *Yajur Veda*, *Atharva Veda*, and *Rig Veda*, which uphold the unity of truth across diverse expressions[9]. The principle was also exemplified by Mughal Emperor Akbar, who, through his syncretic initiative *Din-i Ilahi*, sought to promote religious harmony across the Indian subcontinent.[10]

In recent years, the balance between secularism and religious freedom within the realm of educational institutions has become a focal point and a contentious subject of constitutional and societal scrutiny. It is imperative to maintain a delicate equilibrium between principles of neutrality and inclusivity in public education while safeguarding the individual right to freely express religious beliefs, as it is commonly said that *"There ought not to be any barter of fundamental rights for the enjoyment of other rights or privileges."*[11] While the term "secularism" was explicitly inserted in the Preamble of the Constitution of India through the 42nd Amendment Act of 1976[12], the underlying principles of secularism were inherent in the Constitution from its inception. The Constituent Assembly on December 6, 1948, deliberated on the proposed Article 19 (now Article 25 of the Indian Constitution) wherein Pandit Lakshmi Kanta Maitra elaborated on his interpretation of secularism and highlighted that unlike the Western model that advocates a complete detachment of religion from state affairs, India adopts a contextual form of secularism that seeks to balance religious accommodation with constitutional neutrality.

> *"… By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular*

[8] S.R. Bommai v. Union of India, 1994 (3) SCC 1 (per Sawant, J.) (secularism is part of the basic structure; citing *Sarva Dharma Sambhava* as the Indian model of secularism).
[9] *Rig Veda*, bk. 1, hymn 164.46 ("Ekam sat vipra bahudha vadanti", i.e., Truth is one, sages call it by many names); *Yajur Veda* 40.6; *Atharva Veda* 12.1.45.
[10] Irfan Habib, *Akbar and His India* 71–75 (Oxford Univ. Press 1997)
[11] *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1
[12] The Constitution (Forty-Second Amendment) Act, 1976, No. 44, Acts of Parliament, 1976.

religion in the State will receive any State patronage whatsoever…. This I consider to be the essence of a secular State."[13]

The Constitution's core values of equality, fraternity, and justice embody the spirit of secularism. The term 'secularism' in the context of education refers to the principle of maintaining a neutral public sphere free from religious endorsements or biases. This principle aims to ensure that educational institutions operate as inclusive spaces where all students, regardless of religious backgrounds, can access learning without feeling alienated or favored based on their beliefs. Secularism in educational institutions is seen as a means of protecting equality, preventing discrimination, and fostering a harmonious environment where diversity among young minds can thrive. Religious freedom, on the other hand, is a fundamental right guaranteed under most municipal constitutions, particularly Article 25 of the Constitution of India[14] which ensures that every citizen is entitled to the fundamental right to freely practice, profess, and propagate their religion. It is a testament to India's commitment to religious pluralism, which underscores the idea that a true democracy must accommodate the diverse beliefs and practices of its citizens, regardless of their religious affiliation.

Global human rights frameworks, including the Universal Declaration of Human Rights (hereinafter referred to as 'UDHR'), affirm the right to freedom of thought, conscience, and religion. This encompasses the liberty to adopt a religion or belief of one's choice and to express it through worship, observance, practice, and teaching.[15] The United Nations Human Rights Committee, in its General Comment No. 22, has clarified that this right encompasses not only traditional ceremonial practices but also broader cultural and religious customs, including dietary regulations and the wearing of specific clothing or headgear linked to one's faith. This right extends to the public sphere, including educational institutions, allowing individuals to express their religious identity through religious clothing and attire, such as hijabs, turbans, crosses, or kippahs, which often hold significant personal and cultural meaning. uch expressions are vital components of individual identity and, as such, merit protection in both private and public domains.

[13] Constituent Assembly Debates, India, Dec. 6, 1948, https://www.constitutionofindia.net/debates/06-dec-1948/ (last visited Nov. 15, 2024).
[14] India Const. art. 25.
[15] Universal Declaration of Human Rights, art. 18, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III), at 76 (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 18.

3. THE GLOBAL DIALOGUE: STANCE OF SOVEREIGN STATES

Critics have long argued that restricting religious symbols in educational institutions borders the students' ability to express their identities and infringes upon their pertinent right to hold religious beliefs. This challenge of protecting religious expression while preserving secularism is an enduring tension that has prompted varied legal responses across the globe in many countries.

3.1 India

In a country like India, the delicate balance between secularism and religious freedom is a tangled socio-legal issue, often subject to judicial interpretation. Several landmark cases have shaped the understanding of the positive landscape of Indian secularism[16] and, meanwhile, addressed the state's power to regulate religious practices in the interest of public order and health[17]. The Supreme Court has consistently sought to balance individual religious liberty with the broader public interest, often relying on the notion of '*essential religious practice'* (hereinafter referred to as "ERP") to delineate the scope of permissible religious conduct. By carefully navigating this intricate legal landscape, India strives to uphold both the diversity of its religious traditions and the secular principles that underpin its democratic framework and that do not violate the secular fabric of the nation. Amongst the most important cases is the latest judgment of *Aishat Shifa v. State of Karnataka*[18]. It all started in 2022 when the State Government of Karnataka issued an order to government educational institutions stating that each institution must follow a common uniform policy. The government granted the right to choose a uniform policy for the students of accredited educational institutions under S.145(1) of the Karnataka Education Act, 1983, by emphasizing that there has been an increasing trend of students wearing religious attire instead of the prescribed uniform.[19] It was argued that this disturbed equality and public order within schools, and thus, it should be banned. However, the controversial ordeal occurred when one of the pre-university colleges for girls in Udipi, Karnataka, denied the entry of Fatima Bushra, a young Muslim girl student, because she was dressed in hijab on the grounds of infringement of the Uniform Policy. In some instances, women students were allowed entry into the institution but were segregated from other students and attended classes separately. The challenge was put forth by young female Muslim students on the grounds of violation of the right to education, equality, and discrimination based on

[16] Supra note 2.
[17] Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731;
Aruna Roy v. Union of India AIR 2002 SC 3176
[18] Supra note 1.
[19] Karnataka Education Act, No. 1 of 1995, § 145(1).

religion when the Karnataka High Court's 2022 decision upheld a ban on hijabs in government-run educational institutions, arguing that the prohibition did not violate the constitutional guarantee of religious freedom because the hijab was not considered an ERP in Islam. When the Hon'ble Apex Court was posed with this question in appeal, it took a rather surprising approach by giving a split verdict on the issue, with both the Hon'ble judges on the bench taking a polarizing stance on the issue. Hon'ble Mr. Justice Hemant Gupta, while upholding the High Court's decision, argued that though the right to religion is fundamental, it is subject to reasonable restrictions. He emphasized the importance of maintaining uniformity and discipline in educational institutions. He stated that the government order does not come into conflict with the state's constitutional obligation to promote literacy. It simply enforces a uniform dress code for students and does not restrict access to education for female students. The principle of secularism applies to all citizens equally. Allowing a particular religious community to display its religious symbols may undermine the foundational principle of secularism by creating a perception of preferential treatment. Therefore, the government order cannot be considered a violation of secular principles or the objectives of the Karnataka Education Act of 1983.[20] On flip side of the coin was Hon'ble Mr. Justice Sudhanshu Dhulia, who gave his dissenting opinion and argued that the hijab is an integral part of a Muslim woman's religious identity and expression. He emphasized that the state's interest in maintaining uniformity cannot override a person's fundamental right to religion, which also violates the essential right to education of young Muslim women. He firmly asserted that a student's decision to wear a hijab, even inside a classroom, must be respected and not restricted. For some young women, particularly from traditional or conservative households, wearing a hijab might be the sole condition upon which their families permit them to pursue formal education. In such contexts, the hijab serves not merely as a religious symbol but as an essential enabler of educational access. Mandating that a pre-university student remove her hijab before entering school does more than impose a dress code; it represents a grave intrusion upon her right to personal autonomy, privacy, and dignity. More significantly, it risks violating her constitutionally protected right to education by placing undue barriers rooted in appearance rather than merit or conduct. Such actions violate Articles 19(1)(a) and 21 of the Indian Constitution. The right to dignity and privacy is inherent and cannot be compromised, even within the confines of a school, as it is not a "derivative right", as suggested by the High

[20] Supra note 1.

Court.[21]This case highlights the complex and often conflicting nature of religious freedom and secularism in India and raises concerns that the divergent opinions of the judges underscore the nuanced and multifaceted nature of this issue, which requires finality in the times to come, awaiting a larger bench judgment on this issue.

3.2 United States of America

While the 1st Amendment of the U.S. Constitution protects religious freedom, the Supreme Court has often struggled to reconcile this right with the Establishment Clause, which prohibits government endorsement of a specific religion. Several significant cases have shaped the legal landscape for religious expression in schools.[22] Among these, the primary case has been *West Virginia State Board of Education v. Barnette*[23], wherein the Supreme Court of the U.S. upheld the right of students to abstain from the Pledge of Allegiance, reinforcing the importance of respecting individual conscience. While these cases primarily dealt with religious practices, they also have broader implications for exhibiting religious symbols. For instance, in *Santa Fe Independent School District v. Doe*[24], the Court held that student-driven and initiated prayer at high school football games contravened the Establishment Clause. This decision has been cited in discussions about the permissibility of religious symbols in public schools. In another case named *Tinker v. Des Moines Independent Community School District*[25], the Federal Court held that the students do not surrender their freedom of speech at the school entrance. The school can limit the speech and expression of students in the context of religion only if the school discipline is disrupted materially or substantially.

3.3 France

France represents one of the most assertive models of secularism, grounded in the constitutional principle of ***laïcité***, which aims to firmly separate religious expression from public institutions and spaces. This model has led to state-enforced religious neutrality, especially within public institutions such as schools. In 2004, the French government introduced legislation that prohibits the display of prominent religious symbols within public school settings. This measure includes items such as Islamic headscarves, Sikh turbans, Jewish

[21] Supra note 1.
[22] Wisconsin v. Yoder, 406 U.S. 205 (1972); Santa Fe Independent School District v. Doe, 503 U.S. 290 (2000).
[23] 319 U.S. 624 (1943).
[24] 530 U.S. 290 (2000).
[25] 393 U.S. 503 (1969).

kippahs, and oversized Christian crosses.[26] The French government justified this restriction on the grounds of upholding secularism, promoting gender equality, and maintaining public order and cohesion in educational environments. Further extending this approach, France passed Loi n° 2010-1192 in 2010, which bans the concealment of the face in public spaces**,** effectively prohibiting the **burqa** and **niqab**[27]. The government claimed that the measure was necessary for public security, social integration, and gender equality. However, the law sparked considerable international concern over whether it infringes upon religious freedoms and disproportionately targets Muslim women. However, as a signatory to the ICCPR, France is obligated to uphold and apply its provisions domestically. In 2018, the UNHRC ruled in favor of two women, Miriana Hebbadj and Sonia Yaker, who argued that the French hijab ban violated their rights to equality and religion under the ICCPR[28]. The Committee recognized the wearing of a burqa or hijab as a display of religious belief. Despite such international rulings, France has not amended the laws and maintains its commitment to laïcité, defending its policies as essential to preserving its secular republican identity.

The French model thus presents a rigid interpretation of secularism**,** wherein uniformity in public space is prioritized over accommodation of diversity**,** raising important concerns about the intersection of religious freedom, state neutrality, and gender rights**.**

3.4 United Kingdom

The United Kingdom follows a model of accommodative secularism that formally recognizes and permits limited religious expressions within public institutions, including educational settings. However, such accommodation is not absolute. While the UK does not have a written constitution, it is bound by its statutory human rights commitments, particularly the Human Rights Act 1998**,** which incorporates the European Convention on Human Rights **(**hereinafter referred to as **"**ECHR") into domestic law. Under Article 9 of the ECHR, an individual is entitled to the liberty of thought, conscience, and religion, which encompasses the right to express their beliefs through worship, instruction, practices, and rituals.[29] Nonetheless, this right is not absolute and may be lawfully restricted to protect public safety, maintain order,

[26] Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics - *Secularity and Conspicuous Religious Symbols in Schools*. [Law 2004-228 of Mar. 15, 2004], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190 (Fr.).
[27] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010], J.O., Oct. 12, 2010, p. 18344 (Fr.).
[28] International Covenant on Civil and Political Rights arts. 18, 26, Dec. 16, 1966, 999 U.N.T.S. 171.
[29] Human Rights Act 1998, c. 42, sch. 1, pt. I, art. 9 (UK).

safeguard health or morality, or to ensure respect for the rights and freedoms of others.[30] The UK legal system has upheld context-sensitive restrictions on religious expression, especially within public institutions such as schools, airports, and law enforcement agencies. For instance, Sikh individuals are legally exempted from wearing motorcycle helmets under the Motorcycle Crash Helmets (Religious Exemption) Regulations 1976, and the Employment Act 1989 allows Sikhs to wear turbans in certain workplaces, including construction sites[31]. These accommodations are grounded in historical respect for religious minorities, particularly the Sikh community. However, this does not translate into a blanket permission for all forms of religious attire or symbols in educational institutions. British schools, especially those governed by uniform policies, retain significant discretion in regulating student dress codes. Courts have upheld school authorities' decisions in several instances where religious garments were restricted in the interest of school discipline or uniformity. In *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School*[32], the House of Lords held that the refusal to allow a student to wear a jilbab did not violate her article 9 rights because the school had taken reasonable steps to accommodate diversity while maintaining a uniform policy.[33] Further, security-related restrictions also impact religious practices. For example, although the Sikh kirpan is a religious article of faith, its carriage is generally prohibited in airports and on airplanes, following the UK's aviation security laws and anti-terror regulations[34].

While exceptions exist in certain public spaces, these are narrowly tailored and usually require proof of religious necessity, proportionality, and absence of risk. The UK's legal framework thus reflects an attempt to balance religious freedom with public order and institutional integrity. It accommodates religious diversity, but within carefully regulated boundaries.

3.5 Turkey

Turkey follows a model of assertive secularism**,** which places a strong emphasis on the exclusion of religious affiliation from the operations of the public domain, especially within government-funded institutions like public universities. This model stems from Turkey's

[30] Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221.
31 Motor-Cycle Crash Helmets (Religious Exemption) Regulations 1976, SI 1976/2265.
32 [2006] UKHL 15, [2007] 1 A.C. 100
33 Employment Act 1989, c. 38, § 11
34 Department for Transport, Aviation Security Regulations, https://www.gov.uk/government/publications/aviation-security (last visited January 14, 2025).

historical commitment to *laiklik*, a strict form of secularism rooted in Kemalist ideology that views religion as a private matter and aims to safeguard the neutrality of the state by minimizing religious influence in public institutions. The ECHR, in *Leyla Sahin v. Turkey*[35], upheld Turkey's decision to ban headscarves in universities, arguing that the restriction was necessary to maintain secularism and gender equality. While the Court acknowledged that the ban limited individual freedom, it deemed the measure proportionate to achieve the legitimate aim of preserving secular public spaces. Critics, however, argue that such rulings often disproportionately affect minority communities, forcing them to suppress their identities to conform to state-imposed norms.

4. BEYOND THE CLASSROOM: HOW THESE RESTRICTIONS SHAPE STUDENT IDENTITY AND AFFECT SOCIAL HARMONY

The right to privacy extends to personal autonomy, including the freedom to make individual choices regarding one's attire and appearance. For certain groups, distinctive dress styles, such as long hair or turbans, are protected not only as an aspect of privacy but also as a fundamental right guaranteed by religious freedom. This right, rooted in religious belief and practice, extends beyond the provisions of Article 25 of the Constitution. Religious symbols, including hijabs, turbans, crosses, and kippahs, often hold profound significance for individuals, especially students. They serve as expressions of faith, culture, and personal identity. Restricting these symbols can alienate students from their cultural and religious roots, creating feelings of exclusion and inferiority within the school environment. India, being a signatory of the Convention on the Rights of the Child since December 11, 1992, is committed to respecting children's freedom of thought, conscience, and religion. This right, subject to certain limitations, includes the freedom to manifest one's religion or belief. Consequently, restrictions on religious attire, such as hijabs, turbans, or crosses, could potentially infringe upon municipal and international human rights conventions.[36]

Cultivating a sense of communal harmony within the school is paramount. Implementing a standardized and uniform dress code may serve as a means to reduce visible distinctions arising from ethnic, religious, or socio-economic backgrounds, thereby promoting a sense of unity. However, it is crucial to recognize that our society is committed to ensuring freedom for all

[35] 44 Eur. H.R. Rep. 99 (2005).
[36] Convention on the Rights of the Child, art 14.

individuals, and thus, putting such restrictions at such a young and impressionable age may often lead the children to face a situation wherein they are torn between embracing aspects of the mainstream culture acceptable to the larger society or preserving their own unique religious practices, which is a question pertinent in any democracy. The Supreme Court, in its landmark case, has held that a true democracy allows even the smallest minority to express its identity within the constitutional framework.[37] Therein, Jehovah's Witness students refused to sing the National Anthem due to religious conviction, despite showing respect during its playing. In the case of Aishat Shifa,[38] also, the question was not about the core principles of democracy but rather whether an educational institution, having mandated a uniform policy, can enforce its wearing by all students to maintain uniformity and equality. The petitioners maintained that the act of wearing a hijab was integral to the practice of their faith and protected under the right to freedom of religion and that prohibiting it, even for a short period during school hours, violates Articles 19[39] and 25[40] of the Indian Constitution and undermines the Islamic community's faith. *Baroness Hale of Richmond* referred to Para 98 where he expressed his views that a compulsory policy prohibiting veiling by women in state educational institutions could offer a significant prospect for young girls to prioritize their educational aspirations over patriarchal familial constraints.[41] At the same time, it could also help the families understand that access to state education is contingent upon rights to equality and freedom. Conversely, such a ban could infringe upon the liberal principles of individual autonomy which might deter orthodox parents from enrolling their girl child in state schools for the fear of the risk of heterogenization of cultural identity. Therefore, implementing such restrictions upon the display of religious symbols arguing the right to equality in educational settings is a multifaceted issue that requires careful consideration of the equilibrium between these competing policy priorities within a specific social context. France's strict secularism, or *laïcité*, is another prominent example of how restrictions on religious symbols can profoundly affect identity and dignity. The French Law[42] prohibits wearing identifiable religious symbols in educational institutions. This policy has been upheld by the French Constitutional Council as consistent with the nation's commitment to secularism. However, it has drawn criticism for disproportionately targeting Muslim students, particularly girls wearing hijabs, and for framing religious symbols as threats

[37] Supra note 7.
[38] Supra note 1.
[39] India Const. art. 19.
[40] Supra note 3.
[41] Frances Raday, Culture, Religion, and Gender, 1 Int'l J. Const. L. 663 (2003).
[42] Supra note 17.

to social cohesion. Such policies, while ostensibly promoting neutrality, often ignore the personal and social impact on students forced to choose between their faith and education.

5. DEBATING RELIGIOUS FREEDOM IN SCHOOLS: THE ARGUMENTS THAT DIVIDE AND UNITE

On one side of the debate, proponents argue that such restrictions preserve the secular character of educational environments, fostering a neutral space where students can engage with each other without the visible markers of religious difference. On the other hand, critics contend that these limitations infringe upon the individual right to express religious identity, risking exclusion and discrimination, particularly for minority groups.

In the controversial Hijab Case[43], the dress code signifies the religious symbol of Islam, and restrictions on such liberty hamper secular fundamentalism. The ERP test is rooted in Article 25[44] of the Indian Constitution, which safeguards against the potential conflict between religious practices and the state's obligations regarding public order, morality, and health. However, the Attorney General argued that the preamble of the Karnataka Education Act explicitly aims to cultivate a secular environment, challenging the validity of certain religious practices within educational institutions -

"Students should not be allowed to wear identifiable religious symbols or dress codes catering to their religious beliefs and faith. Allowing this practice would lead to a student acquiring a distinctive, identifiable feature which is not conducive for the child's development and academic welfare."

There are some tests that satisfy the conditions to fulfill the criteria for ERP –

(i) The practice must be integral to religion.

(ii) If the practice is not followed, it will fundamentally alter the tenets of religion itself.

(iii) The religious practice must have arisen before its formal establishment and evolved harmoniously with it.

(iv) The practice must have a binding nature.[45]

[43] Supra note 1.
[44] Supra note 3.
[45] Essential Religious Practice Test, India, LiveLaw.in, https://www.livelaw.in/top-stories/state-hasnt-banned-hijab-says-karnataka-ag-if-institutions-permit-will-you-object-high-court-asks-192457 (last visited Nov. 15, 2024).

The Supreme Court held that having specific food and wearing a dress does not fall under the ERP Test.[46] The practices protected under Article 25 are integral to the religion. It is incumbent upon the petitioners to establish that the practice of wearing a hijab qualifies as an essential religious practice, mandated by the tenets of Islam. While a practice may be religious, it may not necessarily be an essential and integral part of the religion. Only the latter is protected by the Indian Constitution. Alternatively, Home Minister Araga Jnanendra asserted that institutions should enforce standard dress codes to foster a sense of national unity among students in schools and colleges.[47]

If an educational institution refuses to admit a student based on dyed hair color, e.g., red or grey, it will not violate Article 14[48], as some of the attributes protected under Article 15[49] must be immutable in nature, like sex or race. In case of its applicability, it mandates to form a substantial difference in person. In contrast, the right to religion as an attribute is not immutable, but it brings a 'fundamental choice'. The key facets of equality are equal treatment, non-discrimination, proportionality, and equality of opportunity. Similarly, the practice of wearing hijab has existed since time immemorial and is also part of religious identity, and the restrictions on the same meant discrimination against them.

The Karnataka government has not mentioned any particular religious clothing in its order to bring forth a uniform policy. This point leads to the argument of how it could be considered discriminatory. Here comes the concept of indirect discrimination, where impact plays a pivotal role over intention. The impact of the policy took place on Muslims, especially Muslim women. A hijab-wearing Muslim women were indirectly discriminated by the state on the basis of religion i.e., Muslim and being Muslim women. Does it not violate a person's right to fundamental choice, individual autonomy, and physical integrity?

The interim order that was passed by the constitutional court to restrain religious attires in classrooms has been misused by the anti-social elements and also educational institutions in other regions to prevent Muslim girls from wearing their Hijab. In the recent Bombay HC

[46] *AS Narayana Deekshitulu v. State of Andhra Pradesh*, (1996) 9 SCC 548.
[47] Hijab Row: Karnataka Govt Sets Up Expert Committee, Hindustan Times, https://www.hindustantimes.com/india-news/hijab-row-karnataka-govt-sets-up-expert-committee-101643224367207.html (last visited Nov. 15, 2024).
[48] India Const. art. 14.
[49] India Const. art. 15.

judgment, Mumbai's NG Archarya College & DK Maratha College have banned all religious symbols like hijab, burkas, caps, stoles, etc., in their uniform policy. Their defense is that they were not targeting any particular religion and restricted only those attire that are not part of the fundamental right to religion.[50] Then, some 40 students from J&K studying in the Hassan Institute of Medical Sciences, a nursing college in Karnataka, alleged that they were restricted from keeping their beards to attend the lectures.

Why do students have to choose either religion or education? They were restricted from practicing their communities' faith; if the constitutional court of South Africa could allow Indians to wear a nose ring in school, then why not India itself for all communities?[51] If Sikhs are allowed to wear turbans in the army, then why not a person having religious symbols attend educational institutions? The state has come up with the ground of disturbing public order, but how a quiet practice of religion, which is a headscarf can disturb the public order? The Madras High Court also held that the headscarf is an essential part of religion when Muslim women clad in burqas/purdahs are photographed in elections.[52]

Former Prime Minister of India, Mr. Atal Bihari Bajpai once said – *"Yeh Sarkare aayegi, jayegi, Partiyan Banegi, Bigdegi, magar ye desh rahna chahiye, is desh ka loktantra bana rhna chahiye."*

Therefore, the democratic framework of India must be governed by the ideals of Justice, Liberty, Equality, and Fraternity that provide consciousness of people and secure their rights. Dr. K.M. Munshi, in Constituent Assembly Debates, stated that religious practices should be confined to the private sphere, while public life and governance must adhere to secular principles. A harmonious balance between individual religious liberty and the collective good of the nation is essential for the advancement of society.[53]

[50] *Zainab Abdul Qayyum Choudhary & Ors. v. Chembur Trombay Education Society's NG Acharya and DK Marathe College*, WP(L) No. 1773 of 2024.
[51] *MEC for Education: Kwazulu-Natal v. Navaneethum Pillay*, 2007 (3) BCLR 287 (CC).
[52] *M. Ajmal Khan v. Election Commission of India* (WP No. 26841 of 2006)
[53] Constituent Assembly Debates, India, Nov. 23, 1948, https://www.constitutionofindia.net/debates/23-nov-1948/ (last visited Nov. 15, 2024).

6. CONCLUSION – THE WAY FORWARD

"Let knowledge, like sun, shine for all. There should not be any room for narrow-mindedness, blind faith and dogma. For this purpose also, if the basic tenets of all religions over the world are learnt, it cannot be said that secularism would not survive."

- HON'BLE JUSTICE HEMANT GUPTA[54]

India's tryst with destiny, which commenced on August 15, 1947, was marred with concerns about ensuring unity and integrity in a nation at its embryonic stage while guaranteeing equality and liberty to various religious groups. It is said that when freedoms are universally guaranteed, the liberties of even the most marginalized minority become the liberties of the majority. Religious freedoms exhibit significant overlap with other fundamental human rights. Religious freedoms can be considered as extensions or even subsets of broader liberties. Yet, despite the apparent overlap with other liberties, the enforcement of religious freedoms is often complicated by religion's unique relationship with society.

The principle of equality before the law forms the cornerstone of any sovereign legal order. A uniform legal framework, applied consistently across all communities irrespective of religious or ethnic identity, is often regarded as a defining attribute of national unity, sovereignty, and institutional strength. A diverse legal framework, on the other hand, can be perceived as a manifestation of weakness and vulnerability. In such a situation, a *Uniform Civil Code* can act as a safeguard against the misuse of religious differences for political gain. By preventing the exploitation of communal sentiments, UCC can foster democracy and national unity. Policymakers, educators, and parents must work collaboratively to develop policies that respect the rights of all students, regardless of their religious beliefs. By promoting interfaith dialogue, fostering tolerance, and creating inclusive learning environments, we can ensure that our educational institutions remain beacons of knowledge, understanding, and unity. In a nutshell, achieving harmony between faith and freedom is essential for fostering an inclusive and equitable educational environment.

[54] Supra note 1.

PREVALENCE OF SUPERSTITIONS IN INDIA – A SOCIO-LEGAL ANALYSIS

Divya D.V.[1]

Abstract

In India, superstition is a deeply entrenched aspect of cultural and religious life, reflecting a wide range of beliefs in supernatural forces and phenomena. These beliefs, while often rooted in historical and cultural traditions, can sometimes lead to harmful practices and violations of human rights. From ritualistic abuses and exploitation under the guise of black magic to discriminatory practices against marginalized groups, superstitions can have grave adverse impact on individuals and communities. The legal regulation of superstition in India presents a complex challenge. At the same time, India's Constitution guarantees freedom of religion and the right to cultural practices, in a way helps the social conscience to tolerate the practices within the realm traditional beliefs. On the other hand, the need to address and prevent practices that be a reason for a number of rights violations because of the practices like witch hunts, ritualistic violence, and other forms of exploitation, underscores the necessity for legal intervention. Despite the deeply entrenched nature of superstitions in Indian society and their potential to cause significant harm, the legal regulation of superstition remains inconsistent and fragmented across the country. Superstitions can result in practices that infringe upon individual rights and dignity, and legal frameworks may need to better address these human rights concerns. The primary research problem is to identify and address the challenges and gaps in the existing legislative and administrative context for regulating superstitions in India, aiming to develop a more cohesive and effective approach. This paper analyses the existing legal framework, its lacuna if any. Constitutional inconsistencies and challenges in the implementation of Anti-superstition laws.]

Keywords*: Superstitions, witch-hunting, harmful practices, ritualistic abuses, black magic etc.*

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"*Superstition is the belief in supernatural causation leading to certain consequences of an action or event, or the belief in the existence of certain natural forces which cannot be explained by natural law*."

- Carl Sagan

1. INTRODUCTION

Perspectives of Superstitions can be seen among all human societies.[2] It is found in all cultures with a belief on either good or bad luck.[3] Superstitious believes have its roles in every societies and hence these dogmas remain to exist.[4] Practically everybody has some practice of belief or faith connected to superstition. Sometimes, longstanding customs are considered as superstitions, albeit it is believed that it may have a scientific basis. Those in positions of power can misuse these customs, turning them into laws, spreading misinformation, or exploiting them for personal gain.[5] Additionally, we might cultivate their own personal superstitions; for instance, a horse gambler might believe that black horses are lucky runners. It is to be noted that superstition is a practice often lack any kind of reasonableness or rationality.[6] For a long time, the belief in magic or astronomy was not considered as superstitions and non-scientific one.[7]

2. DEFINITION AND TYPES OF SUPERSTITIONS

The word Superstition has been coined from the Latin word "superstitio", which means excessive fear of the god.[8] According to Collins English Dictionary, superstition "is an irrational belief usually founded on ignorance or fear and characterized by obsessive reverence for omens, harms, etc."[9] Thus it is to be understood that superstitions are simply the faith in paranormal elements that one incident resulted in the reason of another without having any physical linking between the two incidents essentially astrology, witchcraft etc. that contradicts natural science.[10] Superstitions may be based on one's religious belief, because of different cultural practice or may be even strictly personal to any individual. These belief or practices

[2] Frazer, J.G, THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION (1922). *See* also Abraham T. Kovoor, *Under – development and Superstitious Beliefs*, ECONOMIC REVIEW 29, 30 (1976).
[3] Rabiei, K., Ghasemi, V., & Arzani, H, *Superstition and Cultural Diversity-Case Study: Isfahan Province, Iran*, MJSS 4 (4), 73 (2013).
[4] Beck. J., Forstmeier, W, *Superstition and Belief as inevitable by-products of an adaptive Learning Strategy. Human Nature*, 18, 35 (2007).
[5] Medical News Today, available at https://www.medicalnewstoday.com/articles/326330 (last visited Jan 1. 2025).
[6] Britannica available at https://www.britannica.com/topic/superstition (last visited 1 Feb., 2025).
[7] Perkins, M, THE REFORM OF TIME: MAGIC AND MODERNITY (2000).
[8] The column of curae, available at https://thecolumnofcurae.wordpress.com/2020/04/10/absurd-superstition-still-a-reality-in-the-indian-society/ (last visited 31 Jan., 2025).
[9] COLLIN 'S ENGLISH DICTIONARY AND THESAURUS 1197 (2000).
[10] Yaya Dissa, Togo Adjouro, Aminata Traore & Aly Yorote, *A Case Study of the Effects of Superstitions and Beliefs on Mali Socioeconomic Development*, IJAA 30(2017).

also categorized as causal superstition and coincidental superstition.[11] Some beliefs on Number 13 are international one. Many of the superstitious beliefs are not sustained by proof and seem generally to be a mystery.[12] There is an observation that these kinds of beliefs are ominously more widespread in women than men and in uneducated people.[13] But the fact is that every kind of individuals tends to have similar forms of beliefs.[14] Basically human being is likely to rely in mystic when confronted with high risks, a little probability of victory, or irregular circumstances.[15] It cannot be analyzed that superstition is not abnormal behaviour and is not restricted to old-style beliefs, races, religions, or nationalities nor is it a creation of people of low brainpower, or illiterate. Everyone have these kind of beliefs as it as a part of nature and exhibit at varying level and circumstances.[16]

To sum up, superstition refers to any belief or practice that is explained by supernatural causality and is in contradiction to modern science. In the writings, many academic explanations are available for superstition.[17] Most authors agree that superstitions are beliefs or behaviours that are contrary to rational norms within a specific society. Superstition beliefs rely on a false causative relation between two phenomena that from a rational standpoint are mutually exclusive. The Middle Age people truly and deeply believed that crows brought bad luck. For example, the superstition that black crows announce future misfortune is probably due to misinterpretations of the presence of crows near dead bodies. There is a rational explanation for that. Crows have a keen sense of smell and are hence attracted by the smell of death. That explanation was not known at that period and this is why the presence of crows near houses where someone had just died was interpreted as a subnormal phenomenon.[18] And also people have a fear of witchcraft so badly that any suspected person would be immediately burnt to death and people really felt threatened by black cats, witches and Satan, etc.

2.1 Instances of Prevalent Superstitions in India

There are several kinds of beliefs and practices which are having no clarity of scientific basis. But for some practices, science has explanations. For example, elders advise not to sleep with head facing north. The scientific reasoning behind this is related to the interaction between the

[11] Jahoda, G, THE PSYCHOLOGY OF SUPERSTITION (1969).
[12] Inglehart, R., *Islam, Gender, Culture, and Democracy*, IJCS 43(2-5), 224 (2002).
[13] Emme, E.E, *Significant Counseling Relationships on the College Campus*. Religious Education, 27(2), 145-150. (1932).
[14] Fatik Baran Mandal, *Superstitions: A Culturally Transmitted Human Behaviour*, IJPBS, pp 65-69 (2018).
[15] *Id.*
[16] Vyse Stuart, BELIEVING IN MAGIC: THE PSYCHOLOGY OF SUPERSTITION, (1997).
[17] Dale B. Martin, INVENTING SUPERSTITION: FROM THE HIPPOCRATIC'S TO THE CHRISTIANS, 11 (2001).
[18] Eva Delacroix & Guillard Valerie, Understanding, *Defining and Measuring the Trait of Superstition* (2008).

earth's magnetic field and the human body's energy field. They likely recommended sleeping with the head facing south to avoid potential health issues, such as blood pressure problems, caused by misalignment with the Earth's magnetic field. Unfortunately, over time, this practical advice has been distorted into the superstition that death will happen if we are sleeping with head facing north.[19] Some plants, animals, or even numbers have associated with any superstitious believes. Thus, in any given society sighting an owl may be considered as a good omen, while in another the belief may be just the opposite. The black cat is another such animal that has a place in all cultures either positively or negatively. For some people, these may be good, while for some others, bad.

According to a study conducted in Dadlana village, Panipat, Haryana in the month of February 2018, people are using lemon and chillies outside house doors to reduce evil effects. To avoid bringing bad luck to the house, many are not encouraged to cut nails after sunset. People don't go near to peepal tree at night because there is a faith that ghosts may see around peepal tree.[20] Many consider falling of lizard on oneself not good as it brings bad luck. There is a belief that one should bath after attending a funeral ceremony to protect from bad spirits. Some of us have a belief that that the mourning family of a dead person should not cook food until kriya as it is considered harmful to the family.[21] Apart from all these beliefs, the practice of black magic also exists in our society. It is very common where we are in a culturally, religiously diverse society. Many people turn to these practices when all other efforts to fulfil their desires and requests have failed, seeking healing and relief.[22]

There are superstition related to menstruation in India, which actually perpetuates harmful beliefs and practices. Among some families, women are not permitted to enter into kitchen during menstruation which is a practice rooted in out-dated and unfounded beliefs.[23] Temples are considered off-limits for menstruating women, reflecting a deep-seated disgrace associated to their menstrual cycle. Menstruating women are sometimes labelled as dirty and believed to

[19] Lathangi .G & Harshinee. S & Abdul Rahim .S, *Combat between Law and Superstition*, NLR 2 (2021)
[20] Gurleen Kaur Sethi & Navreet Kaur Saini, *Prevalence of Superstitions in Indian Society in 21St Century,* Int. J. Nurs. Educ. 56 (2019.
[21] *Id.*
[22] Damyanti Agarwal &Dr. Saltanat Sherwani , *Anti-Superstition Laws: Bringing Reforms to the Nation* 3 Integral Law Review 1 (2024).
[23] nuawoman.com available at https://nuawoman.com/blog/bizarre-period-superstitions-in-india-defysuperstitionday/#:~:text=You%20shouldn't%20enter%20the%20kitchen%20on%20your%20period&text=This%20myth%20is%20completely%20false,ladies%20enjoy%20cooking%2C%20cook%20away, (last visited 10 Jan., 2025).

spread evil, a notion that reinforces negative stereotypes.[24] These superstitions have a direct impact on women's mental peace which is a direct cause for further marginalization.[25]

Furthermore India's vast cultural diversity results in a distinctive approach to combating Covid-19. From chants like "Go Corona Go!" intended to drive the virus away rather than cheer it on, to unscientific beliefs such as drinking cow urine to combat the virus, much of the messaging about Covid-19 in India is intensely tangled with traditional beliefs and is frequently reinforced through daily rituals.[26]

2.1.2 *Historical and Cultural Context of Superstitions*

Most of the superstitious beliefs have link with our culture, traditions, and history and imaginative perceptive or stories, interpretations of natural happens, curiosity about things in the upcoming generations, and religions. Every cultural social norm is typically embraced as a way of thinking, feeling, and acting, which includes folk beliefs, customs, taboos, and superstitions.[27]

Historically, much of the search for the so-called truth scientifically has been with a strong disbelief of myths, superstitions, and other beliefs.[28] Most of them had their origin and/or association with religion, although not all superstitious beliefs are religious in nature. Even before rational thinking became known as 'science' there had been such an opposition such as those reflected in the philosophical writings of Plato, Aristotle, Epicurus, Lucretius, and Cicero. Despite the spread of education, science, rational thinking, and specific legislation against certain practices based on such superstitions, they continue to prevail in society.[29] The roots of modern-day witchcraft and sorcery have a lengthy and complex history. One of the earliest recorded instances of witch-hunting in India dates back to 1792, known as the "Santhal witch trials." These trials took place among the Santhal tribes in what was then the Chotta Nagpur Division of Singbhum District during British India.[30]

But in the Indian context, one may find superstitious beliefs and advancement in science and technology going hand in hand. For instance, the launching of a satellite may be timed to

[24] Suneela Garg & Tanu Anand , *Menstruation related Myths in India: Strategies for Combating it*, J. FAM. MED. PRIM. CARE 4 (2015) 184 – 186.
[25] M. Kowsalya Devi & A. Kirupanethi, *Superstitious Beliefs and Need for Central Ant Superstition Law*, 2 IJLAE (2024).
[26] Anirudh Tagat & Hansika Kapoor, *Go Corona Go! Cultural Beliefs and Social Norms in India during COVID-19* 4 JBEP, (2020).
[27] *Id* at p. 3.
[28] *See* the Study by the Government of Karnataka titled "*Evaluation of Status of some of the Malignant Exploitative and Offensive to Human dignity Superstitions of Karnataka and the change in their status of prevalence in the past 25 years*" March 2018.
[29] *Id.*
[30] Orissa High Court Observed in *Jitu Murmu v. State Of Odisha* decided on 10th August, 2020

have an astrologically conducive time, or avoid an inauspicious day or time of the day. When faced with a draught, the State may formally undertake rituals and offer worship to please the presiding deities of rains. Moreover research reveals that people with strong cultural ties continue to hold superstitious beliefs, such as rituals, traditional religious practices, black magic, spiritualism, witchcraft, and paranormal phenomena, highlighting the impact of sociocultural beliefs.[31]

2.1.3 *Impact of Superstitions in the Society*

When people undertake certain actions or engage in practices that are founded on superstitious beliefs, they may on their part gain satisfaction or a sense of relief from their anxieties over past occurrences or anticipated outcomes in the future.[32] Over the years numerous such practices have been forbidden by law. For example, there used to be the heinous practice of *Sati*, involving climbing into the pyre in which the body of a woman's husband was being cremated, to 'ascend' the heaven with the diseased husband's soul. In the south of India, young widows shaved off their heads, without a strand of hair, draped themselves with a red *sari* to cover her from foot to the forehead. In those days the women themselves believed that if they could not commit *Sati*, then they would be sinning. Notwithstanding the law against it, one comes across a rare incidence of human sacrifice, of a sati or a dedication of a girl child as *Devadasi* which results eventually in human trafficking even to this day. Superstitious beliefs contribute to social divisions, conflicts, and discrimination within communities.

Practice of superstitious belief in varying forms resulted in many commonly accepted or hidden practices like witch hunting, black magic or sorcery etc. Declaring a woman as witch and torturing her, prosecuting her or harassing her by alleging that she is involved in witch craft which is also a practice of superstitious belief. It is found that witch hunting is mostly carried out against women and she becomes the victim of such practices.[33] Women are subjected to torture, poisoning, public humiliation, and forced to ingest human waste. At times, widows or women with valuable assets are deliberately singled out for exploitation.[34] That means witch-hunting involves the stigmatization of particular groups, typically including widows, women

[31] Pugazhendhi R. & Renisha Jerine R., *Impact of Sociocultural Beliefs Upbringing on Indian Superstition Among Undergraduates*, 12 IJIP 1,8 (2024)
[32] *Supra* note 28.
[33] Poornachander Vadicherla, *Scientific temper and Superstitious Violence: In Context of Witch-hunting in India*, CEJ, 12, Pp.222 (2021).
[34] Rishav Jain, *Witch-Branding and Hunting in India: A Legal Approach*, 4 IJRPR, 1453, 1456 (2023).

without children, aged couples, and women from lower castes.[35] Hence it is very evident that these types of practices exacerbate existing social inequalities and tensions.

2.1.4 Superstitious Belief and Crime Patterns in India

Reports from India's National Crime Records Bureau[36] show that approximately 2,500 Indians were murdered in organized witch hunts between 2000 and 2016, with several instances involving children killed due to superstitious beliefs.[37] Such occurrences have augmented in these times. As per reports of NCRB, there were 6 deaths connected to human sacrifices and 68 killings motivated by witchcraft in 2021. Chhattisgarh reported the peak number of witchcraft-related cases, after that Madhya Pradesh and Telangana. However, the NCRB does not deliver precise statistics on occult-related crimes in the country. In a 2021 private study by an NGO, it was found that in between 1999 and 2013, approximately 2,300 murders of individuals labelled as 'witches' occurred across India.[38] In 2022, the NCRB reported a total of 85 incidents in which witchcraft was cited as the motive behind murders.[39]

Superstitions become a social problem when they extend to deny dignity to human beings either collectively or individually. It will be a social problem when it violates human rights recognized by a society and affects the life chances of individuals or groups of people thereby humiliating an individual or an entire community. There are several personal practices arising out of such superstitious beliefs which may not affect or hurt anyone. Anti-superstition laws extend legal safeguards to such individuals by outlawing practices that may subject them to harm or exploitation. This encompasses activities like witch-hunting, exorcisms, and other harmful rituals that can result in physical or psychological harm. Black necromancy, also referred to as necromancy, involves using supernatural powers for malicious and self-serving purposes, often aimed at causing harm to someone physically, emotionally, or financially. This practice can be carried out using personal items of the victim, such as their hair, clothing, a photograph, or even by staring directly into their eyes.[40] Furthermore, superstitions can escalate into social conflict and violence, particularly in communities where belief in them is widespread. Superstitions often prey on weak groups, particularly those with lack of education or socio-

[35] Mohd Aqib Aslam, *A Doctrinal study on Witchcraft and Role of Ant superstition Laws in Modern India*, IJAS 156,160 (2021).
[36] National Crime Records Bureau, hereinafter referred to as NCRB.
[37] https://blog.ipleaders.in/rising-need-anti-superstitious-laws-india/ (last visited 1 Jan., 2025).
[38] https://www.shankariasparliament.com/current-affairs/daily-news/a-blank-in-black-magic-law#:~:text=According%20to%20the%20National%20Crime,by%20Madhya%20Pradesh%20and%20Telangana.
[39] National Crime Records Bureau, available at https://www.ncrb.gov.in/crime-in-india-year-wise.html (last visited 10 Jan., 2025).
[40] *Supra* 22 at p. 4.

economic means.[41] Anti-superstition laws have a crucial role in nurturing a philosophy of scientific inquiry within society.[42] By expressly prohibiting superstitious practices and beliefs, these laws underscore the significance of evidence-based reasoning and critical thinking. They unequivocally convey the message that reliance on superstition and irrational beliefs has no room in a modern, rational society.

International Initiatives to curb Superstitious Practices

Though the practices like sorcery and witch hunting has been dominant from long time back, it got attention in the regulatory framework only recently.[43] Through a series of research papers, UN High Commissioner for Refugees elevated its concern over the people who are affected by sorcery accusations as very akin to that of the internally displaced people.[44] UN Special Rapporteur on extrajudicial, summary, or arbitrary executions also recognized the fact of high rate of killings by condemning the practice of sorcery. The Committee on the Elimination of Discrimination against Women (CEDAW) in 2007 was extremely concerned about witch hunting against women.[45] According to the fact sheet[46] submitted by the United Nations Office of the United Nations High Commissioner for Human Rights for the purpose of implementing the Convention on the Elimination of All Forms of Discrimination against Women,[47] it is identified that in the existing taboos against women, several are grounded on superstition. In a context filled with myths and superstitions, what might be a simple accident can be interpreted in darker terms, as the result of evil spirits or bad omens.[48] Hence the fact sheet directed the state parties to alter and reshape the social and cultural behaviour of both men and women, aiming to eliminate prejudices, customs, and many other practices that are based on the belief of one sex being inferior or superior to the other, or on rigid gender roles.

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[41] Razina Ahmed & Sapna S, *A Psychological Analysis of the Structural, Socio-Cultural, And Legal Aspects of Women's Rights, their Societal Development & Superstition- Gender-Based Violence and their Eradication Alarming Practice*, 6 JRTDD 140–155 (2023).

[42] Surekha Chukkali & Anjali M Dey, *Development and Validation of Superstitious Beliefs Scale*, 12 R. J. INTERDISCIP. STUD. HUMANIT. 1-12. (2020).

[43] Miranda Forsyth, *The Regulation of Witchcraft and Sorcery Practices and Beliefs*, ANN. REV. LAW SOC. SCI. 12, 332 (2016).

[44] *Id. See also* Oliver Kaplan, Policy Research Working Paper 10023, *Superstitions and Civilian Displacement Evidence from the Colombian Conflict*, World Bank Group, Social Sustainability and Inclusion Global Practice April 2022, available at https://openknowledge.worldbank.org/server/api/core/bitstreams/1f659010-3dfe-5e61-a07a-e671ae66ef7e/content , (last visited 4 Feb ., 2025).

[45] DECCAN HERALD, Witch-hunting: A Social ill law alone cannot fight, available at https://www.deccanherald.com/opinion/witch-hunting-social-ill-law-2025706 (last visited Jan 11, 2025).

[46] https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet23en.pdf., published on Wednesday, 28 October 2009, (last visited 4 Feb., 2025).

[47] CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, (Art. 5 (a)), adopted by General Assembly Resolution 34/180 of 18 December 1979.

[48] *Supra* note 42.

The United Nations Human Rights Council (UNHRC) adopted Resolution A/HRC/RES/47/8, focusing on the abolition of harmful practices related to accusations of witchcraft and ritual attacks.[49] This resolution highlights the urgent need to address harmful practices connected to accusations of witchcraft, particularly those impacting women and children globally. It recognizes that such accusations, rooted in superstitious beliefs, result in stark human rights abuses, physical harm or injuries, social exclusion, discrimination, and even death. The resolution stresses the necessity for preventive measures and protection mechanisms to tackle the underlying causes of these harmful practices and to protect the rights and dignity of those targeted. It also calls for awareness-raising campaigns and educational initiatives to challenge misconceptions, stereotypes, and harmful beliefs linked to witchcraft accusations. Additionally, the resolution emphasizes promoting tolerance, understanding, and human rights, and advocates for providing adequate support services, such as psychosocial support, legal assistance, and access to justice, particularly for women and children who are excessively affected by these practices.[50]

In another report, the Human Rights Council specifically recognized "harmful practices related to accusations of witchcraft and ritual attacks as one of the root causes of human rights violations and abuses perpetuated against persons with albinism."[51] In the United Kingdom, following the tragic murders of eight-year-old Victoria Climbie in February 2000 and fifteen-year-old Kristy Bamu in December 2010, the Government recognized serious deficiencies in addressing cases involving superstition and spiritual abuse.[52] As a solution to this critical issue, the Department for Education, in association with various stakeholders, developed an action plan called the National Action Plan to Tackle Child Abuse Linked to Faith or Belief 2012. This plan focused on identifying children at threat and ensuring their protection from specific forms of misuse linked with belief or confidence systems. Additionally, it targeted the usage of magical beliefs to instill fear in children, which will further contribute to further violations of human trafficking for domestic slavery or sexual exploitation.[53]

[49] *Elimination of Harmful Practices related to Accusations of Witchcraft and Ritual Attacks*: Resolution / adopted by the UN's Human Rights Council on 12 July 2021 A/HRC/RES/47/8. 2021.

[50] *Id.*

[51] *Report on Harmful practices and hate crimes targeting persons with albinism Human Rights Council,* United Nations General assembly, 4 January 2022.

[52] *SEE* BBC NEWS, WITCHCRAFT MURDER: COUPLE JAILED FOR KRISTY BAMU KILLING, AVAILABLE AT HTTPS://WWW.BBC.COM/NEWS/UK-ENGLAND-LONDON-17255470, (LAST VISITED 9 JAN., 2025).

[53] Department for Education, National Action Plan Linked to Faith or Belief. UK Government, 2012.

3. LEGAL INSTRUMENTS AGAINST SUPERSTITIOUS BELIEFS

The lack of comprehensive anti-superstition laws in India contradicts the constitutional mandate to foster scientific temper and humanism, as specified in Article 51A (h) of the Constitution of India. Scientific temper involves nurturing a rational, evidence-based approach to understanding the world, encouraging individuals to critically analyse and evaluate information through empirical evidence and logical reasoning. The constitutional provision highlights the need for scientific temper among citizens, viewing it as crucial for informed decision-making, technological advancement, and societal progress. Humanism, as outlined in the Constitution focuses on recognizing the inherent dignity, rights, and value of every individual. It advocates for compassion, empathy, and respect for human life and dignity, regardless of caste, creed, gender, or socioeconomic status. Humanism promotes the significance of human relationships, cooperation, and mutual understanding in creating a balanced and all-encompassing society. Article 51A (h) also fosters a spirit of inquiry and reform, emphasizing the importance of continuous learning, innovation, and adaptation. It encourages citizens to engage in critical reflection, challenge existing norms, and work towards societal progress. This spirit of inquiry is vital for addressing social injustices, advancing knowledge, and enhancing societal well-being.

The inclusion of scientific temper and humanism in Article 51A underscores the constitutional commitment to build a progressive, egalitarian, and democratic society. It reflects the foundational values of reason, compassion, and social justice upon which the Indian Constitution is based. Article 51A (h) has significant repercussions for education policy and civic engagement in India, stressing the need to integrate scientific education, critical thinking, and ethical values into educational curricula, and guiding policymakers in developing laws and policies that support scientific research, protection and conservation of our environment, and social welfare grounded in humanistic principles.

The Constitution upholds values of equality and social justice, striving to eliminate discrimination and unfair treatment based on religion, caste, gender, or other arbitrary factors. Superstition perpetuates social inequalities and reinforces discriminatory practices, contradicting the constitutional goal of promoting equality and social justice. Additionally, India's secular ethos, as enunciated under the Constitution, emphasizes the separation of religion and state, safeguarding fair and equal handling for all religious communities. Superstition, often rooted in religious beliefs or practices, obstructs the realization of secular ideals by favoring certain religious views over others, thus undermining the secular nature of society. The constitutional mandate to foster rational thinking and combat superstition is rooted

in the foundational principles of equality, social justice, secularism, and democratic governance, as outlined in the Indian Constitution.[54] This underscores the importance of building a society based on reason, evidence, and humanistic values, which is essential for creating a just, inclusive, and progressive nation.[55]

3.1 National level Legal Framework

In India, laws related to superstition and irrational beliefs are dispersed across different areas of legal issues, criminal laws, personal laws and specific regulations targeting certain harmful practices. Though the Indian Constitution does not explicitly deals with superstition as an issue, still the other constitutional provisions and existing laws can be leveraged against harmful superstitious practices. Even without the comprehensive national legislation directly addressing superstition, several legal provisions indirectly tackle aspects of superstitious and irrational practices. Under criminal law, practices related to superstition that cause harm or exploitation may be penalized under Bharatiya Nyaya Sanhita (BNS).[56] For instance, provisions of murder,[57] culpable homicide not amounting to murder,[58] attempt to murder[59] can be applied in cases involving witch-hunting or human sacrifices. Additionally, Section 93 of the BNS, which deals with the exposure and abandonment of children below twelve years old by a parent or caretaker, can be applied in the instances where children are subjected to harmful rituals driven by irrational beliefs. In BNS, it is made as offense that "whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both." Section 114,[60] section 63,[61] outraging the outraging a woman's modesty[62] are certain of the provisions of law available in the instances of superstitious practices.

Again for child protection, the Juvenile Justice (Care and Protection of Children) Act, 2015, and other related laws offer safeguards against harm resulting from superstitious practices, such

[54] The Constitution of India, Article 14, 15(3), 15(4), 21, 51, 51A (h).
[55] Srivastava, V., *Constitutional Protection of Religious Practice vis a vis Reformative Secularism: Analytical Study*, 4 Indian JL & Legal Rsch, (2022).
[56] Hereinafter referred as BNS for indicating Bharatiya Nyaya Sanhita.
[57] *Id*., Section 101.
[58] *Id*., Section 105.
[59] Section 109.
[60] Bharatiya Nyaya Samhita 2023 defined hurt as "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."
[61] the definition of the offence 'rape' under BNS.
[62] Bharatiya Nyaya Samhita 2023., sections 74 & 79.

as child sacrifice or ritual abuse. Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 defines magic remedy. The definition is inclusive in nature. Hence it says that any mantra or any talisman which alleged to have unbelievable powers for avoiding any illness in humans or animals.[63] The Act also attempts to prevent the advertisement of any magic remedies for treatment of any diseases. The legislation prohibits publication of certain any advertisements."[64] Moreover the Central Government issued the Cable Television Networks Rules, 1994 in order to carry out the provisions of the cable television Network (regulation) Act, 1995. The Rule elaborates the facts of program code[65] in which no programme shall approve in the cable service which inspires superstition or any such similar belief.

In addition to the above mentioned legal provisions, the other legislations like Protection of Human Rights Act, 1993,[66] Scheduled castes and Scheduled Tribes (Prevention of atrocities) Act 1989 can be invoked during the times of illegal superstitious practices in India. With respect to consumer protection, the Consumer Protection Act, 2019, along with associated regulations, offers remedies for persons who are exploited or defrauded through false claims related to superstition or irrational beliefs. It includes situations where people are misled or coerced into buying products or services based on superstitious claims. Additionally, if superstitious beliefs result in the mistreatment or sacrifice of animals, laws for protecting animals may come into picture. The Prevention of Cruelty to Animals Act, 1960, and other related regulations are designed to prevent cruelty to animals, including instances where animals are injured or sacrificed due to superstitious practices.[67]

3.2 Variation in Anti-Superstition Laws Across Indian States

The laws against superstition in India vary by state. They broadly cover practices that involve harm, fraud, or coercion based on superstition. To date, eight Indian states - Bihar,

[63] Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, s. 2(c).
[64] *Id*, section 5.
[65] Cable Television Networks Rules, 1994, Section 6.
[66] The Act aims to regulate misleading health advertisements.
[67] Samantha Spence & Naveen Suresh, *Addressing the Legal Gap: Implementing Unified Anti-Superstition Laws in India*, 12 IJARESM (2024).

Chhattisgarh, Jharkhand,[68] Odisha, Rajasthan,[69] Assam, Maharashtra,[70] and Karnataka[71] have enacted laws to combat witch-hunting.

The Prevention of Witch (Daain) Practices Act in 1999 was enacted by the state of Bihar as one of the country's first laws addressing witchcraft and harmful rituals. It prohibits recognizing a woman as a witch.[72] And the law punishes the person who causes any type of physical or mental torture to any women by identifying that her as a witch.[73] According to it, anybody who identifies a person as a "witch" and acts to support this identification may have to undergo imprisonment up to three months, or a fine of 1,000, or both. Ultimately torturing, humiliating or killing any women alleging as witch has been prohibited by law in Bihar.

Albeit Chhattisgarh is one of the most witchcraft affected States, the State has enacted the Chhattisgarh Tonhi (witch) Pratadna Nivaran Act only in 2005 which is dealing with prohibition of black magic in Chhattisgarh. By virtue of that Act, a person convicted for identifying someone as a witch can get punishment of imprisonment up to three years of rigorous imprisonment with a fine.

Maharastra enacted the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013 soon after murder Dr. Narendra Dabholkar, a well-known social activist. This legislation marks as a major advancement in tackling the issues related with superstition. The law targets and criminalizes a range of superstitious practices, intending to safeguard individuals from harmful rituals and financial exploitation. The main objects of the legislation are to stop the evil and inhuman practice like supernatural or black magic in the state of Maharashtra. Some of the practices are listed in the schedule of the Act.[74] The 2013 Act clearly states that no individual, whether alone or with the help of others, is allowed to commit, encourage, promote, or engage in practices such as human sacrifice, superstitious rituals, evil or inhumane actions, or black magic.

[68] The Prevention of Witch (Daain) Practices Act was passed in Jharkhand in 2001.
[69] Rajasthan Prevention of Witch-Hunting Act, 2015.
[70] Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013. A Social activist named Narendra Dabholkar has demanded for this act for the first time and he had struggled a lot for years to protect and save people from these superstitious beliefs and practices with will result in inhumane activities which harm and sometimes kill other people. But Narendra Dabholkar was finally shot dead by two strangers. *See* https://www.thehindu.com/opinion/editorial/murder-and-motive-on-the-narendra-dabholkar-murder-case/article68171408.ece (last visited 10 Dec., 2024).
[71] Karnataka Prevention and Eradication of Inhuman Evil Practices and Black Magic Act, 2017.
[72] The Prevention of Witch (Daain) Practices Act, 1999, Section 3.
[73] *Id.*, Section 5.
[74] Human sacrifice and other types of evil and aghori practices, black magic are those practices which are defined under the schedule of Act, 2013.

In the year 2014, State of Odisha published the Odisha Prevention of Witch-hunting Act, 2013 for active measures to curb the menace of witch craft in the State of Odisha. This Act includes definitions for terms such as witch, witchcraft, witch hunting, and witch doctor. This Act is a step forward in combating witch branding and protecting women from harassment.

The State of Rajasthan also enacted the Rajasthan Prevention of Witch-Hunting Act in 2015 to "provide for effective measures to tackle the menace of witch-hunting and prevent the practice of witchcraft." The Assam Witch Hunting (Prohibition, Prevention and Protection) Act, 2015 tries to prohibit witch hunting completely. Identifying any person as witch, calling anyone as witch, defaming or accusing any one is an offence.[75] Provisions include elimination of torture, harassment, killing of people by using that evil practices. Apart from punishing the offenders, victim rehabilitation is also made as one of the key concerns of the legislation. Moreover the government has to constitute special courts in consultation with High Court in the matter of deciding on the provisions of the Act.[76]

The Karnataka Prevention and Eradication of Inhuman Evil Practices and Black Magic Act, 2017 was passed by the state in response to the increasing number of inhuman practices like black magic, witch craft etc. The law prohibits several practices related to black magic and superstition, like forcing a person to walk on fire at religious festivals and the practice of piercing rods from one side of the jaw to the other. The vigilance officer appointed as per the act is tasked with detecting and preventing any violations of its provisions, collecting information to safeguard the successful prosecution of offenders, reporting such incidents to the local police, and implementation of any other duties assigned to them by the State Government.[77] These all state laws outlaw various practices, including human sacrifice, witchcraft, and exorcism without consent. Thus to sum up, it is understood that some states have established specific legislation to prevent and ban witch-hunting and other superstitious practices, others have limited or no legal measures, leading to inconsistent protection against superstition.

Following the recent killing of two females in Kerala in which it was alleged to be a human sacrifice; the Government of Kerala was compelled to take action to introduce legislation against superstitions and sorcery. Several draft bills on this issue is pending with the government for years. A draft bill, created by former Director General of Police A.

[75] Assam Witch Hunting (Prohibition, Prevention and Protection) Act, 2015, Section 3. The Act also defined the term abettor or identifier under section 2(a) of the Act.
[76] *Id*., Section 16.
[77] Karnataka Prevention and Eradication of Inhuman Evil Practices and Black Magic Act, 2017, Section 6.

Hemachandran in 2014, suggested imposing imprisonment ranging from three to seven years for those inflicting physical or mental harm through supernatural or black magic activities.[78] Another such draft bill, proposed by earlier Supreme Court judge Justice K.T. Thomas in 2019, recommended banning all practices that cause bodily harm. Justice K.T. Thomas along with other members in the Kerala State Law Reforms Commission has presented a draft law aimed at eliminating such practices and raising awareness about the harmful effects of irrational beliefs on individuals and society.[79]

A Public Interest Litigation was filed by *Kerala Yukthi Vadhi Sangam* seeking issuance of a direction or suggestion for enacting a statute in the model of Maharashtra Prevention and Eradication of Human sacrifice and Other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013. The petitioners sought relief to prohibit black magic, witchcraft or sorcery, and other inhuman, evil and sinister practices. The petition also concerned about the implementation of the recommendation of the above Law Reforms Commission report, with regard to the enactment of "The Kerala Prevention of Eradication of Inhuman Evil Practices, Sorcery and Black Magic Bill-2019". The petition also requested an order for the State Government, the State Law Secretary, and the State Police Chief to form a special team to carry out a thorough and effective investigation, or reinvestigation, into the cases of missing persons reported over the past 50 years in the state, especially in light of the recent recurring incidents. The petitioners argued to invoke the provisions of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 and other laws in the case of black magic and witch craft centres in the state of Kerala. Prohibition of contents promoting superstitious beliefs from various serials, telefilms, YouTube channels and declaration of the advertisement of books for sale with regard to black magic on internet sites is illegal is also in the demand of the petitioners. The petition narrated the incidents that happened because of superstitious beliefs in Kerala from 1955 onwards. The petitioners alleged that the provisions of the existing legal system are inadequate in prohibiting the ongoing superstitious practices and the State is very much silent on these issues. The petition is still pending for disposal.[80]

To sum up, anti-superstition measures, where they exist, vary widely across different states in India. While some states have enacted specific laws or regulations to tackle certain superstitious practices, others have not taken any significant legislative steps in this regard.

[78]https://www.deccanherald.com/india/law-against-superstition-a-tightrope-walk-for-kerala-government-1159938.html (last visited 10 Jan., 2025).

[79] R. Krishnakumar, *Outlawing Superstitious Beliefs In Kerala: A Rational Move*, Frontline, THE HINDU Available At Https://Frontline.Thehindu.Com/The-Nation/Article28758424.Ece, (Last Visited 3 Feb., 2025).

[80] *Kerala Yukthi Vadhi Sangham* v. *Union of India and Others* WP(C) NO. 33093 OF 2022(S)

This lack of uniformity among the states results in uneven protection against superstition and inconsistency in addressing related issues. Anti-superstition laws extend legal safeguards to such individuals by outlawing practices that may subject them to harm or exploitation. From the various legislations, it is very clear that the existing prohibitory or preventive provisions encompass activities like witch-hunting, exorcisms, and other harmful rituals that can result in physical or psychological harm. But still the current social scenario superstitions reveal the fact that these mode of practices can escalate into social conflict and violence, particularly in communities where belief in them is widespread.[81] Superstitious beliefs contribute to social divisions, conflicts, and discrimination within communities. Practices such as witch-hunting or caste-based superstitions exacerbate existing social inequalities and tensions. By expressly prohibiting superstitious practices and beliefs, the laws underscore the significance of evidence-based reasoning and critical thinking. They unequivocally convey the message that reliance on superstition and irrational beliefs has no place in a modern, rational society.

Hence in any society, anti-superstition laws has to play a pivotal role in preventing such conflicts by promoting tolerance, aligning with the principles of human rights and dignity, whilst discouraging the use of superstitions to justify harmful actions or discriminate against certain groups or individuals. They affirm individuals' rights to freedom of thought, expression, and belief by shielding them from coercion or persecution rooted in superstitions. By explicitly prohibiting harmful superstitions and promoting scientific temper, these laws contribute to building a more rational, tolerant, and equitable society. Fear of reprisal or societal backlash discourages individuals from questioning or rejecting irrational beliefs, thereby stifling freedom of expression and intellectual discourse. Superstitious beliefs and practices hinder societal progress by perpetuating a climate where ignorance and irrational beliefs continue to thrive, impeding efforts to promote scientific temper, critical thinking, and evidence-based decision-making essential for societal advancement.

3.3 Problems with the Existing Legal Systems

The current absence of anti-superstition laws only contributes to the existing culture of fear and censorship, limiting individuals' freedom to express dissenting views or challenge superstitious beliefs. The absence of anti-superstition laws fails to address the underlying societal fissures, posing challenges to social cohesion and harmony. Anti-superstition laws have pivotal role in preventing such conflicts by promoting tolerance, aligning with the

[81] Mandal, F.B, *Introduction To Evolutionary Biology*, OXFORD & IBH PUBLISHING CO. PVT. LTD. New Delhi, 2015.

principles of human rights and dignity, whilst discouraging the practice of superstitions to justify harmful actions or discriminate against certain groups or individuals.

Fear of reprisal or societal backlash discourages individuals from questioning or rejecting irrational beliefs, thereby stifling freedom of expression and intellectual discourse. However there is a legal vacuum in India regarding explicit national anti-superstition legislation. Hence this situation perpetuates irrational beliefs and practices, thereby compromising societal well-being and infringing upon fundamental rights.[82] This legal vacuum is characterized by several key issues. India lacks a comprehensive legal framework specifically targeting superstitious beliefs and practices. Lack of explicit anti-superstition laws creates ambiguity and loopholes in the legal system. Superstitious practices that may cause damage or exploitation often go unchecked due to lack of clear legal prohibitions, allowing perpetrators to evade accountability.[83]

A Public Interest Litigation (PIL) has been filed before the Supreme Court seeking direction to the Centre and state governments to take appropriate steps to control superstition and sorcery. The plea said that the root cause behind the recent stampede in Uttar Pradesh's Hathras, where at least 121 people died and several injured, was "superstition & sorcery". It referred to Delhi's 2018 Burari incident, where all 11 members of a family committed suicide under the influence of "superstition & sorcery". Similarly, the fierce murder of two women in the name of black magic happened in the state of Kerala.[84] According to an initial investigation, the victims were subjected to severe cruelty and sexually abused, their body parts cut into several pieces before they were buried. There are hundreds of similar cases across the country," it said. The PIL also sought direction to develop scientific temper, humanism and the spirit of inquiry and reform and to promote the fundamental duties among citizens in the spirit of Article 51A of the Constitution. The petition urged for a strict anti-superstition and sorcery law to curb the unscientific acts predominant in society that harmfully impact the community.

[82] Aslam & Mohd Aqib, *A Doctrinal Study on Witchcraft and Role of Anti- Superstition Laws in Modern India,* IJAR, pp. 7(1): 156-165, (2020).

[83] Manaswi, M.P. Chengappa, *Witch Hunt Violence in India: (Concocted) Superstition and the (In)/Adequacy of Special Laws? A Critical Analysi*s CMR Univ. J. Contemp. Legal Aff, p. 151 (2022).

[84] Sumeda, *What Are The Laws Against Black Magic And Superstition In India?* , THE HINDU, Available At Https://Www.Thehindu.Com/News/National/Explained-Kerala-Human-Sacrifice-Laws-Dealing-With-Black-Magic-Superstitions/Article66017349.Ece (Last Visited On 2 Feb., 2025).

3.4 Challenges in the implementation of Anti-superstition Laws

Superstition is closely linked with cultural and religious beliefs in India, making it difficult to tackle these practices without encroaching on cultural sensitivities.[85] Implementing unified anti-superstition laws in India could encounter several obstacles due to the country's diverse cultural, social, and religious fabric. With India's rich variety of religious beliefs, traditions, and practices, enforcing anti-superstition laws while respecting cultural and religious sensitivities can be challenging. Some communities might view these laws as encroachments on their cultural or religious freedoms, potentially leading to resistance and opposition. Even when laws are in place to address superstitious practices, enforcement difficulties frequently impede their effective application. Issues such as insufficient resources, limited institutional capacity, and societal resistance weaken enforcement efforts, allowing superstitious practices to continue despite legal restrictions. A major challenge is navigating these laws within a culturally sensitive context.[86] Widespread ignorance and ignorance about the harmful effects of superstition pose a challenge to the implementation of anti-superstition laws. Many individuals may not recognize certain practices as superstitious or may not understand the rationale behind the laws.

Measuring the effectiveness of such laws can be difficult because of the pervasive and subjective nature of superstition. The real challenge lies in their implementation and enforcement. Many harmful practices go unreported because of fear or respect for tradition.

3.5 Why there is a need of anti- superstition laws?

Social psychologists observed that the tendency to believe is also due to specially gifted abilities. The superstitious acts which cause grave physical or mental harm any living being should be a matter of legal prohibition. Many superstitious acts results in financial or any sexual exploitation and some others offends the human dignity of another person or a group of persons, by invoking a purported supernatural power, with the promise of curing such person or group of persons of disease or affliction or purporting to provide a benefit, or threatening them with adverse consequences. Absence of thorough investigation and research in this area has resulted in a lack of data on crimes related to superstition concealed under the guise of secret beliefs.

[85] Siddiqui, S. *Religion, and Psychoanalysis in India: Critical Clinical Practice*. ROUTLEDGE., 2016.
[86] Das, Jayanta Boruah & Junu, *Conceptualizing Religious Offences and Understanding Secularism under Indian Legal System: An Empirical Study from Assam*. (2021)

Although India has implemented some anti-superstition laws, still there is a need for stronger legislation to address superstition-related crimes more effectively.[87]

Moreover the absence of specific laws against superstition conflicts with the constitutional requirement to advance scientific temper and humanism as outlined in Article 51-A of the Indian Constitution. This shortfall undermines the commitment to encouraging rational thinking and discouraging practices based on irrational beliefs. Individuals are insufficiently shielded from coercion, exploitation, and harm associated with superstitious beliefs and practices, which jeopardizes their rights to life, dignity, and freedom of thought and expression. The lack of specific legal measures against superstition enables the continuation of dangerous practices that endanger public health, safety, and social harmony. Practices like witch-hunting, exorcisms, and faith-based healing persist due to the lack of explicit legal restrictions, perpetuating irrationality, infringing on fundamental rights, and enabling cycles of violence, discrimination, and exploitation. To address this, it is essential to create and enforce inclusive legal framework that clearly prohibits superstitious practices and upholds scientific temper in accordance with constitutional values.[88]

Permitting these practices to continue unchecked infringes on an individual's fundamental rights to equality and life, as guaranteed by Article 14 and Article 21 of the Constitution, respectively. These acts also contravene many of the international agreements that India has endorsed, including the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the Convention on the Elimination of All Forms of Discrimination against Women (1979).

Hence it is very clear that laws against superstition in India represent a crucial advance in fostering scientific temper and shielding individuals from harmful and exploitative practices. Despite on-going challenges in their implementation and potential misuse, these laws are vital in the broader effort to combat harmful superstitions. To make a significant impact, these legal measures must be complemented by education, awareness, and societal change.

In *Gaurav Jain v State of Bihar*,[89] the Hon'ble Supreme Court instructed the State of Bihar to establish a dedicated cell and implement measures to curb these practices. *Sushil Murmu v. State of Jharkhand*[90] was about a human sacrifice for pleasing a deity. The severed head of a 9-year-old boy was discovered in a pond. The Hon'ble Supreme Court sentenced the accused

[87] https://thediplomat.com/2023/03/the-deep-roots-of-witch-branding-in-india/ (Last visited on 2 Feb., 2025).
[88] V. Vijay Karthik , *The Need For Laws In India To Deal With Superstitions And Pseudoscience In The Post Truth Era* , 7 IJRESM 37, 39 (2024).

[89]Gaurav Jain v State of Bihar 1991 Supp. (2) SCC 133.
[90] Sushil Murmu v. State of Jharkhand AIR 2004 SC 394.

to death, deeming the case to be one of the "rarest of the rare." The court remarked that "superstition is a belief or notion, not grounded in reason or knowledge, often linked to the ominous significance of certain things or events, and primarily driven by selfish desires and barbaric practices." Accused were tried for offenses under sections 302 and 201 of the Indian Penal Code, 1860. *Iswar Attaka and Others v. State of Orissa*[91] the Orissa High Court reiterated the fact that "murders and other serious crimes are continuing unabated in the name of witchcraft, sorcery and superstitious practices". *Smt. Moyna Murmu v. State of West Bengal*,[92] the Calcutta High Court, while denouncing the practice of witch hunting, provided specific directives to the state government to eliminate this harmful practice. The bench, led by Justice Joymalya Bagchi, referencing the observations made in *Gaurav Jain v. State of Bihar*,[93] the Calcutta High Court directed the State Government to take specific actions to eradicate the harmful practice of witch hunting. One of the key recommendations was the formation of a committee by the state government to investigate the prevalence of witch hunting in various districts of West Bengal. The committee was instructed to submit its report within six months of the order to the state government. Additionally, the establishment of special cells was also emphasized as a crucial step.[94]

7. *In a writ petition Mrs. Sashiprava Bindhani v. State of Orissa and Others*[95] before the High Court of Orissa, the honourable Court observed that the duty to prevent the commission of witch - hunting is vested with the District Administration. Protection shall be given to citizens from being victim of witch-hunting.

8. In another occasion, the High Court of Delhi in *Rajeev Sharma v. Union of India and Others*[96] made a clarification between a person's superstitious practice doesn't get any protection of Article 25 of the constitution of India unless that practice is an essential requirement of that religion. Hence the 'essential practice test' "is devised by the Delhi High Court to distinguish the religious practices that are essential or fundamental to a particular religion from the ones which are merely superstitious."

[91] Iswar Attaka and Others v. State of Orissa 2015 SCC OnLine Ori 346
[92] Smt. Moyna Murmu v. State of West Bengal 2016 SCC OnLine Cal 4272, decided on August 2, 2016, *see* https://www.scconline.com/blog/post/2016/08/08/state-government-directed-to-follow-certain-measures-in-order-to-eradicate-the-evil-practice-of-witch-hunting/, (Last visited on 3 Feb., 2025).
[93] *Supra* note 69.
[94] *Id.*
[95] Mrs. Sashiprava Bindhani V. State of Orissa And Others 2012 (117) AIC 883.
[96] Rajeev Sharma v Union Of India And Others WP. (CRL) 3725/2024, Date of order: 28th November, 2024.

4 CONCLUSION AND SUGGESTIONS

The existing state laws against superstition, though not perfect, signify an important first move towards a more equitable and rational society. To a certain extent, they reflect recognition of the harm caused by certain superstitious practices and a commitment to addressing these issues. With on-going refinement, effective enforcement, and strong societal support, these laws have the potential to significantly reduce harmful superstitions and foster a more enlightened society. Combating harmful superstitions involves more than just enacting legislation; it should challenge the deeply ingrained beliefs and traditions, societal norms, and a pervasive fear of the unknown. While the current laws against superstition in India have begun to tackle these issues, their success hinges on a broader societal shift toward scientific temper, rationality, and critical thinking. Education and awareness campaigns, along with strict enforcement, are crucial in this transition. Despite the difficulties, these laws mark an important initial step towards a more rational and less exploitative society.

4.1. Need for a Comprehensive National Law

a) A thorough framework for unified anti-superstition legislation in India should include essential provisions and principles designed to tackle harmful superstitions, encourage rational thinking, and safeguard individuals' rights and well-being. The framework should clearly address the scope of the law to ensure it comprehensively covers all types of superstitions, explicitly banning practices that endanger the physical, mental, or emotional health of individuals.
b) This includes practices such as witch-hunting, human sacrifice, faith-based healing, and other rituals based on irrational beliefs.
c) Stringent penalties should be established for promoting or practicing harmful superstitions, including fines, imprisonment, and other appropriate sanctions.
d) It should also outline enforcement mechanisms, such as dedicated task forces or agencies, to ensure the effective implementation of the law and deter individuals from engaging in superstitious practices.
e) The framework should prioritize the protection of vulnerable groups who are disproportionately affected by the superstitious practices.

4.1.2. *Campaigns to Uphold the Constitutional Provisions*

Campaigns should be conducted by the enforcement authorities so as to uphold the Constitutional provisions for promoting scientific education to debunk myths and superstitions.

a) These campaigns can be targeted at schools, communities, and religious institutions to foster critical thinking skills and promote scientific temper among citizens.
b) Civil society engagement and public participation for the better implementation of the anti-superstition laws should be facilitated.
c) This includes engaging with human rights activists, grassroots movements, and community organizations to raise awareness, gather feedback, and mobilize support for combating superstition.

4.1.3 *Other Suggestions*

1. Regular review and evaluation of anti-superstition laws to assess their effectiveness shall be conducted by the enforcement authorities.
2) Sufficient mechanisms shall be ensured to collect data on superstition-related incidents and it should be exhibited in the noticeable premises of all public institutions.
3) Proper training shall be provided to the law enforcement agencies and resources for the same must be assessed and identified.
4) Engaging with religious and cultural leaders, community organizations, and civil society groups is crucial to discuss the impact of anti-superstition laws on cultural practices and gather feedback. This approach ensures that the laws honor cultural diversity while advancing scientific temper and individual rights.
5) To involve affected communities for building consensus and addressing concerns about the legislation.
6) Encourage open dialogue, fostering mutual understanding, and promoting collaboration will help garner support for the effective implementation of anti-superstition laws.
7) Undertake workshops, and community events, to disseminate information and promote rational thinking.
8) It is essential to continually refine the state laws to ensure they are thorough and effective, and to focus on their proper enforcement. Addressing superstition is not merely a legal

challenge but a social one that demands collective action from lawmakers, enforcers and and the community.

SUKANYA SHANTHA V. UNION OF INDIA (2024) - CASE COMMENT

Muskan[1]

Background and Facts: The writ petition was filed by Ms. Sukanya Shantha, a journalist who in December 2020 published the article *"From Segregation to Labour, Manu's Caste Law Governs the Indian Prison System"*. The article documented pervasive caste-based discrimination in India's prisons, including caste-segregated labour duties (e.g. sweepers vs. overseers) and separate barracks for different castes. Ms. Shantha sought to challenge prison rules in various States that mandate or permit such caste-based practices. She urged the Court to declare these provisions unconstitutional and direct their repeal. By July 2024, the Supreme Court had heard a broad array of stakeholders – the Petitioner, an intervening NGO, the Union of India (represented by the ASG), and counsel for at least eight States (Jharkhand, UP, WB, Maharashtra, Odisha, Karnataka, Andhra Pradesh, Tamil Nadu). On 3 October 2024, a three-Judge Bench (Chandrachud CJI, Pardiwala & Misra JJ.) delivered a reported judgment in her favor.

Issues: The key legal questions were (a) whether explicit caste-based distinctions in prison manuals violate fundamental rights, and (b) what remedies should issue. In particular, the petition challenged practices such as requiring prisoners of "menial castes" to do manual labour or barrack-cleaning, barracks segregated by caste, a "caste" column in prison registers, and broad definitions of "habitual offenders" that historically targeted denotified caste groups. Petitioners argued these practices breached Articles 14, 15(1) (no caste discrimination), 17 (abolition of untouchability), 21 (life and dignity), and 23 (forced labour) of the Constitution. It was also noted that Article 15(4) and Article 46 (DPSP) permit positive measures for caste-backward classes, but not penalizing or segregating them. Correspondingly, respondents raised questions of federal competence (prisons are largely a State subject) and pointed to existing Model Prison Manuals and advisories. Secondary issues included the validity of so-called "habitual offender" classifications and rules targeting denotified tribes.

Constitutional and Statutory Provisions: The Court grounded its decision in a range of constitutional provisions. Article 14 (equality before law) was invoked to forbid arbitrary classification. Citing *Maneka Gandhi*[2] (1978) and related precedent, the Court reiterated that Article 14 "strikes at arbitrariness in State action" and demands "fairness and equality of

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[2] Maneka Gandhi v. Union of India, 1978 INSC 16

treatment". Any prison rule classifying prisoners by caste was thus subject to strict scrutiny for reasonable nexus. Article 15(1) explicitly prohibits discrimination on the basis of caste (among other grounds); its protective purpose was emphasized. The Court noted that **"***caste cannot be a ground to discriminate against members of marginalized castes***"** and that any use of caste in classification must be to benefit (and not penalize) those castes. (Indeed, Article 15(4) allows caste-based classification only for remedial affirmative action, e.g. to advance SC/ST.) Article 17 mandates that "untouchability is abolished and its practice in any form forbidden". The Court observed that this anti-exclusion principle "strikes at the heart of the caste system" and protects human dignity. Article 21 (right to life and personal liberty) was interpreted broadly to include the right to dignity and humane treatment even in custody. Citing *Kishore Singh v. Rajasthan*[3] (1981), the Court noted that assigning a prisoner **" "** or isolating him by caste is a "punitive" measure that infringes "liberty or life in its wider sense". Article 23 forbids slavery and forced labour; its ban on "other similar forms" of forced labour was held to prohibit compulsory caste-based prison labour. Collectively, these provisions enact an equality-driven vision bolstered by Articles 46 and 338 (DPSP for SC/ST welfare) that tolerates no caste-based stigma or segregation in law or administration. No special statutory exemptions (e.g. emergency powers or outdated laws) could override these fundamental guarantees.

Arguments – Petitioner: Ms. Shantha's counsel (Senior Advocate Dr. S. Muralidhar and Ms. Disha Wadekar) argued that numerous State prison rules codified caste hierarchy. They presented charts from various manuals showing, for example, that "menial" jobs (like cleaning latrines or kitchens) were reserved for inmates from scheduled or "sweeper" castes, while supervisory tasks were assigned to "upper caste" prisoners. Some manuals explicitly barred *denotified tribes* (formerly "criminal tribes") from certain activities. Counsel identified three categories of ongoing caste bias: (i) assignment of manual labour by caste; (ii) segregation of barracks or wards by caste; and (iii) penal sanctions keyed to caste (e.g. branding a prisoner a "habitual offender" based on tenuous criteria linked to caste). They argued these measures perpetuate untouchability and violate Articles 14,15,17,21,23. The petitioner pointed out that the Model Prison Manual 2016 only forbids caste-based *kitchen* discrimination, leaving broader caste rules untouched. The petition urged deletion of any "caste column" in registers and a clear statutory definition of "habitual offender" to prevent misuse against denotified tribes (who suffer entrenched prejudice).

[3] Kishore Singh v. Rajasthan(1981) 1 SCC 503

Arguments – Respondents: The Union and States offered a multi-faceted response. The ASG (Ms. Aishwarya Bhati) noted that the Union's Model Prison Manuals (2003 and 2016) *expressly* prohibit caste/religion-based kitchen segregation and special treatment. She highlighted a February 2024 Ministry of Home Affairs advisory to all States directing that *no discriminatory provisions* remain in prison laws. The ASG also pointed to the federal distribution: prisons fall under State List entry 4, so States administer prisons, though the Union would coordinate model reforms. West Bengal's counsel (Ms. Ashtha Sharma) countered that the cited caste-based rules in the 1967 Jail Code are already dormant; proposals to amend/delete them have been sent to authorities. (No State defended retaining caste caste barriers.) An intervening NGO's counsel (Mr. Anuj Saxena) joined the petition, asking the Court to order deletion of the "caste" column in prison admission registers and to restrain caste-based assignments. In summary, respondents acknowledged the constitutional ban on caste bias but noted that recent policies and guidelines already proscribe such discrimination, and administrative steps were underway to excise outdated rules.

Court's Reasoning: The Court embarked on an expansive constitutional analysis, situating the case within India's founding vision of equality and dignity. It emphasized that the *values* of the Constitution i.e. liberty, equality, fraternity, social justice are "at stake" in this petition. Interpreting Article 14, the Court reiterated that the Constitution forbids *arbitrary* or capricious classifications. Any rule which selects prisoners by caste without rational nexus to legitimate penological objectives fails this test. The Court cited *Maneka Gandhi*[4] and *E.P. Royappa*[5] to underscore that equality is a "dynamic" concept and includes a substantive element beyond mere formal sameness.

Under Article 15(1), the Court noted that caste is explicitly a prohibited ground of discrimination. It drew upon precedent to hold that while caste may inform *remedial* measures (Art. 15(4) allows affirmative action), caste cannot be used to disadvantage the already oppressed castes. The judgment held that caste-based distinctions in prison work and accommodation are not legitimate remedial classifications but punitive relics of social hierarchy. It observed that any classification "must withstand judicial scrutiny to ensure it does not perpetuate discrimination against the oppressed castes". Moreover, the Court insisted that prison classifications must be *functional* (e.g. by risk, security, or reform needs) and not reflect social status. Noting that limitations on inmates "that are cruel or irrelevant to rehabilitation

[4] Maneka Gandhi v. Union of India, 1978 INSC 16
[5] E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3

are per se unreasonable, arbitrary and constitutionally suspect", the Court found that caste-based segregation has no rational connection to the aims of punishment or reform.

Article 17's ban on untouchability was given profound weight. The Court observed that caste-untouchability doctrines (purity-pollution rules) have historically justified subjugation of Dalits and denotified tribes, and that Article 17 was meant to eradicate such stigmatization. It cited its own precedent that "Article 17 rejects such notions of purity and pollution…[and] is a powerful guarantee against exclusion". In other words, caste apartheid in any form, including prison, is antithetical to the constitutional promise of equality and dignity.

Article 21 (life, personal liberty) was read to incorporate a right to dignity and freedom from inhumane treatment. The Court noted that prison administrators cannot erode a prisoner's dignity by treating caste status as a basis for inferior treatment. It quoted *Kishore Singh v. Rajasthan*[6], emphasizing that subjecting a prisoner to "degrading labour" or punitive segregation is an "infraction of liberty or life in its wider sense". In short, caste-based humiliation or forced labor in jail violates the due-process requirement that any deprivation of liberty be substantively and procedurally just.

Article 23 (prohibition of forced labour) was also engaged. The Court pointed out that Article 23 bans not only slavery and human trafficking, but "any similar form of forced labour". Assigning manual scavenging or other harsh labour to prisoners solely because of caste amounts to coerced labour, which Article 23 forbids. Therefore, any rule that compels lower-caste inmates to perform degrading tasks while insulating higher castes from such work was declared inconsistent with Article 23's broad sweep.

Applying these principles, the Court held that all the impugned provisions in the State prison manuals were unconstitutional. To quote the operative direction, "[t]he impugned provisions are declared unconstitutional for being violative of Articles 14, 15, 17, 21, and 23 of the Constitution". This sweeping finding reflected that caste-based prison regimes could not survive even a minimal equality analysis. For example, the Court observed: "Assigning labour based on caste background strips individuals of their liberty to engage in meaningful work" and "perpetuates the stigma of untouchability". All such practices were thus struck down as arbitrary class legislation inconsistent with constitutional morality.

Key Findings and Directions: The Court's order implemented its reasoning with specific measures. First, it directed all States and UTs to revise their prison manuals to remove all caste-

[6]Kishore Singh v. Rajasthan 6 (1981) 1 SCC 503

based classifications within three months. Second, it ordered the Union to amend the central Model Prison Manual (2016) and the new Model Prisons and Correctional Services Act, 2023 to eliminate any vestiges of caste discrimination. Third, it held that references to "habitual offenders" in prison rules must conform to valid statutory definitions (if any); otherwise, they were struck down. If a State lacked a habitual-offender law, both Union and State were told to update their manuals accordingly in three months.

In addition, the Court issued several implementation directions. It explicitly deleted the "caste" column (and any caste references) in prisoner registers. It directed the police to follow the guidelines of '*Arnesh Kumar v. Bihar'*[7] (2014) and *Amanatullah Khan v. The Commissioner of Delhi Police*[8] (2024) when effecting arrests of denotified-tribe persons, to prevent arbitrary detention. Crucially, the Court took *suo motu* cognizance of "discrimination inside prisons in India," instituting a new monitored proceeding titled '*In Re: Discrimination Inside Prisons in India'*. Under this suo motu case, all States and the Union must file compliance reports on the judgment, and District Legal Services Authorities (DLSAs) together with prison Boards of Visitors are to conduct periodic inspections for caste bias. These inspection reports will be compiled by State LSAs and forwarded to NALSA, which will file a consolidated status report in the Court. Finally, the Union government was ordered to circulate the judgment to all State Chief Secretaries within three weeks.

In sum, the Court's disposal order recited: "Writ petition disposed of with the following directions: (i) [strike down provisions under Arts. 14,15,17,21,23]; (ii) revise model manual/Act; (iii) align 'habitual offender' usage; (iv) delete caste entries; (v) police follow arrest guidelines; (vi) suo motu cognizance; (vii) compliance report; (viii) DLSA and visitors inspections; (ix) circulate judgment to all States". These unanimous Directions (signed by CJI Chandrachud, J.B. Pardiwala, and Manoj Misra JJ.) leave no ambiguity that caste-based regimes in prisons are prohibited.

Implications for Prison Reform: *Sukanya Shantha* is poised to catalyze sweeping jail reforms. The immediate effect is that outdated caste-linked rules must be excised, forcing prison administrations to reallocate duties and housing purely on neutral criteria (security, skill, health, etc.). The Court explicitly urged revision of the new Model Prisons Act, 2023, signaling that future legislation and policy must embed non-discrimination. By entrusting DLSAs and Boards of Visitors with active oversight, the judgment creates ongoing institutional

[7] Arnesh Kumar v. Bihar 2014 INSC 463
[8] Amanatullah Khan v. The Commissioner of Delhi Polic*e*2024 INSC 383

mechanisms to detect and correct discrimination. It also underscores the role of legal aid bodies in safeguarding prisoners' rights. On a broader plane, the ruling may stimulate other reforms: e.g. removal of caste columns in official records (enhancing privacy and reducing profiling), sensitization of prison staff to caste equality, and abolition of antiquated job classifications (a form of forced labour) that violate human rights norms. The decision aligns India's prison rules with international standards (like the UN Nelson Mandela Rules) that prohibit discrimination. It also highlights the importance of non-legal factors (education, vocational training) as legitimate assignments, in place of degrading caste-based chores.

Implications for Caste Justice: The Court's judgment reinforces India's constitutional commitment to eradicate caste bias, extending it even into the "humblest" corners of the criminal justice system. The ruling follows a string of precedents (e.g. *Appa Baloo Ingale v. Karnataka*[9] 1993; *Safai Karamchari Andolan v. UOI*[10] 2014) that have struck down caste-based exploitation, such as manual scavenging. By declaring caste-segregated prisons unconstitutional, the Court acknowledges that imprisonment must not become a backdoor for reinforcing historic inequalities. It also vindicates the centuries-long struggle against untouchability: "[t]he incorporation of Article 17… is symbolic of valuing the centuries' old struggle of social reformers," the Court observed, adding that Article 17 serves as "a powerful guarantee against exclusion" and stigmatization. In practical terms, the judgment affirms a new right of prisoners – regardless of background – to be treated without caste prejudice. It may encourage further challenges in other contexts where caste shadows state action. Notably, the Court equated caste-based labour assignments with a form of forced labour, thereby bringing them under the ban of Article 23. This interpretation strengthens anti-caste jurisprudence by recognizing that custodial environments have equal protection obligations. Finally, the decision underscores that Indian democracy aspires to an "inclusive society" where discrimination based on birth has "no rationale or legitimacy". It hence adds a constitutional layer of "caste justice" atop criminal law, promising corrective remedies for historically marginalized groups even while incarcerated.

Implications for Custodial Accountability: The case has significant implications for policing and custodial oversight. First, by upholding '*Arnesh Kumar v. Bihar*'[11] and '*Amanatullah Khan*'[12] precedents in its directions, the Court extended those safeguards explicitly to protect

[9] Appa Baloo Ingale v. Karnataka1994 SCC (Cri) 1762
[10]Safai Karamchari Andolan v. UOI 2014 (11) SCC 224
[11]Arnesh Kumar v. Bihar' 2014 INSC 463
[12] Amanatullah Khan v Commissioner of Police 2024 INSC 383

denotified tribes. It mandated that police **"ensure that members of Denotified Tribes are not subjected to arbitrary arrest"**, recognizing the vulnerability of these communities to custodial abuse. This echoes the Court's warning in *Kishore Singh*[13] that the State must "re-educate the constabulary" to respect human dignity. More broadly, taking suo motu note of in-prison discrimination and converting the case into a standing petition (In Re: *Discrimination in Prisons*) creates institutional accountability. States must report on compliance, effectively treating custodial equality as a continuing judicial obligation. The role assigned to DLSAs and Boards of Visitors also injects community oversight into a domain long shielded from scrutiny. In practice, these bodies can now inspect jails specifically for caste bias (and other discrimination), and their findings are funneled back to the Supreme Court via NALSA.

In effect, *Sukanya Shantha* brings "custodial violence" understood as any rights-violation in custody – into the spotlight, at least where it intersects with caste. By condemning caste-based brutality (such as forced menial labour or punishing segregation) as constitutional infractions, the Court implied that any such abuses cannot be tolerated. This sets a precedent that prisons, like all government institutions, must abide by fundamental rights. The judgment also implicitly advances other custodial safeguards: it cited '*Francis Coralie Mullin v. Delhi*'[14] (1981) and '*Sheela Barse v. Maharashtra*'[15] (1987) as part of its discussion, underscoring prisoners' entitlement to legal aid and decent treatment. It warned against "cover-up" of abuses and affirmed that prisoners retain core human rights. Going forward, prison administrations will have to justify any restrictive or segregatory policy under a high constitutional standard. In practical terms, vulnerable prisoners (e.g. Dalits, tribals, minorities) can invoke this case if they face caste-based mistreatment. The Supreme Court has effectively elevated custodial accountability: "Who will police the police?" may now have an answer in the Court's vigilance and its instructed mechanisms.

Conclusion: *Sukanya Shantha v. Union of India* (2024) is a landmark judgment that unambiguously outlawed caste-based discrimination in Indian prisons. The Court's analysis anchored the case in the Constitution's equality ideals and drew upon Articles 14, 15, 17, 21, 23 to strike down unconstitutional prison rules. Its directions require an overhaul of prison law and practice from model manuals to on-the-ground work assignments to purge caste bias. For the larger struggle against caste injustice, it is a powerful affirmation that no citizen's dignity

[13] Kishore Singh v State of Rajasthan 6 (1981) 1 SCC 503
[14]Francis Coralie Mullin v. Delhi' (1981) 1 SCC 608
[15] Sheela Barse v. Maharashtra'(1987) 4 SCC 373

is forfeited by detention. Finally, by instituting vigilant oversight (including a new suo motu monitoring case), the Court has extended the reach of judicial accountability deep into custodial systems.

BEYOND TERRESTRIAL BORDERS: JURISDICTIONAL COMPLEXITIES IN ENFORCING INTELLECTUAL PROPERTY RIGHTS IN OUTER SPACE

Modi Umangkumar Champaklal[1]

Abstract

As outer space emerges as a new frontier for scientific advancement, commercial enterprise, and geopolitical collaboration, the protection and enforcement of intellectual property rights (IPRs) beyond Earth have become increasingly complex and consequential. Traditional IP regimes are grounded in the principles of territorial sovereignty and national jurisdiction—doctrines that are fundamentally incompatible with the legal status of outer space, which is governed by the Outer Space Treaty, 1967 and other international instruments that prohibit sovereign claims. This research article critically examines the jurisdictional challenges associated with enforcing patents, copyrights, trademarks, and trade secrets in the extra-terrestrial context. It explores the limitations of existing terrestrial legal frameworks, including the gaps in the registry-based model under Article VIII of the Outer Space Treaty, and assesses efforts by individual nations such as the United States to extend IP protections via statutes like 35 U.S.C. § 105.

Through comparative legal analysis, the paper evaluates the efficacy of current arrangements such as the Intergovernmental Agreement (1998) governing the International Space Station, draws analogies from maritime and aviation law, and scrutinizes the roles of international institutions like WIPO and UNCOPUOS. The study identifies key lacunae in both enforcement and adjudication mechanisms and proposes a multi-layered legal framework comprising treaty reform, model national legislation, arbitration-based adjudication, and contractual safeguards. Ultimately, the paper argues that a harmonized, cooperative, and forward-looking legal regime is essential to safeguard innovation, promote international trust, and ensure the sustainable development of space-based industries.

Keywords: *Intellectual Property Rights, Outer Space Law, Jurisdiction, Space Commercialization, International Legal Framework*

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1.INTRODUCTION

The twenty-first century marks a paradigm shift in humanity's exploration and utilization of outer space. With the rise of private aerospace corporations, space tourism, satellite mega constellations, asteroid mining missions, and international collaborations aboard the International Space Station (ISS), the extra-terrestrial domain has transformed from a purely scientific frontier into a theatre of significant economic and technological activity. This evolution has brought intellectual property (IP) to the forefront of space law discourse. In an era where patented technologies and proprietary innovations are deployed and commercialized beyond Earth, the question of how to enforce IPRs in outer space has become both urgent and complex.

The unique legal environment of outer space is characterized by the absence of territorial sovereignty. The Outer Space Treaty, 1967 considered the cornerstone of international space law explicitly prohibits any nation from claiming sovereignty over celestial bodies. This creates a legal vacuum in which traditional, territorially grounded principles of jurisdiction, ownership, and enforcement mechanisms do not easily apply. In such an environment, enforcing intellectual property rights becomes a jurisdictional conundrum. If a patented component is used on the International Space Station, or if proprietary software is replicated aboard a commercial spacecraft, which nation's laws should apply? What remedies are available to the rights holder? Can infringement be regulated when the locus of activity lies outside national boundaries?

Jurisdiction, in the context of IP enforcement, traditionally hinges on three pillars: territoriality, nationality, and the principle of effects. However, the outer space context challenges all three. While space-faring nations have attempted to address some of these issues through national legislation such as the United States' extension of patent law to space objects under its registry the lack of international harmonization and adjudicatory mechanisms results in significant legal uncertainty. The rise of multinational collaborations and private actors further complicates jurisdictional clarity. Moreover, the ISS Intergovernmental Agreement (1998), which governs activities aboard the ISS, attempts to allocate jurisdiction among participating nations but has yet to be fully tested in the context of IP disputes.

This research paper seeks to examine the jurisdictional challenges in enforcing IP rights in outer space, with a specific focus on legal ambiguities, interpretative dilemmas, and the

absence of binding international mechanisms. It explores how terrestrial legal principles apply or fail to apply in the extra-terrestrial context, evaluates current legal instruments and case law, and investigates how analogies from maritime and aviation law might provide partial guidance. It also analyses existing frameworks, such as the WIPO, and the IP policies of national space agencies, to assess their adequacy in the evolving space economy. By identifying jurisdictional lacunae and evaluating emerging trends, the paper ultimately argues for the need for a multilateral legal framework that recognizes the sui generis nature of outer space and provides clarity on enforcement of IPRs. Such a framework must balance innovation incentives, commercial interests, and the cooperative spirit that underpins the international space regime.

2. UNDERSTANDING INTELLECTUAL PROPERTY IN THE CONTEXT OF OUTER SPACE

The expansion of human activity into outer space has prompted critical questions regarding the applicability and enforcement of IP rights beyond Earth's jurisdiction. Intellectual property, as a legal concept, refers to the rights granted to individuals and organizations over their intangible creations, including inventions, artistic works, symbols, names, images, and designs used in commerce. The primary categories patents, copyrights, trademarks, and trade secrets serve as essential tools for incentivizing innovation and protecting economic interests. In the context of outer space, these rights become increasingly significant due to the heavy reliance on advanced technologies, unique processes, and proprietary designs in space exploration, satellite development, space tourism, and extra-terrestrial mining.

Patents play a central role in protecting inventions such as rocket propulsion systems, life-support mechanisms, robotic arms, and automated landing modules. Copyrights are crucial for securing ownership over space software, satellite imagery processing programs, and mission control systems. Trademarks help distinguish the services of private spaceflight companies, satellite broadcasters, and space tourism ventures. Trade secrets, meanwhile, safeguard confidential engineering methods, fuel compositions, and algorithmic frameworks that underpin competitive advantage. As space exploration transitions from being a state-centric endeavour to a domain characterized by multinational partnerships and private sector leadership, the legal mechanisms to protect these intangible assets become both more critical and more complex.[2]

[2]Rans G. von der Dunk, European Space Law, in *Handbook of Space Law* 205 (Frans G. von der Dunk & Fabio Tronchetti eds., Edward Elgar Publ'g 2015).

The application of terrestrial IP law in outer space, however, is fraught with doctrinal and practical challenges. At the core of this issue lies the territorial nature of intellectual property rights. Most IP systems operate on the principle of territoriality, meaning that protection is conferred only within the jurisdiction where the right is granted. For example, a patent granted by the Indian Patent Office is enforceable only within Indian Territory. This principle is fundamentally incompatible with the legal structure of outer space, which is governed by international treaties such as the Outer Space Treaty of 1967. [3]

To address this jurisdictional void, some nations have resorted to registry-based extensions of their national laws. Under Article VIII of the Outer Space Treaty, the state that registers a space object retains jurisdiction and control over it. [4]The US, for example, has legislated through 35 U.S.C. § 105 that any invention made or used in outer space aboard a U.S.-registered space object is subject to U.S. patent law. Similarly, the Intergovernmental Agreement (IGA) of 1998, which governs the International Space Station (ISS), provides that the national law of the partner state responsible for a specific module governs the activities within it. This modular jurisdictional approach creates a patchwork of applicable laws aboard the ISS. A U.S.-patented technology used in the Destiny module would fall under U.S. law, while the same act in the Japanese Kibo module would be governed by Japanese law

In conclusion, the current intellectual property regime struggles to respond effectively to the realities of outer space activities. The territorial basis of IP rights, combined with the jurisdictional vacuum of outer space, renders traditional enforcement models largely inapplicable. Although registry-based and module-specific solutions offer interim mechanisms for assigning jurisdiction, they are insufficient to address the transnational, modular, and often automated nature of modern space activities. As space law continues to evolve, there is a growing need for a comprehensive, multilateral framework that redefines IP protection in extra-terrestrial contexts, balancing legal clarity, innovation incentives, and international cooperation.

3. JURISDICTIONAL CHALLENGES IN OUTER SPACE

The enforcement of IPRs in outer space presents a uniquely complex challenge due to the absence of clear territorial jurisdiction, the rapid expansion of private actors in the space domain, and the inadequacy of existing international legal frameworks. Jurisdiction, which

[3] Outer Space Treaty of 1967
[4] Id section VIII

refers to the legal authority of a state to regulate behavior or adjudicate disputes, is essential for any system of law to function. In the realm of intellectual property, jurisdiction allows national courts to enforce exclusive rights conferred by statutes such as patent, copyright, and trademark laws. However, in outer space an area beyond the sovereign claims of any nation the traditional bases of jurisdiction are fundamentally disrupted. This legal vacuum undermines the ability to enforce IPRs effectively when infringements occur beyond Earth. The foundational legal instrument governing space activities, the Outer Space Treaty of 1967, provides that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by sovereignty, use, occupation, or any other means. Consequently, the doctrine of territorial jurisdiction, which underpins IP enforcement on Earth, is inapplicable in the extra-terrestrial context. In response, states have adopted a registry-based jurisdiction approach under Article VIII of the same treaty, which allows a state to retain jurisdiction and control over objects it registers in space and over personnel on those objects. For instance, a satellite launched and registered by the US remains subject to U.S. jurisdiction, even while orbiting Earth. Similarly, personnel aboard a spacecraft remain under the jurisdiction of the launching or registering nation.[5]

While this registry-based model provides a limited legal anchor, it fails to account for increasingly multinational and privatized space operations. One notable example is the International Space Station (ISS), which is governed by the Intergovernmental Agreement (IGA), 1998. The IGA allocates jurisdictional authority based on ownership and registration of specific modules. For example, the US exercises jurisdiction over the Destiny module, Japan over the Kibo module, and the European Space Agency over the Columbus module. If a patent infringement occurs within the Destiny module, U.S. patent law would apply. However, this modular jurisdiction becomes less effective when activities span multiple modules or when software and technologies are accessed remotely across different jurisdictions. Additionally, the IGA's provisions are limited in scope, applying only to the ISS and its signatory states, and do not extend to future missions involving commercial stations, lunar bases, or asteroid mining ventures.

Compounding the problem is the growing role of private actors such as SpaceX, Blue Origin, and international start-ups that design, launch, and operate space technologies. These entities

[5]Matthew Gillett, Katja Grünfeld & Iva Ramuš Cvetkovič, Introduction: Regulating Space Pollution by Non-State Actors (NSAs) under International Law, in *Lex Ad Astra* 1–70 (2025), https://doi.org/10.1163/9789004724624_002

frequently operate across jurisdictions manufacturing components in one country, launching from another and transmitting data to a third. If a company infringes on a patented space-based invention in orbit, identifying the appropriate jurisdiction becomes legally ambiguous. For instance, if a French-registered satellite incorporating U.S.-patented software is launched aboard an Indian rocket and operated from a Canadian ground station, it is unclear which legal system would govern the dispute and how enforcement would proceed. While some national laws have attempted to address this, such efforts are fragmented. The US, through 35 U.S.C. § 105**,** has extended the applicability of its patent law to inventions made, used, or sold in outer space on objects under U.S. control or registry.

Moreover, the phenomenon of "flags of convenience" known from maritime law could also emerge in space law. Similar to how shipping companies register vessels in states with minimal regulatory burdens, space actors may choose to register their spacecraft in countries with lenient IP laws or weak enforcement mechanisms. This could lead to a regulatory race to the bottom, further complicating efforts to ensure fair protection of IPRs in the space domain. Without harmonized international standards, states may adopt conflicting approaches, thereby undermining legal certainty and investment security.

Analogies to maritime and aviation law have been explored in legal literature as potential models for managing jurisdiction in space. Under the UNCLOS, ships in international waters are subject to the jurisdiction of the state whose flag they fly. Similarly, aircraft are regulated by the country in which they are registered, even in international airspace, under the Chicago Convention. However, both maritime and aviation law are backed by robust international treaties and dispute resolution mechanisms, which space law currently lacks. Additionally, space activities involve more complex interactions, including automated systems, remote operations, and shared infrastructure, which do not fit neatly into these analogical frameworks.

National courts, which are typically the forums for IP enforcement, are limited in their ability to adjudicate space-based infringements. Most courts exercise jurisdiction based on territorial presence or substantial connection to the forum state. In the case of IP infringement occurring in orbit, courts may lack sufficient nexus to assert jurisdiction or enforce remedies. Arbitration, particularly under the Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (2011), has been proposed as an alternative. However, arbitration requires a prior agreement between the parties and lacks compulsory enforcement power without national court support. Moreover, arbitral mechanisms are seldom invoked unless commercial contracts explicitly provide for them.

The absence of a dedicated international adjudicatory body for space IP disputes leaves rights holders vulnerable. Enforcement depends on voluntary compliance, diplomatic pressure, or domestic litigation all of which may be ineffective if the infringing party operates in a jurisdiction unwilling to cooperate. Even when national courts do assert jurisdiction, enforcing judgments internationally remains a major challenge, particularly when defendants have no assets or presence in the forum country.

In summary, jurisdictional challenges in enforcing IP rights in outer space stem from the fundamental incompatibility between the territorial basis of IP law and the non-sovereign nature of outer space. Although efforts have been made through national legislation and international agreements such as the IGA, these mechanisms are limited in scope, fragmented in application, and often inadequate for the transnational, privatized, and high-technology landscape of space exploration. The future of space IP enforcement requires the development of a comprehensive international legal framework that harmonizes jurisdictional rules, ensures mutual recognition of rights, and establishes a neutral adjudicatory forum capable of resolving cross-border disputes. Without such a system, the risk of legal uncertainty, commercial conflict, and under-protection of innovation in space will only intensify.

4. CASE LAW AND PRECEDENTS

The jurisprudence relating directly to IP disputes in outer space is still embryonic due to the novelty and complexity of extra-terrestrial legal questions. As of today, there are no decided cases before international courts or domestic tribunals that have conclusively addressed IP infringement beyond Earth. Nevertheless, valuable insights can be derived from analogical jurisprudence in related domains such as maritime law, aviation law, and cyberspace jurisdiction. In the absence of space-specific judicial pronouncements, courts and scholars often extrapolate legal principles from cases that deal with extraterritoriality**,** technology use beyond borders, and international collaboration in lawless domains**.**

A foundational case in U.S. extraterritorial jurisdiction jurisprudence is *United States v. Palmer*, in which Chief Justice Marshall held that U.S. courts had no jurisdiction over piracy committed by non-citizens on foreign vessels unless Congress expressly provided for such extraterritorial reach.[6] This early interpretation of jurisdictional limits resonates with challenges in applying IP laws in outer space, where acts of infringement may occur on space

[6]United States v. Palmer, 16 U.S. (3 Wheat.) 610, 632 (1818)

objects not registered with the enforcing state. Similarly, in *United States v. Kaluza*, the U.S. court had to determine jurisdiction over negligence that occurred aboard a foreign-flagged vessel in international waters, ultimately reinforcing the principle that registry and nationality govern authority beyond territorial bounds.[7] These maritime precedents support the extension of national jurisdiction to registered space objects under Article VIII of the Outer Space Treaty, but they also underscore the need for explicit statutory authority and procedural clarity. While there are no outer space IP infringement cases on record, the International Space Station (ISS) offers examples of how intellectual property concerns are proactively addressed through intergovernmental agreements rather than judicial adjudication. Under Article 21 of the ISS Intergovernmental Agreement (IGA), 1998, partner states agree to respect and protect intellectual property rights of entities involved in ISS activities. The IGA provides that the law of the registry state of the relevant module governs acts occurring in that module. While this regime has avoided formal litigation to date, it relies on cooperative enforcement and contractual arrangements rather than justiciable standards. Moreover, given the absence of public case records, any disputes are presumably settled through diplomatic or administrative channels, limiting transparency and legal development.

In cyberspace, parallels have been drawn from the Yahoo! Inc. v. La Ligue Contre Le Racisme et l'Antisémitisme case, where a French court order restricting content on Yahoo's U.S.-based servers raised questions about jurisdictional overreach.[8] The U.S. Ninth Circuit ultimately ruled that the enforcement of the foreign order conflicted with American constitutional principles. This case demonstrates the risks of jurisdictional conflict in borderless domains**,** which can similarly manifest in outer space, particularly when technologies are operated remotely and involve multinational collaboration. It reinforces the idea that jurisdiction must be anchored in international agreement or mutual recognition of legal authority an area where outer space governance remains underdeveloped.

In patent law, *Deepsouth Packing Co. v. Laitram Corp.* remains a pivotal U.S. Supreme Court decision interpreting the limits of extraterritorial application of domestic patent laws.[9] In that case, the Court ruled that the assembly of components outside the US, even if intended to practice a patented invention, did not constitute infringement under then-current U.S. law. The ruling prompted legislative reform, specifically the addition of 35 U.S.C. § 271(f), which

[7]United States v. Kaluza, 780 F.3d 647 (5th Cir. 2015).
[8]Yahoo! Inc. v. La Ligue Contre Le Racisme et l'Antisémitisme, 433 F.3d 1199 (9th Cir. 2006).
[9]Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972).

closed this loophole. This historical trajectory highlights how gaps in jurisdictional coverage can undermine the enforcement of IP rights and how legislative evolution responds to technological realities. If similarly applied to space, this reasoning suggests that gaps in current treaties and laws could permit exploitation of legal grey zones in orbit—such as assembling patented components on non-registered space objects or using proprietary code in multinational modules without triggering enforcement.

In the European context, although no judicial decision yet addresses IP enforcement in outer space, the European Patent Convention (EPC) and the European Space Agency's IP policies offer administrative mechanisms for protecting inventions used in European space programs. The EPC does not extend protection to space unless national patent laws expressly incorporate extraterritorial applications. Some ESA member states have introduced contractual obligations within procurement agreements requiring the respect of proprietary technologies during collaborative missions. While not case law per se, these administrative protocols function as quasi-normative standards and indicate how IP concerns are being internalized in inter-agency arrangements, even without litigation. The WIPO Arbitration and Mediation Center has handled space-related contractual disputes in the satellite communications industry, although the proceedings are confidential and outcomes are non-precedential. Nonetheless, these forums offer dispute resolution avenues for IP holders operating in space. For example, in a case involving unauthorized signal transmission through leased transponders, WIPO arbitration provided a venue for resolution without resorting to domestic courts. Such practices may become more prominent as parties choose contract-based arbitration over forum-based litigation in the uncertain jurisdictional terrain of outer space.[10]

Looking ahead, hypothetical disputes illustrate the complexity courts may soon face. Suppose a German astronaut uploads a proprietary Japanese satellite imagery processing software onto a shared server aboard the ISS and enables its use by crew from other nations without authorization. In such a case, multiple issues arise: which state's law applies? Does the act constitute copyright infringement? What remedies are available? Could any national court assert jurisdiction over the infringement, or would enforcement depend entirely on intergovernmental cooperation or pre-agreed arbitration? The absence of real-world case law underscores the urgency of answering these questions pre-emptively through international legal instruments.

[10]Emilie McConaughey & Nicole Chalikopoulou, *Space Law and Arbitration: A Not-So-Outlandish Space Odyssey*, 40 ASA Bull. 552 (Sept. 2022).

In sum, while direct case law addressing IP rights in outer space is currently lacking, analogous judicial decisions in maritime, cyber, and aviation domains provide instructive legal reasoning for future application. Cases such as *Palmer*, *Kaluza*, and *Yahoo!* affirm the necessity of statutory clarity, cooperative jurisdictional arrangements, and procedural mechanisms to resolve conflicts in domains where traditional sovereignty does not apply. As commercial space activities accelerate, it is only a matter of time before disputes involving patented components, copyrighted software, or trademarked services deployed in orbit reach judicial forums. Until then, national space agencies, commercial actors, and international organizations must proactively craft legal and institutional frameworks to manage such conflicts, lest the absence of precedent devolve into legal uncertainty.

5. EXISTING LEGAL FRAMEWORKS AND INSTITUTIONAL GAPS

The enforcement of IP rights in outer space exists at the intersection of multiple legal regimes international space law, national IP laws, and institutional practices governed by spacefaring agencies. However, this intersection is riddled with inconsistencies and jurisdictional gaps, revealing the insufficiency of existing legal frameworks in addressing the new realities of space commerce and innovation. The primary sources of international space law, particularly the Outer Space Treaty of 1967, the Moon Agreement of 1979, and the Registration Convention of 1976, were drafted in a geopolitical context where state actors dominated space activity. As such, these instruments lack provisions explicitly addressing intellectual property issues, leaving enforcement entirely dependent on domestic legislation and voluntary cooperation among space actors. Article I of the Outer Space Treaty promotes the free use and exploration of outer space for all countries, while Article II prohibits national appropriation of celestial bodies. These provisions though critical for preserving outer space as a global commons create structural tension with the proprietary nature of intellectual property rights, which rely on exclusive use and national enforcement.[11]

At the domestic level, several countries have taken steps to regulate IP in the space context, but their approaches are highly fragmented. The US remains one of the few nations to have enacted explicit statutory extensions of its patent law into outer space. Under 35 U.S.C. § 105, any invention made, used, or sold in outer space on a space object under the jurisdiction or control of the US is considered to be made within the territory of the US and is thus subject to

[11] Gillett et al., supra note 2, at 2 ¶ 10.

U.S. patent law.[12] This extraterritorial reach has provided a degree of legal clarity for U.S. patent holders. However, other major spacefaring nations such as India, China, and Russia have not enacted equivalent provisions, which raise concerns over legal asymmetry and conflicting enforcement norms.

India's Draft Space Activities Bill, 2017 proposes a licensing regime for private sector participation in outer space and assigns liability to non-governmental entities.[13] While the bill is a welcome development in regulating commercial activity, it does not contain explicit clauses concerning intellectual property protection or cross-border enforcement mechanisms. The absence of a formal law means that India's IP regime continues to operate strictly within Earth-bound territorial boundaries, potentially placing Indian innovators at a disadvantage in global collaborations. Similarly, the European Space Agency (ESA) has developed internal contractual provisions to regulate intellectual property between ESA and its contractors, but these remain administrative measures rather than binding legal rules with transnational enforcement capacity.[14]

At the international institutional level, the WIPO) has limited engagement with outer space-specific IP challenges. While WIPO administers the Patent Cooperation Treaty (PCT), which facilitates international patent filings, the PCT remains silent on the application or enforcement of such rights in non-territorial jurisdictions like outer space. The lack of a space-specific WIPO protocol leads to interpretive ambiguity when IP protected through international filings is used or potentially infringed upon beyond Earth. Moreover, WIPO's arbitration and mediation mechanisms though occasionally employed in satellite and telecommunications disputes—do not possess mandatory jurisdiction and are largely dependent on the consent of parties through pre-existing contractual arrangements.

One of the few multilateral frameworks to attempt jurisdictional harmonization in space is the Intergovernmental Agreement (IGA), 1998, governing the International Space Station (ISS). As discussed earlier, the IGA allocates jurisdiction based on module ownership and recognizes IP rights originating in each partner state. However, its functional scope is limited to the ISS and the participating countries namely, the US, Russia, Canada, Japan, and ESA members. The

[12]Kurt G. Hammerle & Theodore U. Ro, *The Extra-Territorial Reach of U.S. Patent Law on Space-Related Activities: Does the "International Shoe" Fit as We Reach for the Stars?*, 34 J. Space L. 241, 250 (2008).
[13]Draft Space Activities Bill (India), 2017 (prepared by the Ministry of Space, Government of India), https://prsindia.org/files/bills_acts/bills_parliament/1970/Draft%20Space%20Activities%20Bill%202017.pdf (last visited June 25, 2025)
[14]European Space Agency, *Intellectual Property Rights*, ESA (last updated 19 Nov. 2014), https://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights.

IGA does not account for activities occurring on commercial stations, lunar bases, or autonomous missions led by private actors. It also does not provide a dispute resolution mechanism for IP conflicts beyond diplomatic consultations. This makes it an inadequate precedent for the more complex, decentralized future of space exploration.[15]

Further, international bodies such as the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) have yet to articulate guidelines or principles on intellectual property protection in outer space, despite calls from academics and industry stakeholders. The absence of such norms limits the ability of states and private actors to align their national laws with global best practices. Additionally, while there are soft-law instruments such as the ITU regulations concerning satellite orbits and frequency allocations, this focus on technical coordination rather than rights-based protection of proprietary innovations. The lack of a binding multilateral treaty on IP in outer space remains a fundamental barrier to coherent enforcement.

Ultimately, the current state of IP protection in outer space is defined more by absence and fragmentation than by coherence and enforceability. Existing treaties are outdated, national laws are inconsistent, and institutional mechanisms are either toothless or inapplicable. As the commercialization of space accelerates encompassing everything from asteroid mining and orbital factories to satellite-based cloud computing the inability to ensure legal protection of intellectual assets threatens to chill innovation and discourage collaborative ventures. Without a robust multilateral framework capable of aligning jurisdiction, enforcement, and remedies, intellectual property in outer space remains dangerously exposed to legal uncertainty and practical non-enforcement.

6. PROPOSED SOLUTIONS AND MODELS FOR EXTRATERRESTRIAL IP ENFORCEMENT

The effective enforcement of IP rights in outer space requires a paradigm shift from terrestrial legal presumptions to frameworks suited for a non-sovereign, collaborative, and technologically complex environment. As space activities increasingly involve private enterprises, international partnerships, and cross-border technological exchange, fragmented national laws and informal cooperative arrangements are no longer sufficient. There is a

[15]Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station, Jan. 29, 1998, entered into force June 30, 1995, TIAS No. XXX (Deposited Jan. 1998).

growing consensus among legal scholars and policymakers that an integrated, multilateral approach must be adopted to ensure that IP rights remain enforceable, predictable, and respected beyond Earth. Drawing on analogies from maritime law, international telecommunications regulation, and soft-law regimes, several viable models and institutional mechanisms can be considered to fill the legal vacuum surrounding extra-terrestrial IP enforcement.

A compelling solution would be the negotiation and adoption of a multilateral treaty or protocol under the auspices of the WIPO. This instrument could supplement the existing Patent Cooperation Treaty (PCT) and address the sui generis nature of space by establishing shared definitions, minimum enforcement standards, and jurisdictional rules for IP disputes arising in outer space.[16] Such a treaty could function similarly to the Madrid Protocol or the Hague Agreement on international trademark and design protections, which streamline filings and recognize rights across jurisdictions. However, to address enforcement in a domain that lacks territorial sovereignty, the new protocol would need to borrow principles from the UNCLOS, which successfully creates a legal order for a non-sovereign global commons. This model would permit IP enforcement based on registration and activity jurisdiction, rather than territorial occupation, and could be accompanied by dispute resolution provisions akin to those found in the WTO's Dispute Settlement Understanding (DSU).

Another approach would be the creation of a space-specific adjudicatory forum such as an International Space IP Tribunal**,** established through intergovernmental agreement and operating under a hybrid model of public international law and private commercial arbitration**.** This body could be modelled on institutions like the Permanent Court of Arbitration (PCA), which already administers optional rules for disputes relating to outer space activities.[17] The tribunal could offer binding adjudication on disputes involving IP infringement aboard space stations, on lunar bases, or between cross-national collaborators in satellite technologies. It would need to incorporate a conflict-of-laws framework, possibly relying on the law of the launching state, the registry state of the space object, or the nationality of the alleged infringer, subject to choice-of-law clauses in relevant agreements. Such a tribunal would not only

[16]U.N. Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).
[17]Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* (Dec. 6, 2011), https://docs.pca-cpa.org/2016/01/Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-of-Disputes-Relating-to-Outer-Space-Activities.pdf**.**

enhance legal certainty but also reduce the risks of forum shopping, overlapping jurisdiction, and inconsistent enforcement.

An alternative and more pragmatic near-term solution involves harmonization of national laws through model legislation**,** akin to the UNCITRAL Model Law on Electronic Commerce. States could adopt a "Model Law on Space Intellectual Property" that provides for the extraterritorial application of national IP laws to space activities, recognizes foreign judgments or arbitral awards related to IP in outer space, and defines enforcement mechanisms through civil and administrative remedies. This model could encourage legal convergence while respecting national sovereignty and would be particularly useful for developing spacefaring states, which may lack the institutional infrastructure to draft comprehensive IP-space frameworks independently. Such model legislation could also include provisions on data exclusivity, software patentability, and trade secret protection specifically tailored to the technological characteristics of space research.

In parallel, states and private actors should enhance the use of contractual enforcement mechanisms in all space-related joint ventures, launch agreements, and licensing arrangements. These contracts should incorporate robust IP clauses that address ownership, licensing, liability for infringement, and dispute resolution. Choice-of-law and forum-selection clauses can pre-emptively resolve jurisdictional ambiguity. Moreover, parties should be encouraged to use WIPO arbitration and mediation services**,** which, although currently underutilized for space disputes, offer neutral and internationally respected mechanisms suitable for high-stakes technological collaboration. To ensure that such contract-based solutions are not undermined by unwilling jurisdictions, a concerted effort should be made to recognize and enforce arbitral awards related to space IP under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**.**

Finally, there is an urgent need for capacity-building and awareness initiatives among emerging spacefaring nations to ensure they understand the implications of intellectual property protection in outer space. International organizations, particularly WIPO, UNCOPUOS, and UNIDROIT, could collaborate to develop training modules, draft guidance notes, and facilitate regional dialogues on the harmonization of space IP governance. Without adequate awareness and legal literacy, developing nations risk exclusion from global innovation chains or may inadvertently undermine enforceability through weak domestic implementation. Encouraging inclusivity in rule-making processes will enhance legitimacy and ensure that IP enforcement regimes in space do not disproportionately favour established space powers.

In conclusion, while the legal architecture for extra-terrestrial IP enforcement is currently fragmented and underdeveloped, a combination of treaty-based solutions, model legislation, institutional adjudication, and contractual practices offers a viable path forward. The unique nature of outer space—as a shared, non-sovereign environment necessitates an approach that blends international cooperation with enforceable legal rights.

7. CONCLUSION

As humanity ventures further beyond Earth and transforms outer space into a sphere of scientific research, economic enterprise, and technological collaboration, the need for a coherent and enforceable IP regime becomes increasingly urgent. The traditional foundations of IP law rooted in territorial sovereignty, national jurisdiction, and domestic enforcement are insufficient to address the realities of outer space, where sovereignty is prohibited, territoriality is absent, and jurisdictional boundaries are fluid and often undefined. Existing international treaties, such as the Outer Space Treaty and the Intergovernmental Agreement on the International Space Station, offer only partial and context-specific solutions. National laws, such as those enacted by the US, represent early steps toward extraterritorial regulation, but they are not harmonized and risk jurisdictional conflict or overreach. Meanwhile, institutional mechanisms like WIPO, UNCOPUOS, and national patent offices have yet to articulate a dedicated framework for the enforcement of IP rights in outer space. This absence of legal clarity poses significant risks for innovators, commercial investors, and spacefaring states alike, as it may discourage investment, trigger conflict, and lead to the misuse or misappropriation of proprietary technologies deployed beyond Earth.

The solution lies not in a singular model but in a multi-layered legal strategy that incorporates international treaty-making, model national legislation, space-specific arbitration forums, and contractual best practices. A WIPO-led protocol on space IP could offer much-needed harmonization and legal certainty, while a specialized dispute resolution tribunal would fill the current institutional vacuum. In parallel, national governments must adopt laws that extend IP protection to space-based activities and recognize foreign judgments and arbitral awards. For immediate application, private actors should be encouraged to incorporate robust IP provisions in their launch agreements, licensing contracts, and technology-sharing arrangements. These efforts must be inclusive, forward-looking, and adaptable to future technologies and missions, including lunar habitats, Martian colonization, and asteroid mining. Ultimately, the successful protection and enforcement of intellectual property in outer space is not only a matter of legal

sophistication but of international cooperation, shared responsibility, and collective stewardship of the final frontier.