NIU INTERNATIONAL JOURNAL OF HUMAN RIGHTS

A UGC CARE Listed Journal

Volume 9, 2022

ISSN: 2394-0298

NOIDA INTERNATIONAL UNIVERSITY
Plot No 1, Sector – 17 A, Yamuna Expressway, Gautam Buddha Nagar, Uttar Pradesh
Website: www.niu.edu.in

NOIDA INTERNATIONAL UNIVERSITY

ज्ञान–विज्ञान विमुक्तये

Volume 9, 2022 ISSN: 2394-0298

# NIU International Journal of Human Rights

A UGC CARE Listed Journal


NOIDA INTERNATIONAL UNIVERSITY
www.niu.edu.in

NIU International Journal of Human Rights (NIUIJHR) is published annually by Noida International University

**ISSN:** 2394 – 0298
**Volume** 9, 2022

Website: niu.edu.in/niuijhr/

Listed @ Indian Citation Index



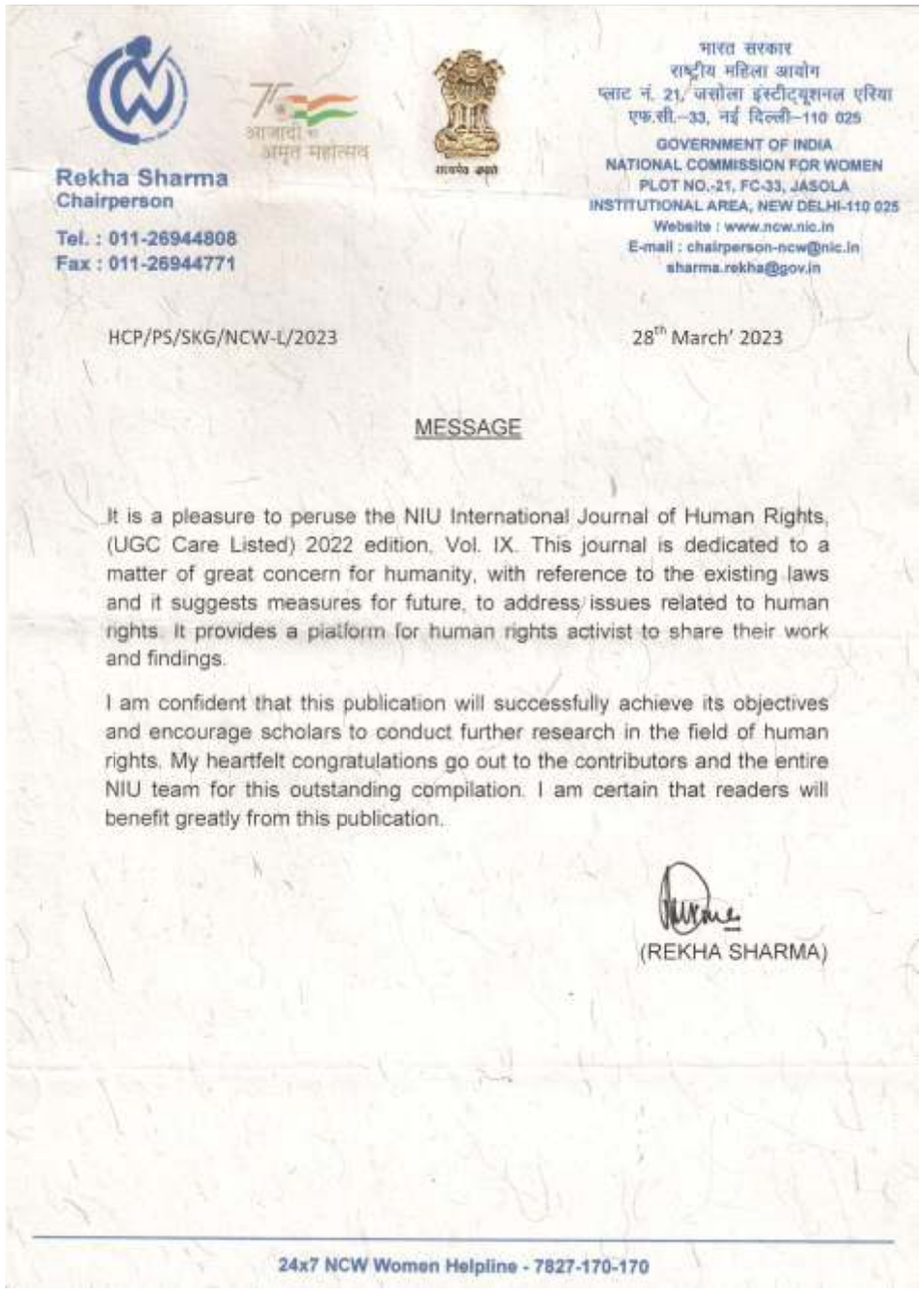
**Disclaimer**
The views expressed in the papers incorporated in the Journal are purely of the authors and not of the Noida International University.

**Address:**
Plot No. 1, Sector 17-A, Yamuna Expressway
Gautam Buddha Nagar, Uttar Pradesh
www.niu.edu.in



ज्ञान–विज्ञान विमुक्तये
A UGC-CARE Listed Journal

## ADVISORY BOARD



भारत सरकार
राष्ट्रीय महिला आयोग
प्लाट नं. 21, जसोला इंस्टीट्यूशनल एरिया
एफ.सी.–33, नई दिल्ली–110 025

GOVERNMENT OF INDIA
NATIONAL COMMISSION FOR WOMEN
PLOT NO.-21, FC-33, JASOLA
INSTITUTIONAL AREA, NEW DELHI-110 025
Website : www.ncw.nic.in
E-mail : chairperson-ncw@nic.in
sharma.rekha@gov.in

Rekha Sharma
Chairperson
Tel. : 011-26944808
Fax : 011-26944771

HCP/PS/SKG/NCW-L/2023

28th March' 2023

MESSAGE

It is a pleasure to peruse the NIU International Journal of Human Rights, (UGC Care Listed) 2022 edition, Vol. IX. This journal is dedicated to a matter of great concern for humanity, with reference to the existing laws and it suggests measures for future, to address issues related to human rights. It provides a platform for human rights activist to share their work and findings.

I am confident that this publication will successfully achieve its objectives and encourage scholars to conduct further research in the field of human rights. My heartfelt congratulations go out to the contributors and the entire NIU team for this outstanding compilation. I am certain that readers will benefit greatly from this publication.

(REKHA SHARMA)

24x7 NCW Women Helpline - 7827-170-170



# Message from Hon'ble Vice Chancellor

It gives me immense pleasure to release Volume IX, Issue 2022 of NIU International Journal of Human Rights. I am glad to witness innovative idea of the Human Rights Journal and its multi-disciplinary approach to raise awareness through the theme of the Journal.

The Volume IX, Issue 2022 of NIU International Journal of Human Rights, disseminates information on human rights highlighting the current work in human rights research and policy analysis probing the fundamental nature that is defined by the Universal Declaration of Human Rights. Noida International University has always reinforced the principles and values like human dignity, non-discrimination, zero tolerance for ragging, sexual harassment, and justice for all. The UGC also prepared guidelines for human rights teaching and research at all levels of education. NIU International Journal of Human Rights is a step further in this direction.

The journal aims to provide a platform for showcasing innovative approaches that apply the framework of international human rights standards to various contexts. It offers comprehensive coverage of a wide range of human rights issues, including but not limited to race, religion ,gender, children , class , refugees , and immigration , In addition, the journal features articles and reports that focus on the human rights aspects of genocide, torture ,capital punishment, laws of war and war crimes.

I congratulate the editorial team, particularly Prof. (Dr.) Aparna Sharma, Editor-in-Chief of the Journal and Prof. (Dr.) Manu Singh, Associate Editor of the Journal for their constant hard work and valuable time.

I sincerely hope that the Journal will be appreciated by students, researchers, policymakers, human rights activists and the interested general public.

**Prof. (Dr.) Uma Bhardwaj**
Vice Chancellor
Noida international University

# Message from Editor-in-Chief

"Values must be universal in nature like, nurturing talents of people, equal treatment and impartial protection of rights."

Since the inception of society human beings have been persuaded towards pursuit of knowledge. Acquaintance of different fields and the advancement of same, is a sign of progressive society. Egalitarian society is still a dream, but the collective efforts are small steps towards that. We aspire to contribute for a prosperous society in the long run, with reference to human rights. I feel immense pleasure in presenting the Vol. IX of our Noida International University Journal of Human Rights, 2022 issue. The edition focuses on conceptual issues with a pragmatic approach.

The Journal covers wide range of discussions like, religion, class, caste, gender, regionalism, discriminations, plights and much more. It not only discusses but tries to provide an insightful solution from social and legal perspective.

In order to sustain the success of this Journal, we encourage contributions from the various communities and countries as authors, reviewers, and guest editors. We appreciate feedback and ideas as it helps us to advance the quality of Journal. We hope that you will find NIUJHR of NIU to be more informative and innovative in coming years.

I am thankful to our Honorable Chairman - Dr. Devesh Kumar Singh, Honorable Chancellor - Dr. Vikram Singh and our constant pillar of support, Honorable Vice Chancellor Prof. (Dr.) Uma Bharadwaj, without her we would not have been able to come up with the present edition. I am personally thankful to Associate Editor, Prof. (Dr.) Manu Singh and we both express our gratitude towards the Editorial team for their constant efforts. We are equally thankful to the Design Team of NIU and to all members who contributed to this Journal directly or indirectly.

I am hopeful that with the support of all, we shall have many academic volumes of the Journal in future.

**Prof. (Dr.) Aparna Sharma**
Editor-in-Chief
Dean - School of Liberal Arts
Noida International University
*editorinchiefniuijhr@niu.edu.in*



# CONTENTS

**ISSN – 2394 - 0298** **Volume 9, 2022**

# CONTENTS

ISSN – 2394 - 0298 Volume 9, 2022





CONTENTS

ISSN – 2394 - 0298 Volume 9, 2022

# The Status of the Right to Abortion under the International Human Rights Treaty Framework

*Y. Aswin Grace**

**Abstract**

Right to abortion as an international human right is a work in progress. International human rights treaties, being legal documents, are written broadly, making no precise reference textually to abortion and reproduction. Nevertheless, standards of human rights on the right to abortion have evolved over time based on the authoritative and formal interpretations of United Nations (UN) Treaty Bodies (TBs) through the general comments and recommendations under the monitoring procedures, individual communications and inquiry mechanisms. Also included are regional human treaties and their systems and the special procedures thematic reports (working groups and various experts appointed to report) of the UN. Right to abortion and its status within the international human rights framework is often viewed and understood based on the works of the treaty bodies largely under the Convention Against Torture (CAT), International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International

Covenant and Civil and Political Rights (ICCPR), the Convention on Rights of the Child (CRC), and the Convention on Elimination of Discrimination Against Women (CEDAW). The lack of an express provision in the human rights treaty framework and the political

debate on the subject continue to pose a challenge to the validity and authority of treaty

interpretations, making the status of the right vague and controversial. During the drafting process of human rights treaties, the disagreements among member states were clearly seen to put the conventions at risk of acceptance and ratification by states if the text seemed to give any support legally to prohibiting or permitting abortion. As a result, abortion or related synonyms are not to be found in the human rights treaties under the United Nations (UN), indicating that there are no express provisions covering the right to (or prohibition of) abortion. However, with time it was argued that women's human rights are endangered when legal and safe abortion services access is restricted unreasonably. These rights include the right to health, life and healthcare information; equality and non-discrimination; liberty, security; freedom of religion, conscience, and privacy; the right to safeguard oneself from cruel, degrading or inhuman treatment; right to decide spacing and the number of children and the right to get benefitted from the progress in the scientific realm. The works of the treaty bodies started emerging as authoritative interpretations highlighting means to have an abortion that is safe as a basic human rights imperative, thus making it the duty of member states to protect and respect the rights given by the human rights treaties, both internationally and regionally. This paper will explore the normative developments that happened at the international human rights level and whether the right to abortion exists.

**Key words:** - *Abortion rights, Human Rights Treaties, Treaty Bodies, United Nations.*

* *Research Scholar at Human Rights Studies Programme, School of International Studies, Jawaharlal Nehru University, New Delhi.*
*Email: aswin_grace@yahoo.com.*





## Introduction

Abortion is the process of terminating pregnancy deliberately, either through the help of a provider or through inducing it oneself. Right to abortion refers to having the right to make a decision of either keeping the pregnancy or not as part of their fundamental human rights. In other words, the right to deliberately end a pregnancy medically or surgically before an embryo or foetus is born as interpreted under provisions of the right to health and reproductive health and right to family planning; also the freedom to determine spacing and number of one's children. The right to abortion here essentially means the right to safe, legal, affordable, and accessible abortion. Whether abortion is safe or unsafe depends on the condition the woman is in during various stages of the process. An unsafe abortion, as defined by WHO, is the termination of a pregnancy by people without the required skills or is carried out at a place not confining even basic medical standards. Right to abortion is also about being able to take decisions on reproduction without being influenced by coercion, discrimination, and violence.

The international human rights treaty framework includes a total of nine essential international human rights treaties. A committee of experts has been established to monitor each of these treaties. Few of these treaties are augmented by optional protocols dealing with specific mechanisms for enquiry and redressal of violations alleged. However, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention Against Torture (CAT), International Covenant and Civil and Political Rights (ICCPR), Convention on Rights of the Child (CRC), the Convention on the Rights of the

Child (CRC), and Convention on Elimination of Discrimination Against Women (CEDAW) are found to be

relevant to the research topic. The Treaty Bodies under the five human rights treaties have made considerable efforts in recognising the human rights of women to autonomy, dignity, the highest possible health standard and respect for private life on the basis of equality with men, without discrimination.

At ICPD (1994), governments decided to acknowledge that there has been a devastating impact on public health due to unsafe abortion making it a human rights problem; otherwise, it would have been left to state laws. During the 1995 Beijing Conference, governments decided that the punitive laws needed to be reviewed rather than reformed to acknowledge the mortality caused by abortion. Reservations, current political debates, and preparatory work give us an idea of the history and the controversy around legalising abortion and abortion as a human right. (Zampas and Gher, 2008). Regionally, the Maputo protocol's Article 14, basically the Protocol under the African Charter defining Women's rights in Africa under the rights of Human and Peoples, clearly states that the reproductive rights of women must be considered human rights.

## Right to Abortion Claims

In the year 1968, in Tehran, the UN conference on Human Rights announced that reproductive rights from then on are considered to be a component of human rights and opined parents are provided with the right to voluntarily and responsibly choose the number of children and spacing between them. During the mid-1990s, at both the Fourth World Conference on Women conducted in Beijing in 1995 and the International Conference on Population and Development (ICPD) in Cairo the previous year, there was an attempt by representatives from various States to make the right to abortion as a universal right, as well as incorporate the same into the conferences' outcome documents. The global coalition of countries, mostly from the Islamic world and Latin America, through their concerted effort, defeated this attempt. As a result of that, the documents that came out from both Beijing and

Cairo - the Beijing Platform of Action of 1995 (Beijing Platform) and the Cairo Programme of Action (ICPD Programme of Action) - failed to include the right to abortion. As a compromise, the document of Cairo stated, 'abortion should not be promoted as a family planning method; instead, governments should take necessary steps in helping women in avoiding abortion. The ICPD Programme of Action stated, 'abortion-related measures or changes in the health system can happen only at the local or national level based on the nation's legislation.'

However, with time it was argued that abortion rights are human rights and women's human rights are at considerable risk when access to legal and safe abortion services is restricted unreasonably. This evolution, however, has been gradual. The initial recommendations by United Nations Treaty Bodies include





a) decriminalisation or the decision to remove disciplinary measures on abortion, b) liberalisation of abortion laws or policies on specific grounds ensuring adequate access resulting in a reduction of risky abortions and to safeguard the equality, dignity and health of people (Erdman & Cook, 2020).

Nevertheless, pro-life scholars, state leaders with pro-life ideology and proponents of foetal rights allege that advocacy for abortion is a tactic to incorporate throughout diverse human rights treaty instruments the idea that the existence of the right to abortion is there because it acts as an important component of reproductive health services and argue that the right does not exist within the human rights treaty framework. 1 They complain that by inserting language implying a right to abortion into multiple UN documents, the advocates of abortion create necessary 'sources' that supply shreds of evidence of such a right in customary international law (Tozzi,2010; Saunders,2015; Stevens, 2018).

Generally, the advocates of abortion claim that the right to abortion is indirectly stated by the other rights discussed in a treaty - which includes the rights such as the right to life, equality, health care, non-discrimination, liberty, security, religion, and privacy, also the rights to be free from cruelty or right to defend oneself from inhuman treatment and to decide the spacing and number of one's children. Having the freedom to be able to undergo a safe abortion is one of the basic human rights, as well as a right of a woman, where her reproductive and sexual rights are protected, and at the same time, considering the risks of illegal abortions, it is also a right to health. (Guillame & Rossier, 2018).

## Treaty Bodies on the Right to Abortion

Initial responses of treaty bodies to abortion claims were governed by the cultural and political considerations of the member states. Subsequently, it was realised that leaving abortion-related issues to States had adverse effects on the protection of women's rights (Margolin, 2008). The position of the treaty bodies on the right to abortion is active, involving the standardisation of the right to abortion as a human right obligation of states. Human rights treaty bodies believe that access to safe abortion sits right into the dialogue around human rights in modern times and actively partake in advancing it through their General Comments, Concluding Observations and decisions under the Communications Procedures (Nowicka, 2011). It is a common practice for the human rights treaty bodies, as well as independent experts, to advise states to reduce the restrictions placed on abortion, to 'decriminalise' abortion, to 'make sure everyone gets access to abortion that's safe', or for the legalisation of abortion under some specific circumstances like deteriorating health of the mother or pregnancy caused through rape.

Though there is no comment on abortion by any international human rights treaty, they have nevertheless been deciphered by various signatory nations into

requiring the legalisation of abortions. In the year 2006, Colombia's Constitutional Court relied on the decisions arrived at by the CEDAW Committee; the right to health and also the right to freely make a decision on the number of children as the basis of liberal abortion laws. Argentina's Supreme Court in 2012 relied on the works of the Human Rights Committee on the issue of restrictive abortion laws. In 2014, Bolivia's Constitutional Tribunal relied on the CEDAW Committee (Fine et al.,2017).

When these developments are analysed, the General Comments by the Committee and its Concluding Observations can be viewed as a jurisprudence steering the application and development of human rights not only at the national level but also at the international level. Scholars also warn that asserting a presumed right to abortion can degrade the human rights which the states negotiated carefully and agreed explicitly to recognise in human rights treaties. When one proclaims abortion rights, it could violate the existing rights of freedom of religion, thought, and conscience and may also affect freedom of opinion or expression. (Glendon, 2001).

As of now, the right to abortion doesn't have any clear international consensus. Right now, 137 of total 196 countries have placed restrictions on abortion. While Concluding Observations by treaty bodies have strengthened the domestic laws on abortion rights, several domestic cases involving interventions by treaty bodies have been subject to great criticism, thwarting progress advancement of the right to abortion in domestic settings. In fact, the decisions in Latin America under the abortion agenda were viewed as the UN promulgating a new form of colonialism (Goings, 2019).

## RIGHT TO ABORTION UNDER THE UNITED NATIONS HUMAN RIGHTS TREATIES

None of the UN human rights treaties contains the right to abortion directly and due to this perspective, states do not have to provide any kind of means for safe abortion legally and have powers to regulate abortion, while the international community cannot interfere. While justifying their strict abortion laws, some nations use this argument and stand under the shadow of this statement to not liberalise their laws. But human rights jurisprudence clearly indicates the need for liberalisation based on the arguments involving women's health. (Patel, 2019).

### Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

When abortion laws are restricted, they can contribute to the discrimination of women. With this belief, the CEDAW committee strongly promotes access to legal and safe abortion. CEDAW's twelfth article says that 'States need to undertake all the steps to eradicate prejudice against women working in health care, so they can make sure equality of women and men is maintained,





especially when it comes to making health care services accessible, including family planning-related services.' General Recommendation No.24 from 1999 states,' If any state refuses to deliver reproductive health services to women, it is considered discriminatory. (CEDAW, 1999). Though the mention of abortion is not made explicitly in the comments, as providing means to safe abortion is a process that involves medical attention and is required only by women, the laws that make abortion a criminal offence are included in this by their own definition. (Cook & Howard, 2007).

The CEDAW committee has made another declaration that: 'The leading cause for maternal mortality and various diseases is unsafe abortion. Punitive measures for women undergoing abortions should also be removed by the state parties. (CEDAW, 2014)

At the same time, when talking about violence against women based on their gender, in its General Comment No. 35, the CEDAW Committee asks for the dissolution of all laws that criminalise abortion because when abortion is criminalised, it can lead to cruelty, torture, inhumane and degrading punishment (CEDAW, 2017). Article 16(1)(e), which talks about family planning rights, was accepted unanimously; but if the definition consisted of abortion, this would not have happened as there are countries which are against abortion (Malmskold, 2018).

CEDAW, in its General Recommendation No.21, has stressed the fact that women must hold the decision-making right with regard to having children or not, as stated in Article 16 (1) (e). No one, including parents, partners or even the government, cannot influence this decision. Every woman is entitled to hold the right to make a choice on when they want to reproduce, and the statement focuses on that. But however, any mention of the right to abortion has not been made, and it only talks about the consequences women can face due to abortion. (CEDAW, 1994).

CEDAW concluded in the case of LC vs Peru that access denied to adequate health services to the concerned girl has put Peru in a situation where it violated the right to non- discriminative health care as required by the girl, as mentioned in Article 12. Article 2© which says that equal legal protection is everyone's right, and Article (2) (f) stating that nations are under obligation to make modifications in their laws if they seem to discriminate against women are violated. Also, the right to enjoy equal human rights in comparison to

men, as stated in Article 3, is violated. Article 5 was also considered violated, where it is stated that nations need to take responsibility in modifying certain cultural practices that stereotypes women (CEDAW, 2011).

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

The right to health, defined as the right to enjoy the highest possible standard of both mental and physical health, is considered as a fundamental human right as specified in the 1946 Constitution of the World Health Organisation (WHO).

The right to access safe abortion for any reason, like socio-economic or even on request, should be incorporated into international health protection since denying abortion can adversely affect not only the mental health but also the physical health of the woman (Zampas and Gher, 2008).

International Covenant on Economic, Social and Cultural Rights (ICESCR) acts as a central instrument in protecting the right to health. Article 21 of the same is where the right to health is mentioned. CESCR Committee states that having strict abortion laws acts as a deterrent to equality and can be a catalyst in violating the right where no one should be discriminated against. It also interferes with the basic right of making informed, unrestricted, and accountable decisions over one's own body. When abortion is addressed as a health matter, the controversy over legalising abortion can be avoided. (Erikson, 2000).

**International Covenant on Civil and Political Rights (ICCPR)**

Abortion-related rights stated in ICCPR can be found in Articles 6, 7, 17, and 24. These articles protect us from torture, guarantee privacy, protect children, and finally, protect our right to live. UN Human Rights Committee (HRC) monitors the implementation of the ICCPR. Though the HRC is not a judicial body, it exhibits some crucial aspects of a judiciary, as seen in General Comment No.33 (HRC, 2009). The resolutions and decisions by the HRC are, however, not legally binding. Right to life is the first documented right which ICCPR is vowed to protect since its inception, as stated by its initial works (UN, 1947). But a vote of 31 to 20 with 17 abstentions signified the disparities between the member states, making the proposal to be rejected (UN, 1957). This Article notes that all humans are born equal and free in rights and dignity. Human rights are not applied to the unborn and are only applied to the born as per the interpretations of treaty bodies.1

The eighth paragraph in the General Comment No. 36 notes that: 'Effective, legal, and safe access to abortion must be provided by the state if a pregnant woman or a girl's life and/or her health are in danger, or if pregnant girl or woman has to undergo unbearable pain or suffering if they choose to complete their term, especially if the pregnancy is caused through rape or incest and is not considered viable (HRC, 2018).

In the Mellet v. Ireland case, 2016, termination of pregnancy was denied to the applicant despite the foetus having congenital heart defects due to Ireland having stringent laws against abortion. The choice of having to travel to England

*1 Article 6(5) of the ICCPR protects the right to life of a child yet to be born, as argued by a few scholars. This is because it prohibits the execution of pregnant women recognising that a woman, when pregnant, carries in her yet another little human who deserves protection as the child is immature and innocent.*





to have the abortion or continuing with the pregnancy has been presented before Ms Mellet. Three rights, namely, freedom from degrading, inhuman and cruel treatment according to Article 7, safeguarding privacy spoken about in Article 17 and equality before the law mentioned in Article 2, are violated in this case (HRC 2016). In a very identical case, Whelan v. Ireland, 2017, all three violations of the above-mentioned articles were confirmed by the Committee (HRC 2017). In all the cases mentioned above, abortion during special circumstances is considered, but the right to abortion because of social-economic reasons or abortion upon request is not recognised.

**Convention on the Rights of the Child (CRC)**

No general comments relating to abortion have been issued by the Rights of the Child committee. The Committee formed for the Rights of the Child has expressed its concern over disciplinary legislation, including the kind of influence it is having on the mortality rates of the mother and has given a suggestion that the states that allow abortion upon medical reasons should review its practices to prevent illegal abortions.

The following are the relevant provisions of the Children's Convention related to abortion: Article 6 guarantees children's right to life and survival; Article 13 specifies children's right to impart and acquire information of all kinds; Article 24 ensures children's right to the highest possible health standards and places responsibility on states to ensure proper health care for mothers, children, and families and Article 37 guarantees children's right to liberty and security of person.[2]

**Convention Against Torture (CAT)**

The Committee against Torture (CAT Committee) has found out that all the limitations in accessing reproductive health services and all the abuses a person has to face during the process of availing of these services can violate the Convention against torture as there is a considerable toll on the health of women pushing her life into risk or can cause intense suffering because of physical or mental pain. For example, the CAT committee found out that imposing a total ban on abortion, existing only in five countries of the world as of now (El Salvador, Nicaragua, Dominican Republic, Chile, and Malta), can lead to ill-treatment or even torture, as because of these laws women risk maternal mortality that can be prevented.

As of now, the CAT committee has made a statement that states have to make sure access to safe abortion for women who face a risk health-wise, sexual violence victims and those who are carrying nonviable foetuses. During its review of Nicaragua 2009, the CAT Committee came to find similar things and stated that the law denying access to safe abortion when the case involves sexual violence can lead to 'getting their rights violated, and severe stress and trauma

could be caused resulting in psychological problems that last long such as depression and anxiety. Stating that it also suggested the state to permit abortions when the pregnancy is caused by sexual violence to prevent trauma by liberalising the laws. (CAT, 2009).

**United Nations impact with respect to abortion legislation**

From 2000 onwards, UN treaty bodies had a significant influence on national abortion laws and approaches. The impact was also evident in TB's interaction with the Universal Periodic Review (UPR) of the Human Rights Council (HRC), under which it recommended that nations modify their abortion laws and pressurise other States to adopt certain domestic laws. Both legislators and judges quoted international treaties or TB decisions while changing the abortion laws in their nations.

**Legality of Abortion Worldwide -An Overview**

In a sensational judgement passed on June 24, Roe v. Wade was overturned by the US Supreme Court, the decision made in 1973, which gave women a constitutional right to abort. Though abortion will not become illegal automatically in the United States, individual states can now decide whether they want to allow abortions or not.

Safety and legality are deeply connected. The countries where there are fewer restrictions, abortions are generally safer. Guttmacher Institute's report divides homelands into six categories (Singh et al., 2018). If we take the number of women who attained reproductive age, these countries occupy 6% of them. Countries belonging to category six accommodate 37% of these women. So, most women live in countries where there are restrictions on abortions, but they can be done for specific reasons. But the laws are slowly amended, and the cases during which permission to abort is granted are expanding worldwide. However, despite the laws in place, women who can actually have access to these practices are minimal, and this report explores the same. Though almost all countries in Europe allow abortions on request, mandatory counselling being a requirement and mandatory waiting periods can affect the practice in reality. (Centre for Reproductive Rights, 2019).

**Conclusion**

Though the human rights law can be interpreted heavily and also is dynamic, it would become too much of an interpretation if one has to claim that abortion is a freestanding human right given protection under international law. However, women, with all their rights, such as the right to health, life, equality, and privacy, can argue that means to have a safe and legal abortion is their right. A wider outlook is required to assess access to abortion, where non- discrimination and equality are paramount. Women's right to reproductive self-determination





can only be fully recognised when there is access to safe and legal abortion. The CEDAW Convention's fundamental purpose should be fulfilled: to eradicate prejudice against women. However, while analysing, we can note that instead of the topic of abortion being handled as a query where we ask how a woman can protect her right to self-determination and bodily autonomy - which women don't have naturally, we are focussing on the question of how laws of abortion are restrictive and may play a role in violating her human rights. The judgements passed on abortion in courts focus on providing means to safe abortion as a procedural question. By bringing in the change of how we discuss this, it becomes possible to bring focus on self-determination as women would be perceived as rational human beings fully capable of making their own choices without being discriminated against by the law.

**References**

1. CAT Committee. (2009). Concluding Observations: Nicaragua, para. 16, U.N. Doc. CAT/C/ NIC/CO/1.
2. CAT Committee. (2011). Concluding Observations: Paraguay, para. 22, U.N. Doc. CAT/C/ PRY/CO/4-6.
3. CEDAW. (1976). Commission on the Status of Women, resumed 26th session: Summary
4. Record of the 667th meeting, held at the Palais des Nations, Geneva, E/CN.6/SR.642, para.44.
5. CEDAW. (1994). CEDAW General Recommendation No.21: Equality in Marriage and Family Relations, para. 21 and 22.
6. CEDAW. (1999). CEDAW General Recommendation No.24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, para.11.
7. CEDAW. (2011). LC vs Peru, UN Committee on the Elimination of Discrimination of Women, CEDAW/C/50/D/22/2009.
8. CEDAW Committee. (2014). Statement of the Committee on the Elimination of
9. Discrimination against Women on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD review, 57th Session.
10. CEDAW Committee. (2017). General Recommendation No.35 on gender-based violence against women, CEDAW/C/GC/35, para.29(c) and 9(i).
11. Centre for Reproductive Rights. (2019). European Abortion Laws: A Comparative Overview,
12. Comment No.22(2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/GC/22, para.34.
13. Cook, R. J. and Howard, S. (2007). “Accommodating Women’s Differences

Under the Women's Anti-Discrimination Convention." Emory Law Journal, 56: 1039.

14. Erdman, J. N. (2016). "The Politics of Global Abortion Rights." Brown Journal of World Affairs, 22(2), pp. 39-57.
15. Eriksson, K. (2000). Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law, 172, The Hague: Kluwer Law International.
16. Fine et al. (2017). "The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally." Health Human Rights, 19(1), pp. 69-80.
17. Finnegan, T. (2016). "International Human Rights Law and the Unborn: Texts and Travaux Preparatoires." Tulane Journal of International and Comparative Law, 25(1), pp.89-126.
18. Gable, L. (2010). "Reproductive health as a human right." Case Western Reserve Law Review, 992, 60(4).
19. Glendon, M. A. (2001). A World Made New. New York: Random House.
20. Goings, C. (2019). "Circumventing the Law: The Illegitimate Creation of Human Rights." 5
21. Journal of Global Justice & Public Policy,163, pp. 164-185.
22. Guillame, A. & Rossier, C. (2018). "Abortion around the world: An overview of Legislation, Measures, Trends and Consequences." Population – E, 72 (2), pp. 217-306.
23. Human Rights Committee. (2005). Karen Noelia Llantoy Huaman v. Peru, communication no.1153/2003, U.N.Doc. CCPR/C/85/D/1153/2003.
24. Human Rights Committee. (2016). Mellet v. Ireland, communication no: 2324/2013, CCPR/ C/116/D/2324/2013.
25. Human Rights Committee. (2017). Whelan v. Ireland, communication no: 2425/2014, CCPR/ C/119/D/2425/2014.
26. Human Rights Committee. (2009). General Comment no.33, Obligations of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33.
27. Human Rights Committee. (2015). Draft General Comment no.36, CCPR/C/GC/R.36.
28. Human Rights Committee. (2016). Mellet v. Ireland, communication no: 2324/2013, CCPR/ C/116/D/2324/2013.
29. Human Rights Committee. (2017). Whelan v. Ireland, communication no. 2425/2014, CCPR/
30. Malmskold, Elin. (2018). The status of abortion in public international law and its effect on domestic legislation, Uppsala University, Available at





http://www.diva.portal.org/smash/get/ diva2:1231728/FULLTEXT01.pdf, Retrieved on 27 December 2021.

31. Margolin, T.A. (2008). "Abortion as a Human Right." Women's Rights Law Reporter, 29 (2 & 3), pp. 77-98.
32. Nowicka, W. (2011). "Sexual and reproductive rights and the human rights agenda: controversial and contested." Reproductive Health Matters, 19:38, pp.119-128.
33. Patel, G.H. (2019). Women and International Human Rights Law: Universal Periodic Review in Practice. New York: Routledge.
34. Saunders, W. L. (2015). "The San Jose Articles and an International Right to Abortion." Ave Maria International Law Journal, 4, pp. 1-28.
35. Singh S, Wulf D, et al. (2018). Abortion Worldwide 2017: Uneven Progress and Unequal Access. New York: Guttmacher Institute.
36. Stevens, A. (2018). "Pushing a Right to Abortion through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment." Penn State Journal of Law and International Affairs, 6(1), pp. 70-141.
37. Tozzi, P. (2010). International Law and the Right to Abortion, International Organizations Law Group Legal Studies Series - No. 1, Retrieved on 11 December, 2019, URL: SSRN: https:// ssrn.com/abstract=1567128.
38. United Nations. (1947). UN Doc. E/CN.4/21 annex G, Drafting Committee report submitted to the Commission on Human Rights, 1st session.
39. United Nations. (1957). UN Doc. A/C.3/SR.820, Third Committee, 12th session, para.9.
40. UN General Assembly (1948), Universal Declaration of Human Rights, 217 A (III).
41. Xuelian, Z. (2019). "On the Concluding Observations of the United Nations Human Rights Treaty Bodies", The Journal of Human Rights, 18(3), pp. 351- 382.
42. Zampas, C. & Gher, J. M. (2008), "Abortion as a Human Right: International and Regional Standards", Human Rights Law Review, 8(2), pp. 249-294.

# A Narrowing Space: An Analysis of Discrimination Against Minorities in Indian Criminal Justice System

***Sameera Khan*, Syed Faraz Akhtar*****

**Abstract**

India is the world's largest democracy and is often appreciated for its cultural diversity and unity. However, the oppression of minority communities across the lines of caste, gender and religion has been a major blot on India's image at the global level. They have been facing constant repression since centuries in the society and culture of the upper castes. This caste suppression also extended to the prison system. It is evidenced by the fact that a large number of prisoners in India belong to the minority communities. Moreover, they are often the victims of abuse of judicial process, custodial torture, sexual abuse and extrajudicial killings. There are multiple factors which are responsible for the biased, intolerant and detrimental behaviour towards the minority prison population in India. These include propagation of religious supremacy, culture of impunity, hatred against minorities and socio- political issues. The minority women in the Indian Prisons suffer intersectional discrimination, injustice, pain and vulnerability by the virtue of their identity in addition to the persistent gender specific differentiation prevailing in the Indian Prison System. They suffer from abject living conditions and mistreatment due to their caste or religion. However, the Legislature and Judiciary have attempted to remedy the structural bias but the lack of implementation has rendered them to be largely futile.

The paper will analyse the various factors which accelerates the discrimination against minority prisoners inside Indian Prisons and its impact on the rights of the incarcerated minority population. It will further discuss the steps taken by the Government and the Judiciary to ameliorate the poor state of minorities in prisons. Lastly, suggestions to improve the Indian Prison System shall be highlighted so that it is more sensitive towards the demands of minorities and curbs the derogatory social prejudices that are practiced by the existing Criminal Justice System.

* *Research Scholar, Department of Law, Aligarh Muslim University, Aligarh.*

** *Research Scholar, Department of Law, Aligarh Muslim University, Aligarh*





**Key words: -** *Custodial Torture, Extrajudicial Killings, Indian Prison System, Indian Criminal Justice System, Minority Rights, Minority Abuse, Social Prejudices.*

## Introduction

*"No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones."*

- Nelson Mandela

Social and Religious Minority Communities across the world have faced abuse throughout the human history. The situation has been no different in India consisting of a large number of minorities with its religious, social and ethnic diversity. There are a number of caste and religious minorities in India which include Dalits, Adivasis, Muslims, Christians and other oppressed castes. The Indian Constitution prohibits "Untouchability" and "Discrimination based on Caste." Despite this, these practices exist until this day and are a big threat to the lives of these persecuted classes. The reason is the culture of impunity and vulnerability that is practiced throughout India and the inefficiency of the Indian Administration to effectively implement the "Rule of Law" for safeguarding the minorities in the country. They face discrimination in daily life at multiple fronts on the basis of their caste, creed, and religion. Amongst the minority population, the incarcerated minority population languishing inside the prisons is the most endangered under the Criminal Justice System. There have been numerous instances where they have suffered mistrial, custodial torture, sexual abuse and denial of basic human rights.

## I. Social Exclusion

The Indian society is divided into upper-caste and lower-caste. The lower-caste is oppressed by the upper caste and often kept in the circumstances of poverty in order to ensure that they develop a servile attitude towards them and do not progress in the society. The notion is reinforced through the distribution of labour and access to facilities. Despite, untouchability and caste discrimination being outlawed with the advent of the Indian Constitution, this differentiation and prejudice is still practised in many parts of the country in daily life. The caste minorities usually reside in the outskirts of the cities with minimal facilities. As a consequence, they face social boycott and rejection which forces them to lead a secluded and subservient life.

The general bigotry and intolerance has penetrated in the existing Criminal Justice System also. If the minorities suffer from any forms of injustice, the police authorities often refuse to register an FIR. They are prone to harassment and torture in the police stations by the virtue of their caste and religion. In addition to this, the social exclusion is still prevalent in several prison manuals

across Indian states where the low-status tasks are allotted to the caste minorities and the dignified tasks are reserved for the upper class. The minorities are also victims of extrajudicial killings by the police. The social marginalisation faced by minorities throughout centuries has led to the development of an institutional bias against them. This severely impedes their access to justice in our country.

### ii. Religious Animosity

As time progressed, the animosity of the upper-castes which was towards the Dalits and Adivasis also extended towards Muslims and Christians. This has been driven primarily by the conversion of the lower-caste Hindus and Dalits to other religions in order to escape the exploitation they face under Hinduism. They have adopted conversion to different religions which included Buddhism, Islam, Christianity and Sikhism. All this was done as an act of resistance and resilience against the discrimination faced by them. The conversion of the people to these faiths was driven by the need to live with dignity within a safe space. The conversion of Dr. B.R. Ambedkar, a Dalit and the father of Indian Constitution to Buddhism was a testament to the fact that the conversion to other religions was considered as a way out to evade the treatment meted out to minorities by the Upper Castes.

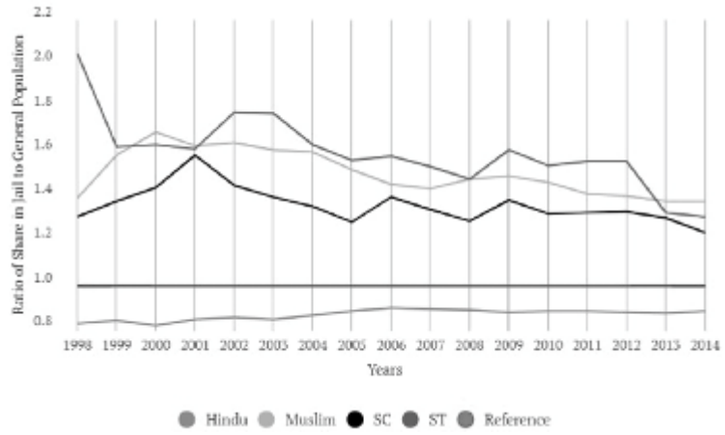
India has been a nation which has been built on the principles of secularism and religious harmony. Unity in Diversity has been one of its greatest strengths. However, the animosity amongst the different religious communities has continued which has led to riots, religious persecution and mass violence against specific communities. A lot of this is driven by political motives and is used to sway the votes of the masses. However, with time, it has also creeped into the noble Institutions of India including the Criminal Justice System. This is evidenced by the overrepresentation of minorities in the prisons.

### iii. Overrepresentation of Minorities in the Jails

The data for the prison population is compiled by the National Crime Records Bureau (NCRB). The reports of NCRB show that in nearly all of the Indian States, there is an overrepresentation of religious and social minorities in prisons. This is evidenced from the graph below where it can be seen that the ratio of the minority communities in prison is much greater than the majority Hindu Community. The ratio of the Incarcerated Prison Population for all the minorities in India is greater than one while for the majority community is below one. (Ahmed & Siddiqui, 2015) This shows that minorities are overrepresented in the Indian Prisons.








**Ratio of Share in Jail Population to General Population for Social and Religious Groups**
**Source: Economic and Political Weekly**

An analysis of the Prison Statistics of India (PSI) Reports compiled by the NCRB over the years also shows that the Muslims have been over-represented amongst the prison inmates in nearly all of the Hindu majority states from the year of 2014 to 2019. They form close to 21 percentage of the under-trials in most of these states. Tamil Nadu is the only state where the percentage of Muslim Convicts is the same as that of Muslim under-trials. (Jafferlot, 2021)

Hindus are also overrepresented in the only Muslim majority state, Jammu and Kashmir. The percentage of Hindu population in the state is 28.5 percentage and they represented 34 to 39.5 percentage of the under-trials and 42.6 to 50.5 percentage of the convicts between 2014 and 2019. In the Sikh dominated State of Punjab, the Sikh population is underrepresented in prisons at 51 percentage out of the total population of 58 percentage. On the contrary, Muslims are overrepresented in the prisons at 4-5 percentage despite forming merely 2 percentage of the total population. As per the data of the National Crime Records Bureau of

2020, 19.1 percent of the total prisoners populations denotes the Muslims. The data represents that total 19.5 percent of undertrial population and 17.4 percent of convicts is the Muslims, along with 30 percent of detenues belonging to Muslim religon. In terms of state representation, “Assam had the highest percentage of Muslims undertrials (52.3 percent) and convicts (47 percent), which is followed by West Bengal (33 percent convicts and 43.5 percent undertrials). The detenues in Haryana for the year 2020 includes 100 percent Muslim population followed by Jammu and Kashmir and Telangana which includes 96.4 percent and

49.5 percent of Muslim detenues respectively. The Muslim population of detenues in the year 2021 was 30 percent of all detenues in India, even after

constituting 14.2 percent of total share of Indian population. (Radhakrishnan & Nihalni, 2022) The data presented by the NCRB does not give a analystical and reasonal picture of such high level of Muslim percentage in prison population. The data lacks the socio-economic profile, educational qualification or category of crimes of the Muslim prisones. (Hasan, 2022)

The other marginalised section of the community in India such as Scheduled Caste and Scheduled Tribes are also overrepresented in prisons. Out of the 16.1 percent and 8.2 percent shares of the SC and ST population in India respectively, they form 20.7 percent an 11.2 percent of share of Indian prison population. (Hasan, 2022) This indicates that in nearly every Indian state, there is an over-representation of the minorities and under-representation of the majority. It further provides a clear indication of the "communalisation of the police" which prevails regardless of the stance of the party in power. (IAS, 2021)

### iv. Factors Responsible for The Minority Overrepresentation

There is a deep entrenched prejudice and animosity against the minorities in our society. This often leads to their harassment and incarceration in many ways. The crimes against them have been homogenized and normalized. The hate crimes against minorities are often swept under the carpet. Moreover, they are susceptible to being victims of fake encounters, riots and lynching with the perpetrators often going unpunished. This has led to the development of an attitude of supremacy in the majority class where it believes that it can treat the minorities on its own accord without facing any significant repercussions. In addition to this, their representation in the Government Institutions is abysmally low. The NCRB data of 2013 showed that only 6.27 per cent of the total police personnel in the country were Muslims. Their representation goes down drastically as the ranking in the police force goes up.

The structural-political factors are significant in driving hatred and abomination towards the minorities. It needs to be noted, that the Hindus, who are a majority in India, are overrepresented in the State where they form a part of the minority community. Moreover, India is not the only democracy with an overrepresentation of minorities in the prison system. The US, UK, Australia and Canada are a few other democracies where the minorities are overrepresented in the prison system. As per, Irfan Ahmad and Md Zakaria Siddiqui, "The disproportion in prisons, across the world, instead hints that election-centric, number- dominated, security-driven democracies are unfriendly to minorities." (Ahmed & Siddiqui, 2015) This is a valid argument, especially in modern day politics where the use of caste and religion has resurfaced as a prominent strategy to garner votes. This accelerates the incidences of discrimination against minorities in various spheres, the Criminal Justice System, being no exception. The general population favours the hostile prosecution of minorities. In India, some religious minorities are looked upon as invaders and acts of violence against them are seen as decisive moves to eradicate them from their nation. The cases are highly politicised and can greatly





influence the vote banks across the nation.

## II. PLIGHT OF MINORITIES INSIDE PRISONS

The conditions faced by minorities inside the Indian Prisons are often sub-human. They are stripped of their basic rights and dignity. They are made to live in appalling conditions and subject to torture, abuse and other forms of discrimination based on their caste and gender. They have little recourse to justice in a system which is inherently biased against them. Few aspects of such discrimination, antipathy and detestation are discussed in the paper.

### I. Custodial Torture

Torture has been defined in the United Nations Convention Against Torture (UNCAT) as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." Discrimination has been recognized as one of the purposes for torture under UNCAT. This means that whenever there is case of custodial torture inside prisons, the Judicial Inquiries must take discrimination into account as a potential factor.

A report of the National Human Rights Commission (NHRC) indicated that 21 prisoners inside the Bhopal were subjected to torture. They were all members of the Student Islamic Movement of India (SIMI). The NHRC documented that the torture had included an attack on their religious identity. They were taunted with anti-Islamic slogans and forced to chant "Jai Shree Ram." Their beards had also been forcibly cut off inside the prisons itself. The report further stated that, "These inmates are allowed to go to their cells only for 10-15 minutes. They are not allowed to talk to anyone. Their cells are fitted with exhaust fans, but they are not switched on. The injury marks on the prisoners' bodies could only have been a result of assaults in jail." (Dixit, 2018) Moreover, they were also deprived of sleep. The NHRC recommended that stringent action be taken against the prison authorities and also proposed the setting up of a high-level committee with the aim of ensuring that, "the prisoners are not discriminated against and singled out on the basis of their religion" (Abbas & Prasad, 2019)

However, no action had been taken and the local media supported the police officers. They painted the inmates as aggressive terrorists which needed to be tamed by the police officers.

In another incident of torture against the minority, a Muslim under-trial in Tihar Jail had the "Om" symbol forcibly burnt on his back. The incident resulted in custodial torture and also was an attack upon the religious identity of the prisoner. The act was allegedly carried out by the head of the prison. In a similar incident, a Muslim prisoner serving a two-year term in Baran district prison in Rajasthan was allegedly tortured and beat up by the policemen which resulted in his death. The prisoner was lodged in the inmate ward of a hospital due to his liver disease. The policemen allegedly thrashed him with a pipe and refused to heed to his calls to use the washroom. His religious identity was also abused, since he was not allowed to practice his religious ideology inside the prison.

These incidents are evidences of the custodial torture faced by the minorities inside prisons. They are often the outcomes of institutional biases against the minorities. The public officials feel entitled to treat the minorities according to their whims and facnies. The incidents of abuse and torture against the minorities are often covered up or justified. There are instances where they are knowingly perpetuated in order to appease the majority class and cash in on their vote banks.

### ii. Sexual Abuse

Women are susceptible to sexual abuse inside the prisons. Minority women are particularly vulnerable since they face intersectional discrimination by the virtue of their gender and caste. A girl belonging to a Scheduled Tribe was kept in a remote prison in Raipur on the ground of being a Maoist conduit. On her release, she recalled her harrowing experience in the prison where she said she was often subjected to torture and electric shocks in order to extract a confession. She recounted that, "Women live in crammed prisons, with a shortage ofvfood, clothes and even sanitary napkins. Women face sexual violence and harassment at the hands of the policemen in forests. Young girls aged 14 are impregnated as a consequence and spend their time in jail in denial and depression." She further revealed that she was physically and sexually abused. Her daughter was also rusticated from the school since she fought for the rights of the women in prison after her release. (Setalvad, 2019)

A Dalit woman whose brother was lodged in prison died in police custody. Consequently, she was apprehended by the police in a private car and forcibly taken to the police station. She stated that she was abused for several days inside the police station. In her FIR she stated that, "The cops forced me to strip and then verbally abused me. They even threatened to douse me in petrol and burn me alive." She alleged rape and inhumane treatment by five-six policemen. This included beating by the cops and her nails being plucked using screwdrivers and spanners. (India Today Web Desk, 2019) It is important to note that while the woman faced this ordeal, she was not even a convict. However, she still faced the degrading treatment since the cops thought she was an easy prey as she belonged from the lower strata of the society.

### iii. Deplorable Living Conditions

The prisoners are often deprived of humane living conditions. An Adivasi Rights Activist was imprisoned for her involvement in a movement against a project by the government. She stated that inside the prison, "The food was infested with insects. Our drinking water was dirty; I survived by eating an apple every day." In addition to this, she was forced to sleep on a bathroom floor. The water was contaminated and the living space was unhygienic and crammed. Another women activist noted that, "Due to a lack of space, many of us would just have space to sit and not even to lie down." The lack of basic infrastructure, humane living conditions and repeated abuse by the authorities has a grave impact on the





mental health of the prisoners. In several instances, it can also drive them towards suicide. The injuries suffered can also result in their death. The social and economic backwardness of the minorities like Adivasis and Dalits makes them vulnerable, being unable to defend themselves legally and financially.

An activist from Kashmir belonging to a religious minority was imprisoned under the Prevention of Terrorism Act, 2002. She stated that she faced an extremely hostile attitude and verbal abuse form the police. She stated that, "Young Kashmiris including women are locked up in multiple prisons across the country. They are attacked, their voices silenced, as they are reduced to their immediate identity of being Kashmiri and Muslim." They are denied access to basic facilities inside the prisons as well. Their health needs are ignored. She recounted how, "A pregnant woman inmate was made to suffer in pain for over six months. Some high- risk prisoners were to be taken to court, therefore they could not provide security to her if she had to go to the hospital. This is the level of injustice against minority women in prisons." (Setalvad, 2019) The treatment is a consequence of the Institutional Bias ingrained against the minorities. The prison authorities do not feel obligated to provide even basic human rights to the minorities. Their physical and mental health takes a huge hit during the time they spend in prison.

### iv. Caste-Based Discrimination

Research carried out by a leading online news agency, highlighted how caste played an influential role in the segregation of labour inside the prisons. There have been minimal amendments in the colonial texts of the late 19th century which regulated the prison conditions. The caste-based labour in the prison manuals has been left untouched. The Rajasthan Prison Manual explicitly states that, "Any brahmin or sufficiently high caste Hindu prisoner from his class if eligible for appointment as cook." The rules under Section 59(12) of the Prisons Act, 1995 state that, "Sweepers shall be chosen from among those who, by the custom of the district in which they reside or on account of their having adopted the profession, perform sweepers work, when free. Anyone else may also volunteer to do this work, in no case, however shall a person, who is not a professional sweeper, be compelled to do the work." The rules do not provide for any need of consent from the members of the "sweeper community." The rules have also been replicated in the women prisons. The Rajasthan Prison Manual provides that in case there is no woman prisoner from the "appropriate" caste groups, "two or three specially selected male convict Mehtars may be taken into the enclosure by a paid worker." The manual further provides that, "Two or more long- term prisoners of good caste should be trained and employed as hospital attendants."

The Bihar Prison Manual also provides that, "Any 'A class' Brahmin or sufficiently high caste Hindu prisoner is eligible for appointment as a cook." It also provides that, "Any prisoner in a jail who is so high caste that he cannot eat food cooked by the existing cooks shall be appointed a cook and made to cook

for the whole complement of men. Individual convicted prisoners shall in no circumstances be allowed to cook for themselves, unless they are specific division prisoners permitted to do so under rule."

The Prison Manuals across different states stipulate the labour activities that need to be carried out on a daily basis. However, across all the prison manuals, the classification is roughly made on a "purity-impurity" scale. The upper castes handle the relatively "pure" jobs like cooking, medical assistants and more. The lower castes are left to carry out the "impure" jobs like cleaning sewerage, sweeping and ensuring the cleanliness of washrooms. (Shantha, 2020)

A prisoner in Rajasthan was asked his caste on the first day of his imprisonment. On mentioning that he was from a Scheduled Caste, he was assigned menial jobs that were usually assigned to the lower-castes. He was given jobs like cleaning of toilets, sweeping and storing water. He recounted that, "I had assumed it was something that every new prisoner had to do. But in a week or so, it was evident. Only a select few were made to clean toilets." He mentioned how the caste pyramid was evident in the prison system. The rich and influential prisons were not assigned much work and only exerted their authority inside the prisons. The crime committed by the prisoners was irrelevant and the only basis of classification for prison labour was their caste.

The prisoner stated how his family had moved away from the village into the city to escape the clutches of the caste system. They had successfully evaded the system and landed jobs outside their castes allowing them to integrate with the society. However, inside the prison he was once again faced with the grim reality of the caste system. His identity was merely reduced to his caste and a sweeper, despite being a trained electrician. He was made to do manual scavenging despite it being outlawed under the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. Moreover, the under-trials are not required to provide labour services in prisons. However, it has often been seen that in prisons, where convict prisoners were only a handful, the detainees were also called in to provide free labour.

## III. DISCRIMINATION AND INJUSTICE PREVAILING IN THE CRIMINAL JUSTICE SYSTEM

The minorities face discrimination not only inside the Indian Prisons but also under the existing Criminal Justice System. The miscarriage of justice suffered by them is appalling. The authorities often shown insensitivity towards their Constitutional Rights and they are denied the fair procedure under the Penal System. They are often subjected to shaming and persecution even if they are the victims of the offence. The State parties and the Institutions favour the Upper Castes even though they are the perpetrators of the crime. This creates an atmosphere of exclusion and discrimination for the minorities. Few aspects shall be discussed by the authors to highlight the injustice prevailing in the Criminal Justice System in India.





### I. Hathras Gangrape Case

The case shook the nation and its conscience where a Dalit girl was allegedly raped and murdered by four persons belonging to the upper caste. A grave miscarriage of justice is alleged as the policemen burnt the body in the late hours of the night to shield the accused. The cremation was done without the consent of the family and the police also refused to register an FIR initially. The family of the perpetrators tried to convince the public that it was an honour killing. The family of the victim was one of the four Dalit families in the village and already faced social ostracization. Adding further insult to the injury of the Dalit family, who had lost their daughter to the cruel offence of rape and murder, there was a mass gathering in support of the accused by the people of upper caste. Despite clear evidence pointing towards the involvement of the upper caste perpetrators, they alleged that the men had been falsely accused and demanded justice for them. (Kashyap, 2020) This shows the dismal attitude towards the lower-caste by the upper-caste who do not consider their lives important and their sufferings are ignored in an attempt to shield the member of the upper caste.

The progress of the case has been painstakingly slow. The case had 104 witness and the deposition of only 15 witnesses had taken place till date. The lackadaisical approach of the Judicial Proceedings in the case can be due to two factors – The Covid-19 Pandemic and the fact that the victim belonged to a Dalit family. The proceedings by the prosecution are yet to be conducted, showing that the outrage regarding rape cases is also selectively reserved for the women of upper castes. The Nirbhaya Gang Rape case shook the nation and the accused have already been convicted and hanged for their offence. However, the wheels of justice have not been properly set into motion in the present case, despite a similar offence taking place, largely due to the fact that the victim belonged to the lower caste and the perpetrators were upper-caste men.

### ii. Mob-lynching

The incidents of mob-lynching against the minorities have been on the rise in the recent times. There has been an increase in the support for anti-cow slaughter legislations in the recent year since the cow is regarded as a holy animal by the Hindus. However, it must be understood that Muslims and several lower-caste and poor Hindus rely on beef as an affordable food source for their survival. (Misra, 2015) They have been easy targets of Hindu extremists, who act in vigilante groups popularly referred to as "gau rakshaks" A number of states like Haryana, Gujarat, Rajasthan and Madhya Pradesh have enacted anti-cow slaughter laws. However, in practice, the implementation of these laws has been taken into their own hands by the "gau rakshaks."

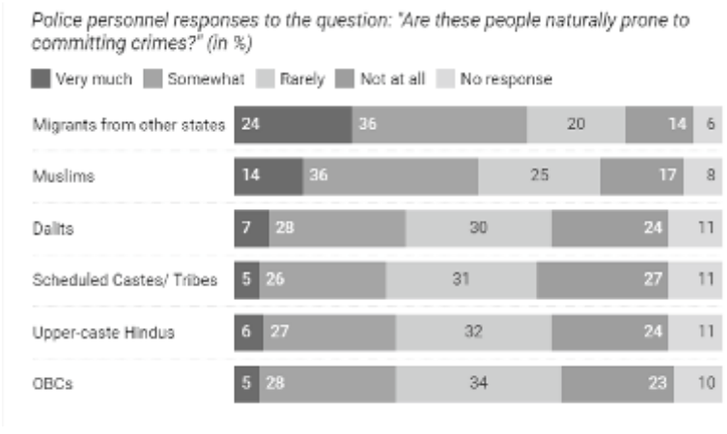
A Muslim man in Dadri, Uttar Pradesh was stoned to death by a job merely because he was alleged to have kept beef in his home. The incident was not even condemned by the politicians and a minister of the ruling party went to the

extent of terming the whole incident as a "misunderstanding." (Singh, 2015) Moreover, the suspects in the stoning were deemed as "innocent young men" who should be released from prison and the prosecution of the victims was sought for. (Raj, 2016) This was not an isolated incident. In 2016, a Muslim Family's house was attacked and vandalized by a large group of villagers on the suspicion that they may have killed a calf. The family somehow escaped from the house only to be arrested by the police. (Sahu, 2016) In Haryana, two women were gang-raped and two of their relatives murdered by a group of men. The eating of beef by the family of the victim's was given as the reason by the accused. (Boult, 2016)

These incidents showcase how the religious and caste minorities are vulnerable to the abuses by the upper castes. They are not only under the fear of being arrested by the law enforcement authorities but also the threat of extrajudicial violence at the hands of "cow protectors." The shocking truth is that in most of the cases, perpetrators in such offences go unpunished. On the contrary, the victims are often subjected to legal action under anti-cow slaughter legislation. The vigilantes taking the law into their own hands are often backed by the state and the chances of their persecution are minimal. The victims face institutional discrimination in the manner where they have FIRs filed against them, rather than the perpetrators.

### iii. Reasons behind the Institutional Bias and Intolerance against the Minorities

A study in 2019 by Common Cause and the Centre for the Study of Developing Societies (CSDS) surveyed 11,834 police personnel across 21 states about their perceptions, attitudes and professional skills. When questioned about the susceptibility of certain communities to commit crimes, nearly half of the police officials were of the view that Muslims are more likely to commit crimes. They held similar biases against scheduled castes and scheduled tribes.

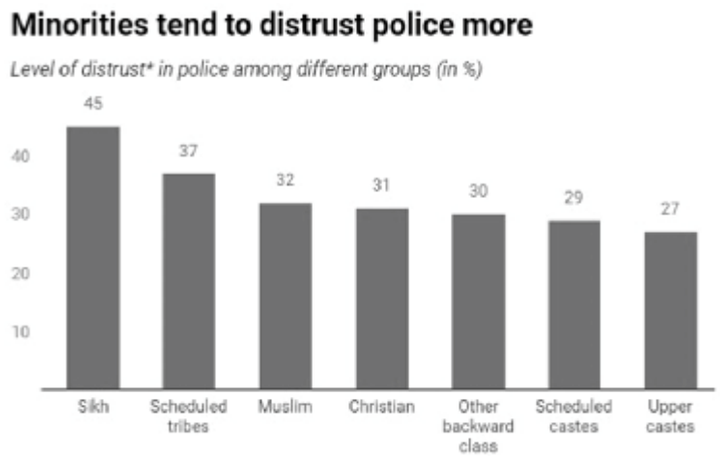



**Source: Status of Policing in India Report, 2019**



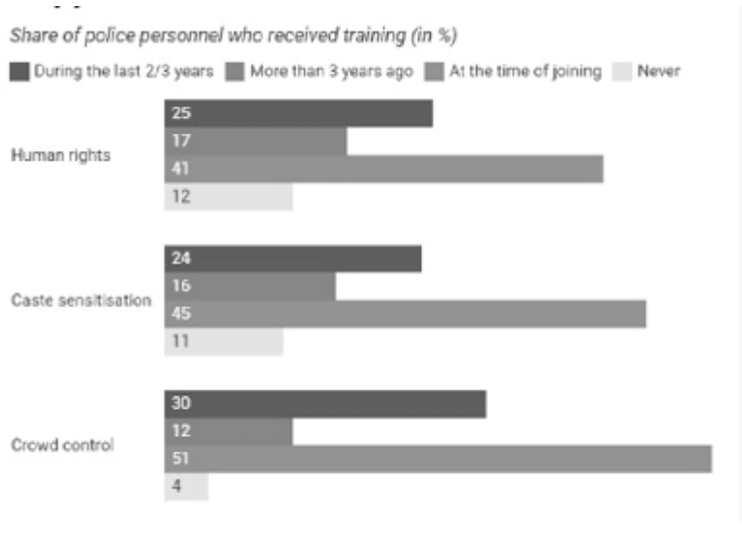


The biases are also reciprocated by the communities due to mistrust. The 2018 survey by CSDS found that, "Muslims, Scheduled Castes and Scheduled Tribes are more wary of the police than other communities." (Common Cause, 2018)




**Source: Status of Policing in India Report, 2018**

A major factor behind the mutual distrust is the lack of training of the police officials. The graph below shows that less than half of the total number of police personnel received training related to Human Rights and Caste Sensitization. This is worrisome in a diverse society like India, where the minorities still make up a significant portion of the population.




**Source: Status of Policing in India Report, 2019**

**Steps Taken to Alleviate the Conditions of Minorities in the Criminal Justice System**

The State has been guilty of allowing institutional biases to develop against the minorities. The Indian Constitution envisages equal treatment for all the citizens and the implementation of the Rule of Law under Article 14. However, in practice, the minority communities continue to face widespread discrimination in the Criminal Justice System. The measures taken to alleviate their conditions have been minimal. However, a few of the notable efforts have been discussed.

**1. Amendment of the Rajasthan Prison Manual**

The Prison Manual of Rajasthan allowed for the division of labour in prisons on the basis of caste. This was shocking since the Indian Constitution had been enacted in the year 1950 and prohibited all forms of discrimination on the basis of caste. The provisions under the Prison Manual were brought to the notice of the Rajasthan High Court who took suo motu cognizance of the issue. The High Court observed that, "We are of the firm view that no under trial prisoner can be assigned such (caste-based) duties in a prison." It further directed the Additional Advocate General to "apprise the court regarding the proposed steps for complete overhauling of the Prison Manual and to ensure that the prisoners are not forced to indulge in menial jobs like cleaning toilets etc. merely on the basis of their caste and also that no under trial prisoner is forced to perform such jobs in the prison". As a result of this decision, the rule was changed by the Home Department of Rajasthan. The amended rule now states that, "No tradesman shall be chosen on the basis of his caste or religion".

**2. Model Prison Manual by Bureau of Police Research and Development (BPRD), 2016**

With a view to improve the conditions of the prisoners and ensure conformity to the United Nations Rules for the Treatment of Women Prisoners, 2010 (UN Bangkok Rules) and the UN Minimum Standards for Treatment of Prisoners, 2015 (the Mandela Rules), the BPRD came up with an elaborate model prison manual. Both the conventions call for the repeal of discriminatory practices in prisons on the basis of race, colour, sex, language, religion, birth or any other status. The Model Prison Manual, 2016 states that, "Management of kitchen or cooking of food on caste or religious basis will be totally banned in prisons." It also prohibits any sort of "special treatment" to any prisoner based on caste or religion. It makes "agitating or acting on the basis of caste or religious" a punishable offence. The Manual is aimed at ending caste-based discrimination in prisons and securing the rights of the minorities. However, it lacks effective implementation and only a few states have adopted it. The majority of Indian States still follow the archaic prison manual from the colonial times which legitimized caste-based discrimination.





## IV. CONCLUSION- PROVIDING A GREATER SPACE TO MINORITIES IN THE INDIAN CRIMINAL JUSTICE SYSTEM

It can be concluded that as of now, the minorities in India suffer from widespread discrimination under the Criminal Justice system. It is based on socio-religious, historical and political factors. They face deplorable living conditions inside the prisons as well as during their trials under the Criminal Justice System. They are subject to violation of their dignity and basic human rights. They are forced to live in unsanitary and inhumane conditions inside the prisons. They are coerced into doing menial tasks on the basis of their status as a minority. Their plight is further perpetrated by the lackadaisical approach followed by the authorities towards their upliftment. They have been subjected to custodial torture, sexual abuse, denial to practice religious ideologies and imprinting of the sacred symbols of the majority religion on their bodies. Their actions are indicative of institutional bias against the minorities. Moreover, the offences against the minority communities are often overlooked and go unpunished. This provides an encouragement to the perpetrators to carry out similar offences in the future.

Moreover, the police personnel often lack adequate training to deal with the minority communities. They are not sufficiently trained in the disciplines of Human Rights and Caste Sensitization. This results in an indifferent attitude towards the minorities. The Hathras gang rape case is a prime example of how the minority victim was unable to seek justice even after she had been raped and murdered by four men belonging to the upper caste. The high percentage of extra-judicial killings of the minorities is also a worrying sign that the space for the minorities in the Indian Criminal Justice System is narrowing. The State support for such attempts does not paint a rosy picture for the future of the minorities under the Criminal Justice System in India.

The Government and the Judiciary have taken certain steps to ensure the better treatment of minorities. The BPRD also introduced a New Prison Manual, 2016 to ensure that no bias is practised inside the prisons on the basis of Caste or Religion. However, despite the best efforts, the archaic laws are still in operation across several States in India. Moreover, even in States where the New Model Prison Manual, 2016 has been adopted, its implementation has been extremely poor. Subduing the minorities and making them perform the menial tasks like cleaning of toilets, manual scavenging and manual labour is convenient for the upper caste since they are still able to maintain a life with dignity inside the prisons.

**i. What Needs to be done?**

In order to topple the existing system riddled with institutional bias and discrimination against minorities, several strict measures are required to be taken by the Government. Some of the suggestions which can be implemented by the Government in order to ensure that the Indian Criminal Justice System is accommodative towards minorities have been mentioned below.

- The acts by public officials which reek of institutional bias against the minority communities should be publicly condemned by the State. The action taken against such officials should act as a deterrent for the other officials to ensure that Constitutional Principles are being followed when dealing with minorities.
- A holisitic study is required to be done in order to understand the root cause of the presence of such high percent of minority population in Indian prison. A sudy shall be launched to analyse rhe economic, educational, social profiles of the inmates and detenues belonging to minorities. Also, disposal of the the undertrial prisoners belonging to minorities shall be give due credence and immediate attention.
- Another major reason for the minority prison population is the political or agitational charges against them. It has been seen that the majority of minority prison population are facing these allegations. A proper investigation of these charges shall be conducted and speedy disposal of such cases shall be resorted. A specific independent wing shall be appointed to investigate such matters.
- A more liberal and right based approach shall be followed with the minoritites rather than a pressing system. A system shall be formulated to provide and protect the basic rights of the minorities like free and effective legal aid.
- The representation of minority communities in the Criminal Justice System in India must be increased. As of now, their representation is extremely low, compared to their percentage in Indian population. More diverse police force and Judicial System can allow for better protection of the rights of the minorities.
- The survivors of communal violence, caste-based attacks and institutional maltreatment should be provided with legal assistance to reduce the barrier in seeking justice. The action taken against such incidents must be swift and attempts to obstruct efforts to secure justice must be severely penalized.
- The vigilantes responsible for the perpetration of violence against the minorities should be promptly dealt with. They must face effective legal action for taking law into their own hands. Their coddling by the law enforcement authorities and the politicians must come to an end.
- The police personnel must be adequately trained in the field of Human Rights and Caste Sensitization. The courses related to these aspects must be compulsorily provided at the time of recruitment.
- There is a need to adopt measures which address long-standing economic, social and cultural discrimination against religious minorities, including discrimination within state institutions. A comprehensive anti-discrimination legislation can be introduced which includes protections against intersectional discrimination.





- The harassment of minority women must be dealt with expediently since they are the most vulnerable class of minorities. The police and prosecutors must be adequately trained in treating minority women victims in an appropriate, respectful and confidential manner, and always enabling victims to be assisted by women officers. Prompt action needs to be taken in such cases.

## V. REFERENCES


- Abbas, S., & Prasad, D. (2019, May 10). We Must Recognise That Discrimination Plays a Large Role in Custodial Torture. Retrieved from The Wire: https://thewire.in/rights/we-must-recognise-that-discrimination-plays-a-large-role-in-custodial-torture
- Ahmed, I., & Siddiqui, M. (2015). Why are Indian Jails Disproportionately Filled with Minorities? Economic and Political Weekly, pp. 7-8.
- Boult, A. (2016, September 12). Women and girl 'gang-raped as punishment for eating beef'. Retrieved from The Telegraph: https://www.telegraph.co.uk/news/2016/09/12/women-and-girl-gang-raped-as-punishment-for-eating-beef/
- Common Cause. (2018). Status of Policing in India Report, 2018, 2018. New Delhi: Common Cause & Lokniti - Centre for the Study Developing Societies (CSDS).
- Dixit, R. (2018, April 3). NHRC Says Prisoners Were Tortured in MP Jail. So Why is No Action Being Taken? Retrieved from The Wire: https:/thewire.in/uncategorised/government-media-in-mp-working-together-against-tortured-undertrials
- Hasan, W. (2022, March 15). Why The Percentage Of Muslim Prisoners In India's Jails Is Disproportionate to Their Population In India. Retrieved from article14: https://article-14.com/post/why-the-percentage-of-muslim-prisoners-in-india-s-jails-is-disproportionate-to-their-population-in-india--6230001268058
- IAS, S. (2021, December 10). Overrepresentation of Minorities in Jails | Current Affairs. Retrieved from iasparliament.com: https://www.iasparliament.com/current-affairs/overrepresentation-of-minorities-in-jails
- India Today Web Desk. (2019, July 17). Nails plucked, threatened with electrocution, immolation: Rajasthan custodial rape victim recounts horror. Retrieved from India Today: https://www.indiatoday.in/crime/story/rajasthan-churu-custodial-rape-victim-sardarshahar-police-1570397-2019-07-17
- Jafferlot, C. (2021, December 10). Across India, minorities are overrepresented in jails. The Indian Express.

- Kashyap, A. (2020, October 4). Upper Caste Group, BJP Leader Rally In Support Of Hathras Gang-Rape Accused. Retrieved from thelogicalindian.com: https://thelogicalindian.com/protestandinjustice/upper-caste-group-demands-justice-for-the-accused-of-hathras-gangrape-case-24138
- Misra, A. (2015, October 23). Violence against Indian Muslims who eat beef has hypocrisy at its heart. Retrieved from The Conversation: https://theconversation.com/violence-against-indian-muslims-who-eat-beef-has-hypocrisy-at-its-heart-49457
- Radhakrishnan, V., & Nihalni, J. (2022, September 13). Over 30% of detainees in Indian prisons are Muslims, double their share in population. Retrieved from The Hindu: https://www.thehindu.com/data/over-30-of-detainees-in-indian-prisons-are-muslims-double-their-share-in-population/article65882525.ece#:~:text=In%202021%2C%20over%2030%25%20of,the%20population%20is%20only%2014.2%25
- Raj, S. (2016, June 1). Muslim killed by Indian mob had been in his home, new report says. Retrieved from The New York Times: https://www.nytimes.com/2016/06/02/world/asia/muslim-killed-by-indian-mob-had-beef-in-his-home-new-report-says.html
- Sahu, M. (2016, August 1). UP mob attacks Muslim home, owner held for “cow slaughter". Retrieved from The Indian Express: https://indianexpress.com/article/india/india-news-india/up-mob-attacks-muslim-home-owner-held-for-cow-slaughter-2946637/
- Setalvad, T. (2019, January 24). Women prisoners recount Jail Horror Stories. Retrieved from CJP: https://cjp.org.in/women-prisoners-recount-jail-horror-stories//
- Shantha, S. (2020, December 10). From Segregation to Labour, Manu’s Caste Law Governs the Indian Prison System. Retrieved from The Wire: https://thewire.in/caste/india-prisons-caste-labour-segregation
- Singh, H. S. (2015, October 2). Mob in Indian village kills man over cow slaughter. Retrieved from CNN: https://edition.cnn.com/2015/10/02/asia/india-mob-murder-beef/index.html




# The Human Rights of Drug Abuse Victims in India: A Call to Action

***Amaan Ali Shah****

**Abstract**

The human rights of drug abuse victims in India are a topic of growing concern, as the government's efforts to combat drug trafficking and abuse have resulted in widespread human rights violations. From mandatory minimum sentences and lengthy detention without trial, to the seizure of property and the denial of access to healthcare, drug abuse victims in India face a multitude of challenges that threaten their basic human rights. The Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985 is a major piece of legislation in India aimed at controlling the production, distribution, and use of narcotic drugs and psychotropic substances. While the NDPS Act has been effective in reducing drug trafficking and abuse in India, it has also been criticized for certain provisions that have been seen as problematic. The government has launched a comprehensive National Action Plan for Drug Demand Reduction to address the issue of drug abuse in India. The plan aims to reduce demand for drugs through prevention, treatment, and rehabilitation. This paper examines the ways in which India's approach to drug abuse has violated the human rights of those who suffer from this disease, and argues for a more compassionate and effective approach that prioritizes the health and well-being of drug abuse victims. Drawing upon the insights of scholars, activists, and policymakers, this paper explores the root causes of drug abuse in India and the ways in which the government's current approach has fallen short. By highlighting the human cost of India's drug policies, this paper seeks to spark a national conversation about the need for change and the importance of protecting the human rights of drug abuse victims in India.

**Key words: -** *Drug Abuse Victims, Drug Trafficking, Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985, National Action Plan for Drug Demand Reduction, Rehabilitation.*

* *Research Scholar, Department of Law, Aligarh Muslim University*
*Email Id: amaan.ali197@gmail.com*

## Introduction

The global drug problem has become increasingly complex and has caused significant human rights violations in many countries. India is no exception, with the country facing a severe drug crisis. This article explores the human rights of drug abuse victims in India, the challenges facing the protection of these rights, and potential strategies for protecting the human rights of drug abuse victims in India.

The human rights of drug abuse victims in India are a set of entitlements and freedoms that are recognized in international human rights law and are applicable to all people regardless of their drug use or substance abuse history. These rights include the right to life, liberty, and security of person; the right to be free from cruel, inhuman, or degrading treatment; the right to be free from torture and other cruel, inhuman, or degrading treatment; the right to privacy, the right to an adequate standard of living, the right to medical treatment, the right to adequate housing, the right to education, the right to employment, and the right to be free from discrimination.

India has a long history of recognizing and protecting the human rights of drug abuse victims. The Indian Constitution recognizes the right to life, liberty, and security of a person, and the right to be free from torture and other cruel, inhuman, or degrading treatment. Additionally, the Indian Supreme Court has issued several judgments recognizing the human rights of drug abuse victims in India, including the right to medical treatment, the right to be free from discrimination, and the right to be free from cruel, inhuman, or degrading treatment.

In recent years, the Indian government has taken steps to protect the human rights of drug abuse victims. The Narcotic Drugs and Psychotropic Substances Act of 1985 established the Narcotics Control Bureau, a government agency responsible for monitoring and controlling the production, distribution, and use of drugs in India. The Act also criminalized the possession, sale, manufacture, and trafficking of drugs, and provided for the rehabilitation of drug abusers.

## II. THE CURRENT SITUATION – HOW DRUG ABUSE IMPACTS HUMAN RIGHTS IN INDIA

The current drug situation in India is alarming. According to the National Crime Records Bureau, the number of drug-related deaths in India has increased from 8,741 in 2016 to 8,990 in 2019. (Ministry of Social Justice and Empowerment, 2019-20) Additionally, India is estimated to be the world's second-largest consumer of illicit drugs, with an estimated 3.3 million people using drugs in India.

The widespread use of drugs in India has had a detrimental effect on the human rights of drug abuse victims. Drug abuse can lead to physical and psychological harm, including an increased risk of death, health problems, social stigma, and discrimination. Drug abuse can also lead to violations of other human rights,





such as the right to life, liberty, and security of a person, the right to be free from cruel, inhuman, or degrading treatment, and the right to an adequate standard of living.

According to the National Survey on Extent and Pattern of Substance Use in India, about 7.2% of the adult population in India has used some form of psychoactive substance in the last 12 months. The survey also found that alcohol is the most commonly used substance, followed by tobacco, cannabis, and opioids. (United Nations, 2021)

Here are some of the different types of drug abuse in India, along with the latest available statistics:

1. Opioid Abuse: Opioids, including heroin and prescription painkillers, are the most commonly abused substances in India. According to the National Survey on Extent and Pattern of Substance Use in India, around 4.3 million people in India use opioids. (Ministry of Social Justice and Empowerment, 2019-20)
2. Alcohol Abuse: Alcohol abuse is a major problem in India, with a significant portion of the population engaging in excessive drinking. According to the World Health Organization (WHO), India has one of the highest rates of alcohol consumption in the world, with around 5.7% of the population suffering from alcohol use disorder. (United Nations, 2021)
3. Cannabis Abuse: Cannabis is one of the most widely abused substances in India, with an estimated 7.3 million people using it. Cannabis abuse is particularly prevalent among young adults and adolescents.
4. Stimulant Abuse: Stimulants, including cocaine and amphetamines, are becoming increasingly popular in India, particularly among young adults. The National Survey on Extent and Pattern of Substance Use in India estimated that around 2.8 million people in India use stimulants. (Ministry of Social Justice and Empowerment, 2019-20)
5. Inhalant Abuse: Inhalants, such as solvents and gases, are widely abused in India, particularly among young children and adolescents. The National Survey on Extent and Pattern of Substance Use in India estimated that around 3.5 million people in India use inhalants. (Ministry of Social Justice and Empowerment, 2019-20)

There are several factors contributing to the rise in drug abuse in India (Kumar, 2020), including:

1. Easy Availability: The easy availability of drugs, both legal and illegal, has made it easier for individuals to access and use them. In addition, the increase in drug trafficking and production in the region has made drugs more accessible.
2. Socio-Economic Factors: Poverty, unemployment, and low socio-economic status can lead individuals to turn to drugs as a means of coping with their problems. In addition, the increasing pressure to succeed in a competitive

society has led many individuals to turn to drugs as a way of relieving stress and anxiety.

3. Peer Pressure: Peer pressure is a significant factor in drug abuse among young people. Teens and young adults often feel pressure to fit in with their peers and may turn to drugs as a way of gaining social acceptance.
4. Lack of Awareness: There is a lack of awareness about the dangers of drug abuse, and many individuals do not understand the long-term consequences of drug use. In addition, many individuals believe that prescription drugs are safer than illegal drugs and are unaware of the potential for addiction and overdose.
5. Mental Health Issues: Mental health issues such as depression, anxiety, and stress can also contribute to drug abuse. In many cases, individuals may turn to drugs as a way of self-medicating and coping with their mental health problems.
6. Lack of Treatment and Rehabilitation Services: The lack of adequate treatment and rehabilitation services for individuals struggling with substance abuse is another factor contributing to the rise in drug abuse in India. Many individuals do not have access to the resources and support they need to overcome their drug abuse problems.

## III. VIOLATIONS OF HUMAN RIGHTS OF DRUG ABUSE VICTIMS IN INDIA

The human rights of drug abuse victims in India are routinely violated. Drug-related crimes such as possession, sale, manufacture, and trafficking are criminalized under the Narcotic Drugs and Psychotropic Substances Act of 1985, and this has led to an increase in arrests of drug abusers and their subsequent incarceration. Additionally, drug abusers face discrimination and social stigma, which can lead to further violations of their human rights, such as the right to education and the right to employment.

The use of drugs is also linked to the transmission of HIV (Verma & Aggarwal, 2020) and other communicable diseases, which can lead to further violations of the human rights of drug abuse victims. Additionally, many drug abusers lack access to adequate medical treatment due to the lack of access to healthcare services. This can lead to further violations of the right to life, liberty, and security of a person, as well as the right to medical treatment.

One of the most pressing human rights violations faced by drug abuse victims in India is discrimination and stigma. (Gururaj, 2016) Drug users are often stigmatized and marginalized, leading to a denial of access to basic health care, education, and employment opportunities. This violates the right to equality and non-discrimination, which is enshrined in Article 14 of the Indian Constitution.

Another major issue is the lack of access to affordable and quality rehabilitation and treatment services. (Shafi, Kumar, & Singh, 2019) Drug abuse victims are





often forced to resort to self-detoxification or treatment at private rehabilitation centres, which are often unaffordable and provide sub-standard care. This violates the right to life and dignity, as well as the right to health, guaranteed under Article 21 of the Indian Constitution.

Furthermore, the Indian government's approach to drug abuse has often focused on punishing drug users rather than treating them. This has been achieved through the implementation of harsh drug laws and policies, which have been criticized by human rights organizations and activists. This approach violates the right to life and dignity, as well as the right to a fair trial and protection from cruel, inhuman, or degrading treatment or punishment, guaranteed under Articles 21 and 22 of the Indian Constitution.

Another significant challenge is the lack of access to quality rehabilitation and treatment services. Many drug abuse victims are incarcerated or forced into rehabilitation centres that are unaffordable or provide sub-standard care. This can exacerbate their addiction and lead to further harm, violating their right to health and dignity.

In addition, the Indian criminal justice system often lacks adequate protections for the rights of drug abuse victims, particularly with regard to due process and a fair trial. This can result in arbitrary or unreasonable arrests, detainment, or punishment, violating their right to life and dignity, and the right to a fair trial and protection from cruel, inhuman, or degrading treatment or punishment.

Second, there is a lack of legal aid services and access to legal services for drug abusers in India. This has led to many drug abusers being subjected to arbitrary arrests and detention, and their rights not being respected in court. Additionally, the lack of access to legal services has resulted in many drug abusers not having access to necessary medical treatment and rehabilitation services.

Finally, drug abuse is linked to a number of other social and economic issues, such as poverty, unemployment, and lack of access to education. These issues make it difficult for drug abusers to access the services they need to protect their human rights. It is important to recognize that drug abuse is a complex and multifaceted problem that requires a comprehensive and evidence-based approach. (Monteiro, 2022) This includes addressing the root causes of drug use, providing access to quality rehabilitation and treatment services, reducing stigma and discrimination, and ensuring that drug abuse victims are not targeted or punished by the criminal justice system

It is imperative that India adopts a more compassionate and evidence-based approach to drug abuse, and prioritizes the human rights of drug abuse victims. This can be done by providing access to affordable and quality rehabilitation and treatment services, reducing stigma and discrimination, and ensuring that drug abuse victims are not targeted by law enforcement agencies.

## IV. INTERNATIONAL HUMAN RIGHTS STANDARDS AND THEIR APPLICATION IN INDIA

International human rights standards provide a framework for protecting the human rights of drug abuse victims in India. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights all recognize the right to life, liberty, and security of person, the right to be free from cruel, inhuman, or degrading treatment, the right to privacy, the right to an adequate standard of living, the right to medical treatment, the right to adequate housing, the right to education, the right to employment, and the right to be free from discrimination.

These international standards are applicable to the human rights of drug abuse victims in India. The Indian government has an obligation to ensure that these rights are respected, protected, and fulfilled. The Indian government should also strive to ensure that all people, including drug abuse victims, are treated with dignity and respect and are not subjected to cruel, inhuman, or degrading treatment. .

In India, the Constitution of India provides for the right to life and personal liberty, the right to equality, and the right to freedom from exploitation. India has also ratified the ICCPR and the ICESCR, and is thus bound by their provisions.

However, the implementation of these international human rights standards in India remains a challenge. India's approach towards drug abuse has been primarily centred around the criminalization of drug use, (Monteiro, 2022) rather than a public health approach that seeks to address the root causes of drug abuse and provides treatment and rehabilitation services.

In practice, this has led to the widespread abuse of human rights of individuals who use drugs, including arbitrary arrests, prolonged detention, and lack of access to health services and legal representation. The use of the death penalty for drug offenses, despite being in contravention of international human rights law, continues to be used in India.

India has the responsibility to uphold its obligations under international human rights law and ensure the protection of the rights of individuals who use drugs. This requires a shift towards a public health approach that addresses the root causes of drug abuse, and provides access to health services and rehabilitation. The criminalization of drug use should be replaced with a harm reduction approach that recognizes the rights of individuals who use drugs and ensures their access to health services and protection from abuse and discrimination.

## V. STRATEGIES FOR PROTECTING HUMAN RIGHTS OF DRUG ABUSE VICTIMS IN INDIA

1. There are several strategies that the Indian government can implement to protect the human rights of drug abuse victims. First, the government should ensure that drug abusers are not discriminated against or subjected to cruel, inhuman, or degrading treatment and that they have access to basic services, including medical care, housing, and education. Review and reform of laws and policies: The first step in protecting the human rights of drug abuse victims is to review and reform laws and policies that criminalize drug use, and replace them with a health-centred approach that focuses on providing access to quality rehabilitation and treatment services. This can help reduce stigma and discrimination, and ensure that drug abuse victims are not subjected to punishment or further harm.
2. Strengthening the judicial system: The judicial system must be strengthened to ensure that drug abuse victims are treated with dignity and respect, and have access to a fair trial and due process. This includes ensuring that drug abuse victims are not subjected to arbitrary or unreasonable detention or punishment and that they have access to legal representation and protection from cruel, inhuman, or degrading treatment or punishment. The government should ensure that drug abusers have access to legal services and that their rights are protected in court. This includes ensuring that drug abusers are not subjected to the death penalty for drug-related offences and that their rights are respected in the judicial process.
3. Improving access to quality rehabilitation and treatment services: Access to quality rehabilitation and treatment services, including mental health services, is essential for overcoming addiction and ensuring the health and well-being of drug abuse victims. This includes addressing barriers to access, such as affordability and lack of availability, and ensuring that services are evidence-based and adhere to international standards. The Indian government should ensure that drug abusers are not denied access to adequate medical treatment, including access to HIV prevention and treatment services. Additionally, the government should ensure that drug abusers have access to rehabilitation services, such as counselling and vocational training.
4. Addressing the root causes of drug use: To effectively protect the human rights of drug abuse victims, it is necessary to address the root causes of drug use, including poverty, unemployment, lack of education, and other socio-economic factors. This requires a multi-sectoral approach that includes collaboration between government agencies, civil society organizations, and the private sector. The government should implement effective prevention and harm reduction strategies to reduce the prevalence of drug use in India. This includes the implementation of public health interventions, such as needle and syringe exchange programs and opioid substitution therapy. Additionally, the Indian government should take steps to reduce the criminalization of drug use and ensure that drug abusers are not subjected to arbitrary arrests, detention, or incarceration.
5. Reducing stigma and discrimination: Reducing stigma and discrimination is a key component of protecting the human rights of drug abuse victims, and

requires a cultural shift that recognizes drug use as a health issue, and not a criminal one. This can be achieved through public awareness campaigns, education, and community-based interventions that aim to reduce stigma and discrimination against drug abuse victims.

The government of India has taken several measures to address the issue of drug abuse and to provide rehabilitation and reformation for drug abuse victims in the country. (Department of Social Justice and Empowerment, 2022) Here are some of the latest initiatives and programs:

1. National Action Plan for Drug Demand Reduction: The government has launched a comprehensive National Action Plan for Drug Demand Reduction (Department of Social Justice and Empowerment, 2022, p. 24) to address the issue of drug abuse in India. The plan aims to reduce demand for drugs through prevention, treatment, and rehabilitation.
2. Establishment of Rehabilitation Centers: The government has established rehabilitation centers (Department of Social Justice and Empowerment, 2022, p. 188) across the country to provide medical treatment, counseling, and vocational training to drug abuse victims. The centers are equipped with medical facilities and staffed by trained professionals.
3. Strengthening of the Anti-Narcotics Law Enforcement: The government has taken steps to strengthen the anti-narcotics law enforcement in India, including the creation of a special task force (Department of Social Justice and Empowerment, 2022, p. 172) to crack down on drug trafficking and the establishment of a centralized database to track drug-related crimes.
4. Public Awareness Campaigns: The government has launched public awareness campaigns (Department of Social Justice and Empowerment, 2022, p. 186) to educate the public about the dangers of drug abuse and to encourage individuals to seek help if they are struggling with substance abuse. The campaigns include TV and radio spots, posters, and brochures.
5. Integration of Substance Abuse Treatment into Healthcare Systems: The government has taken steps to integrate substance abuse treatment into the healthcare system in India, with the aim of making it more accessible and affordable for individuals who are struggling with substance abuse.
6. Expansion of Access to Medically-Assisted Treatment: The government has expanded access to medically-assisted treatment for individuals struggling with opioid addiction, including the provision of methadone and buprenorphine maintenance treatment.

## VI. LEGAL AND JUDICIAL REFORMS NECESSARY FOR PROTECTING HUMAN RIGHTS OF DRUG ABUSE VICTIMS IN INDIA

Legal and judicial reforms are necessary to protect the human rights of drug abuse victims in India. The Indian government should take steps to





decriminalize drug possession and reduce the severity of punishments for drug-related offences. Additionally, the government should ensure that drug abusers are not subjected to arbitrary arrests and detention and that their rights are respected in court.

Additionally, the government should ensure that drug abusers have access to legal aid services and that their rights are protected in court. This includes ensuring that drug abusers are not subjected to the death penalty for drug-related offences and that their rights are respected in the judicial process.

The Indian government should also take steps to ensure that drug abusers have access to medical treatment and rehabilitation services. This includes ensuring that drug abusers are not denied access to HIV prevention and treatment services and that they have access to counselling and vocational training.

The Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985 is a major piece of legislation in India aimed at controlling the production, distribution, and use of narcotic drugs and psychotropic substances. While the NDPS Act has been effective in reducing drug trafficking and abuse in India, it has also been criticized for certain provisions that have been seen as problematic.

1. Section 37, Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985: This section of the NDPS Act provides for the death penalty as the maximum punishment for certain offenses, including drug trafficking. Critics argue that the death penalty is not an effective deterrent against drug trafficking and abuse, and that it is a harsh and unjust punishment for non-violent offenses.
2. Section 64A, Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985: This section of the NDPS Act provides for the forfeiture of property in the event of a drug-related conviction. Critics argue that this provision is unjust, as it can result in the forfeiture of property that is not directly related to the offense, and that it is often used as a tool for harassment and intimidation by the authorities.
3. Section 67, Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985: This section of the NDPS Act provides for mandatory minimum sentences for drug offenses, which can result in long prison terms for even minor offenses. Critics argue that mandatory minimum sentences can result in disproportionate punishment, and that they do not take into account the specific circumstances of each case.
4. Section 43, Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985: This section of the NDPS Act provides for the detention of accused individuals for up to one year without trial. Critics argue that this provision is unconstitutional, as it violates the right to a fair trial, and that it is often used to detain individuals without sufficient evidence.
5. Section 50, Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985: This section of the NDPS Act provides for the seizure of drugs and other

substances, even in cases where there is no evidence of a drug-related offense. Critics argue that this provision is unconstitutional, as it violates the right to privacy and property, and that it is often used as a tool for harassment and intimidation by the authorities.

These are some of the criticisms of the NDPS Act 1985, with specific reference to certain sections of the Act. While the NDPS Act has been effective in controlling drug trafficking and abuse in India, it is important to consider these criticisms and make changes to the Act that will address these issues and ensure that it is consistent with the principles of justice and fairness.

One of the key legal reforms that are necessary to protect the human rights of drug abuse victims is the review and reform of laws and policies that criminalize drug use. This can help reduce stigma and discrimination, and ensure that drug abuse victims are not subjected to punishment or further harm. Instead, the focus should be on providing access to quality rehabilitation and treatment services and addressing the root causes of drug use.

Another important area of reform is in the judicial system, which must be strengthened to ensure that drug abuse victims are treated with dignity and respect, and have access to a fair trial and due process. This includes ensuring that drug abuse victims are not subjected to arbitrary or unreasonable detention or punishment and that they have access to legal representation and protection from cruel, inhuman, or degrading treatment or punishment.

Additionally, it is important to improve access to quality rehabilitation and treatment services, including mental health services, which are essential for overcoming addiction and ensuring the health and well-being of drug abuse victims. This includes addressing barriers to access, such as affordability and lack of availability, and ensuring that services are evidence-based and adhere to international standards.

There have been several Supreme Court cases in India that have dealt with the issue of drug abuse and the need for rehabilitation and reformation of drug abuse victims. Here are a few notable cases and their findings:

1. Narinder Singh v. State of Punjab (1996): In this case, the Supreme Court emphasized the need for rehabilitation and reformation of drug abuse victims, rather than punishment and imprisonment. The court held that the state has a constitutional obligation to provide medical treatment and rehabilitation facilities for drug abuse victims and that imprisonment is not the appropriate solution for drug abuse.
2. Mukesh Kumar v. State of Haryana (2011): In this case, the Supreme Court held that drug abuse victims are entitled to protection and treatment under Article 21 of the Constitution, which guarantees the right to life and personal liberty. The court directed the state government to set up rehabilitation centers for drug abuse victims and provide them with medical treatment, counseling, and vocational training.
3. Peoples Union for Civil Liberties v. Union of India (2011): In this case, the





Supreme Court emphasized the need for a comprehensive approach to drug abuse and addiction, including the provision of medical treatment, rehabilitation, and reformation facilities. The court held that the state has a responsibility to protect the right to life and health of drug abuse victims and that imprisonment is not the appropriate solution for drug abuse.

4. Kasturi Lal v. State of Uttar Pradesh (2015): In this case, the Supreme Court held that drug abuse is a public health issue and that the state has a constitutional obligation to provide medical treatment and rehabilitation facilities for drug abuse victims. The court also directed the government to set up de-addiction centers and to provide vocational training and employment opportunities for drug abuse victims.

These cases demonstrate the Supreme Court's commitment to addressing the issue of drug abuse in India and its recognition of the need for rehabilitation and reformation of drug abuse victims. The findings of these cases have had a significant impact on the development of drug abuse policy and practice in India and have helped to ensure that drug abuse victims receive the support and treatment they need to overcome their problems.

## VII. CONCLUSION – THE NEED FOR A COMPREHENSIVE APPROACH TO PROTECTING HUMAN RIGHTS OF DRUG ABUSE VICTIMS IN INDIA

The human rights of drug abuse victims in India are routinely violated, and it is important for the Indian government to take steps to protect these rights. The Indian government should ensure that drug abusers are not discriminated against or subjected to cruel, inhuman, or degrading treatment and that they have access to basic services, including medical care, housing, and education. Additionally, the government should take steps to decriminalize drug possession and reduce the severity of punishments for drug-related offences and ensure that drug abusers have access to legal aid services and that their rights are respected in court.

Finally, the government should take steps to address the underlying social and economic issues that contribute to drug abuse, such as poverty, unemployment, and lack of access to education. This requires a comprehensive approach that includes the implementation of effective prevention and harm reduction strategies, as well as legal and judicial reforms. Only then can the human rights of drug abuse victims in India be fully protected.

## VIII. REFERENCES

1. Department of Social Justice and Empowerment. (2022). Annual Report 2021-22. New Delhi: Ministry of Social Justice and Empowerment.
2. Gururaj, G. (2016). National Mental Health Survey of India, 2015-16: Mental Health Systems. Bengaluru: National Institute of Mental Health and Neuro Sciences, NIMHANS.

3. Kumar, A. (2020). Trends and Patterns of Substance Use among Adults in India: Results from the National Survey on Extent, Pattern and Trends of Drug Abuse-2019. Journal of Substance Use.
4. Ministry of Social Justice and Empowerment. (2019-20). National Survey on Extent and Pattern of Substance Use in India. New Delhi: Ministry of Social Justice and Empowerment, Government of India.
5. Monteiro, L. (2022, October 11). Substance abuse doing more damage than alcohol. Retrieved from Times of India: https://timesofindia.indiatimes.com/city/goa/substance-abuse-doing-more-damage-than-alcohol/articleshow/94771068.cms
6. Shafi, O., Kumar, C. M., & Singh, S. (2019). Substance Use in Adolescents: Situational Analysis. Substance abuse in adolescents.
7. United Nations. (2021). World Drug Report 2021. Vienna: United Nations Office on Drugs and Crime.
8. Verma , R., & Aggarwal, D. (2020). Drug Abuse in India: A Review of Literature. International Journal of Community Medicine and Public Health.



# A Study on the Interface of Human Rights and Banking Institutions

***Ankit Srivastava*, Dr. Anand Kumar Singh*****

**Abstract**

Banks are an essential part of the society. It has a dual role as they are business themselves and they also empower businesses by providing credit and it has been observed that in this dual role, major and majority of banks are focusing mostly on the profit maximisation of their business and because of the distrust in banks after the 2008 financial crisis, good banking governance has gained importance. As human rights has become a core business consideration, banks have human rights obligations as they must not infringe upon the human rights in addition to addressing adverse effects on human rights, which they are a part of. The paper discusses the importance of human rights in banking institutions, their violation and protection. It focuses on that how certain banking practices may cause human rights violations. The authors have further discussed about the international instruments dealing with Banks and its human rights aspects. Subsequently, the paper focuses on the national framework for advancement of human rights in business conduct. The authors have discussed various reports incorporating measures for advancement of human rights in banking industry in India and discussed various options that may be implemented by the Reserve Bank for the betterment of Human Rights.

**Key words:** - *Human Rights, Business, Bankning Institutions, International Instruments, Finance.*

## Introduction

Banking and financial institutions are hailed as the backbone of modern economies. Banks and banking institutions have developed over time, to

* *Assistant Professor, Rajiv Gandhi National University of Law Punjab*
*Email: ankitsrivastava824@gmail.com*
** *Assistant Professor, National Law University Jodhpur*
*Email: anandksingh054@gmail.com*

perform a wide range of activities. Therefore, the term 'banking' has also evolved to encompass many services that such entities provide. Moreover Banks, as custodians of public money, have far-reaching and significant impacts not only on the economy, but also on the well-being of the societies that the economy serves and the environment on which we all depend. Further, banks share a relationship of trust with its customers and this trust can only be upheld if there is transparency and respect for human rights in general.

However, most banks services are guided by pure profit motivations. Banks operate to generate profit from the loans they advance to individuals and corporations without heeding much to the ramifications of their lending. This leads to many corporations, factories to carry out their exploitative agendas without any supervision from their source of capital. This is particularly true about majority of Indian Banking Companies which, according to the Fair Finance Guide India, do not concern themselves with policies on environment and human rights. As per the Scorecard, out of the eight Indian banks, which were evaluated, seven had scored a disappointing zero in themes of climate change and environment and scored badly in themes of human rights.

Since the 2008 financial crisis, which led to a major trust deficit in the entire banking sector, good banking governance has become increasingly important. In present times, it is generally accepted that all business entities including banks must respect human rights i.e. they must not infringe upon the human rights in addition to addressing adverse effects on human rights, which they are a part of. But, Banks themselves can cause human rights violations, for example through discrimination in employment or the provision of their services, and they may contribute to or be involved in human rights violations. through loans or other financial assistance to responsible companies. (Brightwell, 2022). It is therefore necessary for institutions such as banks to develop a human rights policy, conduct human rights due diligence and create remedial processes for any infringement they may cause or contribute to. (Foly, 2015)

However, the premise of human rights due diligence exists on the basis of responsibility prevailing throughout the chain.

## SIGNIFICANCE OF PROTECTING HUMAN RIGHTS IN BANKING OPERATIONS

Amartya Sen in his Noble Prize-winning research held the conception of 'capabilities of people to lead the kind of lives they value' of utmost importance. According to his theory, capabilities, both of individual and of communities, are created by a number of 'freedoms', such as opportunities to be educated and to participate in the economic and political world, etc. (Sen, 2001).

These capabilities are said to recognised as the keys to unlock access to greatest of human rights and overall development of a human being. Being able to participate in a market, in itself, has been recognised as one of such freedoms and as greater aspect of an inviolable human right. (Herzog, 2017). In fact, one





can draw historical parallels between the development of market, both in practice and as a concept, and the contemplation of guaranteed rights and freedoms in all circumstances (Gelderblom, 2015). In this context, the failure of banks in engaging and supporting people in the pursuit of developing their capabilities breeds not only general mistrust in the market but also a forced estrangement from the enjoyment of their protected human rights.

The Reserve Bank of India acknowledged and supports this through a notification with an'[…]It is difficult to overstate the importance of banks acting as good corporate citizens in society, particularly in a developing nation like ours. Their actions ought to demonstrate how they care about human rights.' (RBI, 2007) This position has been reflected in multiple RBI communiqués to banks to undertake corporate social responsibility (CSR) initiatives. (Padmanabhan, 2014)

Notwithstanding the capability approach, there are several other explanations as to why human rights considerations ought to be seen as being innate and integral to the operation of banks.

### A. Nature of Banking Industry

Banking is an assorted industry having a various models of the business types which are operating under the very wider ambit of the term 'banking'. At one part of it, the Global Systemically Important Banks are mammoth institutions whose balance sheets can dwarf the GDP of their domestic countries and whose failure can imperil the stability of the global financial system. These are considered to be too big to fail institutions that came to the vanguard the concern of the regulatory bodies to maintain the financial crisis. They can function through a various method of subsidiaries and related authority's vehicles, and their happenings can aloofness the entire array of the financial products and markets. On the other side of the scale are the local cooperatives or in the other terms the savings banks which are to be count as a village, town, or local area on the basis of their client base. These types of institutions incline to be at a much closer than the model of the traditional approach of the simple banking business where the customers are having the savings and deposits which are recycled to fund the mortgages and the very basic loan products.

Further, the sector has itself created an unpaid initiative to address the human rights. Over the years, there are several risk management frameworks which are recognised and adopted by banking companies across the globe to ascertain, appraisal and handling the environmental and risk of society in the concerning projects. (Kapica,2019)

### B. Banking Practices May Cause, Contribute Or Facilitate Human Rights Violations

In 2017, the Office of the United Nations High Commissioner for Human Rights (OHCHR) also confirmed that "A bank might provide a negative influence by its

own activities (actions or omissions)—either directly with other entities, or through some external entity, such a client".(OHCHR, 2017). This was seen in the extreme case of Jordan-based Arab Bank Plc in the US Supreme Court wherein the Arab Bank faced allegations for financing individuals linked to terrorist attacks in Israel and Palestine.(Jesner, 2014)

In the 2017 Guidance Note provided by the OHCHR, a checklist was provided to be used in order to find out that whether a bank is contributing to, or has a straight link to an unfavourable impact in cases human rights abuse (Banktrack, 2018). This checklist is not exhaustive, but it outlines the basic principles with regard to the contribution of banks to human rights impacts. According to this note, if the bank's decisions alone were sufficient to have a negative impact on human rights without the assistance of customers or other entities, the bank will be considered to have directly "caused" the infringement. (Banktrack, 2018)

Further, if the bank's actions or omissions paved the way for another entity to cause harm and violate human rights, the bank shall be held responsible for its 'contribution' in such abuse. Banks can 'contribute' to human rights violations in multiple circumstances. First, banks have a hidden and cryptic role to perform in the context of global economic inequality. The majority of banks' obligations under international human rights law are met indirectly through the acts of their clients and are frequently (if ever) addressed through leverage, influence, and discussion.(Thun Group, 2013). In a responsible lending arrangement, a rights-inclusive assessment prior to lending may provide essential information regarding investment returns and risk-management (Mercer, 2007). This may, in effect, contribute to 'minimising risks by anticipating and preventing' crises arising out of severe human rights violations. (European Commission, 2001). As such, inclusion of human rights considerations into banking operations becomes helpful indicators of the stability and long-term value of a project which in turn has a larger impact on the creation and maintenance of a healthy business environment in a country. Secondly, a corollary of the first reason is the effect of human rights violations on the reputation and value of businesses (including banks). Human rights violations are not good for business (Cherneva, 2014). However, while it is easy to attribute violations of human rights to a corporate conduct (due to the presence of a clear nexus, most of the times) and punish them for committing human rights violations, it is extremely difficult to hold banks, who provide capital to such corporations, responsible in a similar fashion. Their definite but silent role has obfuscated their primary responsibilities in the protection of human rights. Without money, corporate activity is reasonably blunt. In the face of this reality, such banks must be held complicit in the harmful actions of the corporations they funded as they not only failed in their obligation to prevent the violation but also, unlawfully profited from its operations. Thirdly, The importance of banks cannot be overstated. By choosing to invest in corporations and enforcing requirements that they adhere to international human rights in order to receive such investment, banks operate as prospective regulators of a sort in the absence of a global regulator.





In some cases, banks not only pave the way for harm but they also 'facilitate' the harm (Cherneva, 2014). This refers to cases wherein the bank is aware of or should be aware of a human rights risk that will be posed as a result of a particular project and yet it funds this project, without taking any steps to mitigate such risk to human rights i.e. the real and potential risks must be understood prior to getting involved in any project. Lastly, the quality of a bank's human rights policies and its due diligence processes of identification, prevention and mitigation of harm assumes critical importance. (Cherneva, 2014) When a bank fails to perform appropriate due diligence on human rights, it may overlook risks and fail to take the necessary steps to prevent or reduce them.

## MAJOR INTERNATIONAL INSTRUMENTS BANKS AND HUMAN RIGHTS

The Universal Declaration of Human Rights, adopted in 1948, declares that 'every organ of society' has its own human rights obligations. (UDHR, 1948) While it is generally accepted that States have the primary responsibility to respect, promote and secure human rights for every human being 'without distinction of any kind'(UDHR, 1948), it must be noted that state responsibility is neither exclusive nor sufficient and encompasses not just the sovereign state but any organised body that performs typical functions of a state. As the reach and impact of business enterprises continue to grow at an incredible pace, it is time that the human rights obligations of such enterprises be acknowledged and enforced, too. (Cappelle, 2003)

### A. United Nations Guiding Principle on Business and Human Rights

June 2021 marked the tenth anniversary of UNHRC's endorsement and approval of the United Nations Guiding Principles (UNGP). (OHCHR2011) These principles are the result of a six-year consultation process involving governments, businesses and civil society. UNGP clarifies the obligations and responsibilities of not only the governments but also of businesses in dealing with the potential negative impacts of business-related human rights. Second Pillar of UNGP (out of three Pillars) specifically stresses on the 'Corporate Responsibility to Respect Human Rights'. Since its release, the UNGP have become an authoritative guide on business and human rights across the globe. The UNGPs are sector agnostic and therefore, are applicable to all enterprises including banks and financial institutions like NBFCs. (UN Guiding Principles, 2011)

In June 2017, after six years since the formal adoption of UNGPs by UNHRC, BankTrack, a non-governmental approached the Office of the United Nations High Commissioner for Human Rights (OHCHR) seeking advice and clarification on application of UNGPs in the banking sector. The OHCHR

provided thorough explanations of the factors that affect a bank's participation in activities that have a negative impact on human rights, the bank's accountability in circumstances where it has contributed to a negative impact on human rights, and the function of grievance mechanisms. (OHCHR, 2018) The document serves an important tool for the Central Banks or banking regulators to devise effective policy on the subject matter and affix liabilities on the banking companies involved in human rights violations.

### B. OHCHR Guidance on Applications of Guiding Principles to Banking Sector (2017)

In 2017, the Thun Group, an informal group of seven banking companies that works towards assimilation of UNGPs in banking operations and policies, released a discussion paper on its understanding of UNGPs and their relevance and application in banking industry. (Thun Group of Banks, 2013)

The discussion paper rejected the possibility of banking companies either causing or contributing to human rights violations in area of retail customers and therefore, will have no liability to prevent, mitigate or compensate for such violations. (Facing Finance, 2017)

In this backdrop, the OHCHR, released Guidance Note to clarify its position on the application of UNGPs in the Banking industry and brought the controversy to an end with its emphatic rejection of the contention advanced by the Thun Group .

The Guidance Note provides clarifications on critical issues like the factors that would determine the involvement of a bank in an alleged human right violation; bank's responsibility and extent of liability where it has contributed to a human right abuse; and, role of a bank in the establishment of an effective grievance mechanism for communities affected by its operations.

### C. United Nations Environment Programme-Finance Initiative

The United Nations Environment Programme-Finance Initiative (UNEP-FI) has brought out a voluntary, non-binding framework, 'Principles for Responsible Banking', comprising of Six Principles with an aim to 'to bring purpose, vision and ambition to sustainable finance' through promotion of socially responsible conduct by banking companies. (UNEP, 2022) Principle I, 'Alignment', seeks an alignment of banks strategies with the needs of the society it functions in and caters to. The principle sets out a clear directive for the banks to devise policies and adopt strategies which are in conformity with Sustainable Development Goals, Paris Climate Agreement and UNGP on business and Human Rights. (UNEP 2022)

The UNEP-FI also published a 'Human Rights Guidance Toolkit for Financial Sector' (Hansen, 2014) which allows banking companies to align their internal operational policies and lending practices with human rights considerations of





varied stakeholders. It allows for identification of potential human rights risks and suggests appropriate and effective risk mitigation exercise for banks and other financial institutions. This promotes inclusivity and responsible business conduct in lending business.

### D. United Nations Global Compact

Another significant non-binding initiative run by the United Nations is the United Nations Global Compact (UNGC), which "encourages companies around the world to be socially responsible in its policies and to align its strategies and operations with Ten Principles on human rights, labour, environment, and anti-corruption.". (UN Global) To "support and respect the preservation of internationally recognised Human Rights" and "make sure that they are not involved in Human Rights abuses," according to the first two UNGC Principles, respectively. (UN Global)

Other regulations that demand the financial sector to adhere to particular environmental and human rights criteria include the "OECD Guidelines on Multinational Enterprises" and the "International Finance Corporation Performance Standards". (International Finance Corporation, 2012)

Despite these efforts, the standard for responsible lending remains Basel III (Basel III, 2017) which is the international regulatory framework meant for governance matters and deals with minimal capital requirements as opposed to regulating the larger concerns of social impacts (still less human rights) of banks. For banks, thus, the standards for human rights are not only vague, indeterminable and often unidentifiable but also avoidable.

## MEASURES FOR ADVANCEMENT OF HUMAN RIGHTS IN BANKING INDUSTRY IN INDIA

### A. 'SOFT LAW' APPROACH

In 2014, UNHRC made an emphatic appeal to all its member States to formulate a 'National Action Plan' for effective implementation of UNGPs. In response to this, the Government of India through Ministry of Corporate Affairs (MCA) released a 'Zero Draft' of its 'National Action Plan on Business and Human Rights' in 2018. (IICA, 2020)

The Zero Draft builds upon the 'soft law' approach that MCA had experimented with to promote socially responsible behaviour amongst Indian corporations to respect and promote human rights through their conduct and practices. The first set of "Voluntary Guidelines on Corporate Social Responsibility" were released in 2009, and they urged India Inc. to advance the interests of other stakeholders and society by implementing business practises "that ensure the distribution of wealth and well-being of the communities in which the business operates." (MCA, 2009) The Guidelines encouraged the companies to formulate a Corporate Social Responsibility (CSR) Policy built upon six core principles.

Principle IV, titled 'Respect for Human Rights', mandated that "Companies should respect human rights for all and avoid complicity with violations of human rights by them or by third parties".

In 2011 the MCA revised and replaced the Guidelines with a more comprehensive 'National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business' (NVG) which aimed at promoting sustainable growth and inclusive economic development through 'responsible business'. (MCA, 2011) The NVG was built upon Nine (09) Core Principles. Principle V of NVG, 'Business should respect and promote Human Rights', advocated that 'businesses should appreciate that human rights are inherent, universal, indivisible and interdependent in nature'. (MCA, 2011) Apart from this, the Principle directs prompt identification of operations that have or may adversely impact human rights of all relevant stakeholders and ensure access to effective grievance mechanisms. Significantly, the Principle does not limit itself to the direct operations of a corporation but also directs it to 'not be complicit with human right abuses by a third party'. (MCA, 2012)

In 2018, the MCA released 'National Guidelines on Responsible Business Conduct' (NGRBC) which are voluntary in nature and have been aligned with UNGPs. (MCA 2018) The NGRBC have been devised with an intent to allow the businesses 'demonstrate their commitment to being a responsible business, and accrue the full benefits of sustainable business strategies.' The NGRBC is made up of nine core principles, which are "essential facilitators for adopting sustainable business practises in day-to-day operations" and include leadership commitment, employee involvement, stakeholder engagement, disclosure, and reporting. Principle V of NGRBC 2018, 'Responsibility of business to respect and promote Human Rights' casts a responsibility on corporations to adopt such 'policies, processes, structures and operations' which do not adversely impact human rights of different stakeholders. The Principle emphasises the significance of a 'Human Rights Due Diligence' exercise by corporate houses 'to identify, prevent, mitigate and account for how they address adverse human rights impacts'. (MCA, 2018)

In 2017, Indian Bank's Association released 'National Voluntary Guidelines for Responsible Financing' (Indian Banks Association, 2018). These financial industry regulations combine and adapt both worldwide and domestic best practises. By "providing a systematic standardised framework of action catering to the banking sector's risks, opportunities, and responsibilities around environment, social, and economic factors in an integrated manner," the voluntary guidelines raise the bar for financial institutions' behaviour above and beyond compliance. (Indian Banks Association, 2018). These guidelines establish Eight principles to inform business action on various aspects of environmental, social, and governance (ESG) responsibilities.

The Guidelines encourage banks to systematically and strategically assimilate all eight ESG principles. Adoption of the eight principles will allow the banking institution a competitive advantage through value maximisation of stakeholder's





interest.

Principle VII, titled 'Commitment to Human Rights', encourages the financial institutions to venerate and promote human rights 'in its own operations as well as investments' in different projects (Indian Banks Association, 2018). Additionally, it exhorts banking companies to create effective grievance procedures to address human rights violations involving their employees and other actors in their value chain and to refrain from participating in any way when a third party commits such violations in connection with their business operations. (Indian Banks Association, 2018).

In its recent Annual Report of 2019-20, the Reserve Bank of India the critical importance of ESG risk assessment in sustainable financing. It observed that the impact of climate change on financing model makes it imperative for banks to incorporate ESG principles in their business operations and conduct ESG due diligence to 'identify, assess and manage financial risks'. (RBI 2020)

## B. HARD LAW APPROACH

Lack of accountability of corporations at the international level along with the 'recommendary and voluntary' nature of Human Rights initiatives does not mean that such entities enjoy impunity under municipal laws. On the contrary, companies and the erring officials can be criminally prosecuted under various laws by the State as well as civil liabilities can also be imposed towards affected parties.

### 1. Corporate Criminal Liability -

The courts in India have upheld the vicarious liability of banking companies for contributory negligence, commission of fraud by its employees, etc. Holding the bank liable for the fraudulent conduct of its employee, the Supreme court declared that '…What matters is whether the servant or employee committed the crime, such as fraud or another type of offence, while acting in the course of his work. Once this is shown, even if the employee's actions constitute a criminal, the employer would still be responsible for them.' (SBI case, 1978 & Pradeep Kumar Case 2022) In another landmark case, the Hight of Delhi observed that 'banks are public institutions…which owe a duty of fairness to their customers. Once the banks are convinced that their employees have acted fraudulently in relation to a customer, the banks should at once acknowledge liability for such fraud to the customers…It is not that justice can be done only by court of law. Such obvious justice which is apparent to the banks and which needs no proof in a court of law could have been done by the banks themselves.' (PNB Case 1977)

### 2. Fiduciary Duty

Section 166 of Companies Act 2013 – The provision describes the 'fiduciary duty' of a director to not only work towards the promotion of interests of

members but also towards 'the best interests of the company, its employees, the shareholders, the community and for the protection of environment.' (Companies Act, 2013)

Section 88 of Trusts Act, 1882 – Directs that in case undue pecuniary advantage is made by a person, who is duty bound in a fiduciary relationship to protect the interest of others, by promoting his own interest over or causing harm to such other persons, such advantages gained must be held for the benefit of such other persons. (Trust Act, 1882) In a landmark judgement, the Supreme Court enlarged the application of the provision by declaring that the list of fiduciary relationships, mentioned in section 88 is 'non-exhaustive and includes large variety of relationships' (Canbank 2004). According to the Court, the provisions of Section 88 would apply regardless of any designation that is irrelevant "whenever as between two persons one is required to protect the interests of the other and the former availing of that relationship earns a pecuniary advantage for himself." The aforementioned rule would likewise be applicable to a bank holding a customer's funds. (Canbank, 2004)

## STATUS OF HUMAN RIGHTS IN INDIAN BANKING COMPANIES

In 2015, the National Human Rights Commission (NHRC) took cognizance of an abhorrent practice of 'naming and shaming of students' who failed to repay education loans by Central bank of India. (NHRC 2016) The NHRC stated that "enforcing the practise of 'name and shame regulations' in educational loans would unquestionably amount to significant violation of human rights," and it issued stern instructions to the Bank and other public authorities to stop such odious activities. Publication of images of parents and pupils (defaulters) has the potential to cause irreparable harm, injury, and prejudice to the students. Such public display of images of school loan defaulters—who typically originate from low-income families and rural communities—would undoubtedly amount to a loss of their dignity in addition to a violation of their human rights. (NHRC 2016)

## FAIR FINANCE INDIA- BANK POLICY ASSESSMENT REPORT 2020

*(Fair Finance India Coalition, 2022)*

Recently, Fair Finance India Coalition, a civil society research group committed to the cause of strengthening social, environmental and human rights standards in banking industry, published its performance assessment report of eight major banking companies in India (namely, Bank of India, Federal Bank, HDFC Bank, IDFC First Bank, Indian Overseas Bank, Punjab National Bank, State Bank of India and Yes Bank) on ten different themes, i.e., Nature, Climate Change, Labour Rights, Human Rights, Gender Equality, Financial Inclusion, Arms, Taxes, Transparency and Accountability and lastly, Corruption. The Report measures the extent to which the Indian banking companies have integrated their business operations and policies with globally accepted benchmarks on





responsible and sustainable banking practices.

According to the report, Banks have performed poorly in their commitments towards Human Rights as only one bank committed to UN Global Compact initiative. While two Banks have no policy commitments towards any sub themes of human rights, five banks have a very loose and vague policy on certain human rights (e.g. non-discrimination, gender diversity, equal pay for equal work, harassment free workplace, etc). Hence, six out of eight sample banks have scored a 'zero' on a scale of ten (0/10) in their human rights commitments while one bank has scored the highest of 2.1 (IDFC).

The deplorable state of affairs in these banks require immediate attention of the policy makers and the regulator. With a sense of urgency the banks must be encouraged to venerate human rights and raise the extent of their commitment by revamping their business operation strategies and modelling them on globally accepted standards. The banks must imbibe a culture of transparency and inclusivity in its activities to foster confidence, trust and faith amongst stakeholders that will lead to sustainable growth for itself and the society in which it functions.

### The Way Forward

RBI should incentivise the activities addressing the following (BSR, 2022):

1. Discrimination in Lending Practices- Regardless of their size or scope, lending practices constitute a grave threat to human rights. Brokers may trap small scale borrowers into loans that they are most likely to default on, as was witnessed in the sub-prime crisis of 2008. Financial and credit institutions may refuse to lend to borrowers on grounds of race, religion, or gender. The increasing role of Artificial Intelligence in approval or rejection of banking services to customers has the potential to aggravate such discrimination, albeit more obscurely. (UDHR 1948)
2. Customer Due Diligence - All financial institutions, big and small, must conduct environmental, social, and governance due diligence before making loans. The Guiding Principles make it crystal clear that businesses must evaluate all of their relationships, including those with their customers, for any potential negative human rights impacts. This is true whether they are working with a single customer, a small business, a large corporation, or a government agency. A failure to conduct social, economic and environmental due diligence often leads to human right violations. This could take the form of funding governments that abuse their citizens or speeding up the expansion of a firm that exploits its employees. (UDHR, 1948)
3. Sector Due Diligence - In addition to client due diligence, banks should also conduct a due diligence on the industry/sector to ascertain that their investments in such sectoral enterprises does not contribute to human rights violations. Sectoral due diligence in the sector should evaluate operation-

specific implications as well as the local social milieu before investment. (UDHR 1948)

4. Equal Pay – Equal pay for equal work shall be ensured by the Financial institutions and they should conduct an internal study to ensure that their employees receive the same and rectify if inconsistencies are found. Further, the banks can also incentivise the same behavior in other clients and business partners using their leverage. (UDHR, 1948)
5. Prioritising Positive Infrastructure Projects - By integrating it into their core activities, financial sector organisations can contribute to advancement in the most meaningful and effective way possible. Financiers working with governments, engineers, and civil society can achieve the focus of large-scale infrastructure projects that serve the best public interest, particularly for the most vulnerable. For rural villages, emergency rooms, or schools, this may include sanitization and water purification projects as well as improvements to the streets and parks. An open opportunity that is particularly suitable for the financial sector is ensuring access to these essential resources.
6. Embolden the Fine print - ¬Banks possess an effective method of compelling corporations to comply with their human rights obligations. The borrower and the lender may include clear contractual terms and conditions in the loan agreements setting national and international human rights standards. The consequence would be that if a corporation were to infringe any such condition, it could be held in partial or total default of the loan agreement, drawing huge penalties, monetary and otherwise.
7. The case of carrots & sticks - Typically, a loan agreement ensures payment of the full loan amount lump sum to the borrower once the loan has been approved. This, however, poses the risk of creating an absent lender. Such a lender may be held responsible (directly or indirectly) for complicity if its investment is associated with human rights abuses. In such a case, the absent lender would be left without any remedy. This is true because the concept of a complete, upfront one-time payment hinders the bank's ability to use its authority and hold a firm accountable. A fundamental and useful tool for enforcing contractual terms is staggered lending, which is the disbursement of the loan amount in instalments rather than in full. Subsequent sections of the loan can be utilised as leverage in this way.
8. Extreme Options: Suspension & Cancellation of Loan - Banks may operate in secrecy and with a degree of anonymity, but they are increasingly held accountable for conduct that result in abuses of human rights. Such liability will depend on a number of variables, such as the deal's context, the extent to which the bank exercised or ought to have exercised control over the project, and the seriousness of the injury. It is noticed that banks would rather engage the corporations to stop violations of human rights than suspend or terminate financial contracts with such borrowers. This may be considered as the best course of action since the unintended consequences





of exiting from an investment, at all stages, often includes huge detrimental effect on the community in which the project is based. In case, a bank finds itself becoming complicit, directly or indirectly, in the commitment of any human rights violations, it may engage with the borrower to stop the abuse, ensure its non-recurrence and commit to remediation in accordance with international standards such as Principle 5 of the Equator Principles III and Principle 22 of the UN Guidelines on Business and Human Rights and where such violator fails to evince compliance or is generally dismissive towards human rights concerns, delay, suspend or cancel the loan advanced to it.

## CONCLUSION

Law has actively recognised the legal personality and corresponding legal rights and obligations of corporations. In this regard, it is irrefutable that banks, as a specific category of corporations, also have the binding obligations to respect human rights of all persons and communities at all times. Banks often escape their human rights obligations citing them to be the concern of only states and state functionaries, not private actors. This conventional view regarding protection and promotion of human rights is obsolete today. The development of notions such as 'complicity' and 'spheres of influence' have progressively introduced scrutiny and consequent legal liability of the banking sector in matters of human rights violations. Additionally, assessment regarding human rights is now accepted as an integral step in sound fiscal decision-making for any corporation, including banks.

Banks have emerged as crucial yet under-discussed entity in accomplishing human rights-centred business operations. The role of banks in human rights compliance must be assumed. At the heart of economies across the world, large-scale development projects are funded by banks as they provide necessary capital for the operations. These projects and through them, the banks, directly and indirectly, affect the human rights (such as the rights to life, property, health, livelihood, etc.) of not just individuals but often communities at large (such as the right to development of communities).

Not whether banks should be involved in human rights compliance, but rather what role they should be playing, is the actual question. Banks are frequently not directly involved in the commission of human rights breaches, yet their clients may nevertheless hold them accountable for these acts. However, without a clear mandate, it is difficult for banks to know what a violation of a human right may look like, in what situations they may arise, and the manner and the extent of their responsibility.

Before a bank and a corporate firm agree to work together on a significant project or transaction, the bank might consider the operation's potential impact on human rights in light of the UN Human Rights Norms for Business. When it comes to avoiding complicity in human rights violations, simple aspirational

rhetoric in policies won't cut it. There is a need for clearly defined standards and penalties for violations of such standards keeping in mind any unintended consequences, such as the loss of income to the local community, of such action.

**Referencing**


- 10 Human Rights Priorities for the Financial Sector (BSR) <https://www.bsr.org/reports/BSR_Primer_Human_Rights_Finance_Sector.pdf> accessed June 12, 2022
- About the Principles – United Nations Environment – Finance Initiative (UNEP FI) <https://www.unepfi.org/banking/bankingprinciples/more-about-the-principles/> accessed June 11, 2022
- Basel III: International Regulatory Framework for Banks (The Bank for International SettlementsDecember 7, 2017) <http://www.bis.org/bcbs/basel3.htm> accessed June 12, 2022
- Boulle L, Globalisation and Governance (Siber Ink 2011)
- Brightwell R, "Banks and Human Rights" (Banktrack2022) <https://www.banktrack.org/campaign/banks_and_human_rights> accessed June 2, 2022.
- Canbank Financial Services Ltd. v. Custodian, (2004) 8 SCC 355
- Cappelle J, Human Rights, Banking Risks Incorporating Human Rights Obligations in Bank Policies (BankTrack 2008)
- Cherneva I, The Business Case for Sustainable Finance (Routledge 2014); UN Human Rights Council, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Business and human rights: further steps toward the operationalization of the 'protect, respect and remedy' framework, UN Doc. A/HRC/14/27, 2010).
- Companies Act 2013, S. 166
- Corporate Social Responsibility Voluntary Guidelines 2009 (Ministry of Corporate Affairs2009) <https://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf> accessed June 10, 2022
- European Commission, Green Paper on Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366 final.
- Facing Finance, "Thun Group of Banks Criticised for Misguided Interpretation of Un Guiding Principles." (Facing FinanceSeptember 5, 2017) <https://www.facing-finance.org/en/2017/06/thun-bankengruppe-macht-sich-die-welt-widdewidde-wie-sie-ihr-gefallt/> accessed June 11, 2022
- Fair Finance India – Bank Policy Assessments 2020: Analysing ESG Policies, Disclosures and Commitments of Banks in India (Fair Finance India Coalition2022) <https://fairfinanceindia.org/media/497672/fair-finance-india-bank-policy-assessments-2020.pdf> accessed June 7, 2022
- Foley Hoag LLP, "Banks and Human Rights - Finance Initiative" (United Nations Environment Programme Finance Initiative2015) <https://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf> accessed June 3, 2022
- Gelderblom O, Cities of Commerce: The Institutional Foundations of International Trade in the Low Countries, 1250-1650 (Princeton University Press 2015)
- Guidance Note, supra 14.
- Guiding Principles on Business and Human Rights - Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2011 (OHCHR2011) <https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed June 6, 2022
- Hansen R, "HUMAN RIGHTS AND THE FINANCE SECTOR" (UNEP Finance initiative - human rights guidance tool for the financial sector2014) <https://www.unepfi.org/humanrightstoolkit/finance.php> accessed June 12, 2022
- Harassment of a Beneficiary of Education Loan by a Bank (National Human Rights Commission India) <https://nhrc.nic.in/press-release/harassment-beneficiary-education-loan-bank> accessed June 15, 2022
- Herzog L, Just Financial Markets? Finance in a Just Society (Oxford University Press 2017)
- Homepage: UN Global Compact (Homepage | UN Global Compact) <https://www.unglobalcompact.org/> accessed June 14, 2022
- Id., art. 2.
- International Finance Corporation's Guidance Notes (International Finance Corporation2012) <https://www.ifc.org/wps/wcm/connect/9fc3aaef-14c3-4489-acf1-a1c43d7f86ec/GN_English_2012_Full-Document_updated_June-14-2021.pdf?MOD=AJPERES&CVID=nXqnsJp> accessed June 11, 2022 ; "20 2011 10 1 P -:HSTCQE=VVZW][ - Oecd.org - OECD" (OECD2011) <https://www.oecd.org/corporate/mne/48004323.pdf> accessed June 15, 2022.
- Jesner et al. v. Arab Bank, (2018) PLC, 138 S. Ct. 1386 (U.S.).
- Kapica PW, "Human Rights in the Financial Sector - Project Finance/PPP & PFI - Poland" (Human Rights In The Financial Sector - Project Finance/PPP & PFI - PolandAugust 2, 2019) <https://www.mondaq.com/Finance-and-Banking/832634/Human-Rights-In-The-Financial-Sector> accessed June 4, 2022

- Most Indian Banks Fail on Policies of Climate Change, Human Rights (The Economic Times) <https://economictimes.indiatimes.com/industry/banking/finance/banking/most-indian-banks-fail-on-policies-of-climate-change-human-rights/articleshow/71406646.cms?from=mdr> accessed June 15, 2022.
- National Action Plan on Business and Human Rights (Indian Institute of Corporate Affairs) <https://www.mca.gov.in/Ministry/pdf/ZeroDraft_11032020.pdf> accessed June 11, 2022
- National Guidelines on Responsible Business Conduct (Ministry of Corporate Affairs - Government of India2018) <https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf> accessed June 15, 2022
- National Guidelines on Social, Environmental & Economic Responsibilities of Business (Ministry of Corporate Affairs2011) <https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf> accessed June 9, 2022
- National Voluntary Guidelines for Responsible Financing (Indian Banks Association2018) <https://www.iba.org.in/iba_data/attachdocs/jul-2018/1532502771528.pdf> accessed June 11, 2022
- OHCHR Response to Request from BankTrack for Advice Regarding the ... (OHCHR2018) <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf> accessed June 6, 2022
- OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rightst in the context of the banking sector (2017).
- Padmanabhan G, “Corporate Sustainability a Panacea for Growth: Values, Convictions and Actions” (2014)
- Principles for Responsible Banking (UNEP Fi2022) <https://www.unepfi.org/wordpress/wp-content/uploads/2022/04/PRB-Guidance-Document-Jan-2022-D3.pdf> accessed June 7, 2022
- Punjab National Bank v. Durga Devi (1977) SCC OnLine Del 93
- Report of the Central Board of Directors on the ... - Reserve Bank of India (RBI2020) <https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR201920DA64F97C6E7B48848E6DEA06D531BADF.PDF> accessed June 13, 2022
- Reserve Bank of India, Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting – Role of Banks (RBI Notification No. RBI/2007-08/216, 2007).







- Sen AK, Development as Freedom (Oxford University Press 2001)
- State Bank of India (Successor to the Imperial Bank of India) v. Smt. Shyama Devi, (1978) 3 SCC 399. See also, Pradeep Kumar v. Post Master General & Ors (2022) SCC Online SC 154.
- The Ten Principles: UN Global Compact (The Ten Principles | UN Global Compact) <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed June 13, 2022
- Thun Group of Banks, UN Guiding Principles on Business and Human Rights 16–21 (Discussion Paper for Banks on Implications of Principles, October 2013.
- Thun Group of Banks, UN Guiding Principles on Business and Human Rights 13&17 (Discussion Paper for Banks on Implications of Principles, October 2013) https://www.businesshumanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf.
- Trust Act 1882, S. 88
- UN Office Publishes Detailed Human Rights Guidance for Banks (Banktrack2018) <https://www.banktrack.org/news/un_office_publishes_extensive_human_rights_guidance_for_banks> accessed June 5, 2022
- United Nation Guiding Principle, 2011, Principle 14: "All business companies, regardless of size, sector, operating context, ownership, or structure, are responsible for respecting human rights."
- United Nations Environment Programme Finance Initiative (UNEPFI) & Mercer, Demystifying Responsible Investment Performance: A review of key academic and broker research on ESG factors (2007).
- Universal Declaration of Human Rights 1948, Art. 1-27
- Universal Declaration of Human Rights 1948, Art. 1-27.
- Universal Declaration of Human Rights 1948, Art. 2,23.
- Universal Declaration of Human Rights 1948, Art. 2,7
- Universal Declaration of Human Rights 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71.
- Viswanathan KG, “The Global Financial Crisis and Its Impact on India” (Scholarly Commons at Hofstra Law2010) <https://scholarlycommons.law.hofstra.edu/jibl/vol9/iss1/2?utm_source=scholarlycommons.law.hofstra.edu%2Fjibl%2Fvol9%2Fiss1%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed June 6, 2022

# The Evolution of Imam Khomeini Memorial Trust in Kargil

*Anwar Ali*, Prof. (Dr.) Md. Mahtab Alam Rizvi***

**Abstract**

Imam Khomeini Memorial Trust (IKMT) is a Twelver Shia group in Kargil district administered by India in the Union Territory of Ladakh. Inspired by the "Islamic Revolution" of Iran 1979 led by Ayatollah Khomeini, the group was formed "to propagate Khomeini's teachings". The organisation functioned as an amalgam of both populist and Shia Islamist ideologies that formed its membership strength with the help of literature and preaching towards the revolution. It gained momentum in the region due to its socio-religious reforms, contributions in education, strengthening of economy and welfare works towards its community. While playing an active role in social, economic and political developments in the region, the IKMT espoused a model of modernity and empowerment of locals that has attracted a broad following. The essence of this article is to examine how the socio-religious and welfare activities of the IKMT have formalised and strengthened the organisation in different stages of its evolution while plating role of a socio-political actor. Both primary and secondary sources are used for this research paper such as direct interviews, and journals and books articles and proceeding files of the organisations.

**Key words:** - *Imam Khomeini Memorial Trust, Kargil, Islamic Revolution of Iran, Islamist, Shia*

## Introduction

### The Evolution of Imam Khomeini Memorial Trust in Kargil

The Imam Khomeini Memorial Trust (IKMT) Kargil is a socio-religious group influenced by the Inqilab-e-Islami (Islamic Revolution) in Iran. It came to

* *Research Scholar, at Nelson Mandela Centre for Peace and Conflict Resolution, Jamia Millia Islamia University, New Delhi, India. Email: anwarkgl@gmail.com*

** *Professor at Nelson Mandela Centre for Peace and Conflict Resolution, Jamia Millia Islamia University, New Delhi, India. Email: mahtabalamrizvi@gmail.com*





existence with the demise of founder of Islamic Revolution in Iran Ayatollah Rohullah Mousavi Khomeini in 1989 and named after him to propagate and spread Khomeini's mission in Kargil . Situated in the north-west of the Great Himalayas, Kargil is a district in Indian Administered Union Territory of Ladakh with a total population of around 1.5 lac . With the majority of Shia Muslims, that makes more than 80 percent of the total local population, Kargil proved to be a fertile ground to spread the Shia school of thought inspired by Ayatollah Khomeini's idea of Wilayat-e-Faqi . The establishment of the organisation was a youth-based initiative under the aegis of clerics that later became an influential socio-political stakeholder in the region. The frontline batch in initiating the organisation was the front line in the district to get formal secular education. Their introduction to Urdu and English language gave them access to literature regarding Islamic revolution in Iran. The new literature instilled them for an Islaah (reform) in functioning of socio-religious activities that was limited to some traditions and rituals.

### Ideology:

The description that captures the true nature of IKMT is that it has a dual ideology that of a populist and Islamist. Primarily it is a peaceful Islamist movement formed around a particular school of thought based on the ideology of Ayatollah Khomeini in Iran. It seeks to run the local Shi'ite community on the pattern of "Pure Islam" what they known as "Islam-e-Naab-e-Mohammadi" to the extent that it is compatible to the existing secular democratic political system and the Constitution of India. As a populist – to some extent - it seeks and aspire for welfare and development of the community at grassroot level in Ladakh irrespective of religion, gender and group affiliations.

Scholars have found that there is a gradual shift in thinking of Shia scholars from "traditional" and "salvific" interpretation to "modern" and "revolutionary" inferences , . The clerics in the Anjuman Jamiat Ulema Isna Ashriya Kargil (AJUIAK) - that is locally also known as Islamia School Kargil (ISK) - who had studied from Najaf supported the "traditional" views and deemed it necessary to conduct morning congregations of Muharram to gain "salvation" in current life and life after death. However, the clerics in IKMT began to promote "modern" and "revolutionary" interpretation according to which Shia should strive for modern values, educational progress, economy prosperity, development, political awareness and social involvement . As the Hezbollah, who is also a product of inspiration from Islamic Revolution in Iran, provided a credible ideology to the Shiites in Lebanon , the IKMT provided a sound and acceptable ideology to Shiites in Kargil. Its ideology has evolved and adopted to the

1 *After the demise of Prophet Mohammad, the Shiite Muslims consider twelve "infallible" Imams as the true successor of Prophet Mohammad. As per Shiite belief existence of at least one infallible Imam is must for survival of the earth. When, the first eleven were killed, the twelfth Imam went into "Ghaibat-e-Kubra" long occultation on the directions of Allah.*

realities of Ladakh, what Radhika Gupta has known as "modernist reform movement" .

The formation of the IKMT was a reform and a shift from traditional "quietism" to "revolution". The adoption of the change from "traditional" ritualistic religion to an "active" socio-politically conscious religion traces its roots in Karbala and Islamic Revolution. As discussed by Michael Fischer, what he termed as the "Karbala paradigm" has become a driving force to provide a model for living and a mnemonic for thinking about how to live . According to recent studies, scholars have observed a gradual shift among Shia Muslims from "traditional" and "salvific" interpretation of Karbala to "modern" and "revolutionary" inferences. Recent Shia scholars and preachers interpret messages of bravery, political consciousness, obedience to Wilayat-e-Faqi and political action from act of Hussain ibn Ali and his companions in Karbala. In contrary, earlier, the preachers would focus on sufferings of Hussain and his companions, sobbing in their grief, and seek salvation.

In Kargil, the prime motive in this shift was "Karbala paradigm" added by an Iran model. The developments in Iran were seen as a model for change in how to live and how to act. The preachers in post Islamic Revolution period focused on social changes, reform in rituals, Baedari (awareness), dushman shinasi (knowing the enemy). As instances, the preachers would contextualise verses from Quran, incidents from Karbala and also the teachings and incidents from Islamic Revolution in Iran. Newly named streets [ii] after personalities of Islamic Revolution, Iranian type decoration of Mehfils and Majalis [iii], introduce of Iranian Chador for women and female pupils [iv], learning of Persian language, all reflects the adoption of an Iranian model in Kargil.

Hezbollah in Lebanon and IKMT in Kargil, both being influenced by the Islamic Revolution of Iran also has a similar pattern. As per new findings by researchers some goals of Hezbollah are similar to that of Islamic Republic of Iran like: to "Side with the world's downtrodden against the oppressors " and their loyalty to the Khomeini's idea of Wilayat-e-Faqi. The same ideology flourished in Kargil as they protest and demonstrate against any mass killing or aggression in West Asian countries that also adds Pakistan, Afghanistan and Myanmar sometimes . In their goal of "knowing the enemy", the stated enemies of the greater movement are America, Israel, Britain, Al-Saud (in Saudi Arabia), Al-Khalifa (in Bahrain) and ISIS. Earlier it also chanted the slogan "Zid e Wilayat-e-Faqi – Murdabad" means "down with enemies of Wilayat-e-Faqi". Both Hezbollah and

*ii Many schools, streets, chowks, roads and avenues in Kargil district are named after figures of Islamic Revolution in Iran; e.g Khomeini Chowk, Bagh-e-Khomeini, Soleimani Chowk, Mutahhary School.*

*iii The color theme, use of cloth and Urdu and Persian calligraphy in Mehfils (festive occasions and congregations) and Majalis (mourning congregations) in Kargil district resembles that of Iran.*

*iv The Iranian type Chador (long garb for female) has been introduced in Madrasas (Theology college) and Makatibs (primary level theology schools. Various secular schools, Madrasas and Makatibs in Kargil provide lesson for learning of Persian language.*





IKMT raised a Slogan "La Sharqiya wala Gharbeya" (No Eastern, No Western: only Islamic Republic). It had a political connotation in Hezbollah's Lebanon as the country was divided among East and West . However, Kargil had no such connotation except the international ideological division of East and West bloc during the Cold War. The Revolution of Ayatollah Khomeini emerged at a time when the countries around the world were either aligned with East or with West. Ayatollah Khomeini maintained equidistance from both the blocs.

**Establishment of the Imam Khomeini Memorial Trust:**

The youth who instilled the formation of IKMT found a traditional and influential cleric-based group "Anjuman Jamiat Ulema Isna Ashriya Kargil" (AJUIAK) as an impediment to their ideology and activities. The incompatibility of their ideas in the cleric-based group compelled to establish a separate organisation that gained momentum to later become the influential organisation in the region. The AJUIAK being a traditional organisation remained reluctant to the changes, though it now gradually following suit.

The AJUIAK is a cleric-based group of Twelver Shiites in Kargil. Since its formation in 1957, the group deals with ritual gatherings on days of importance in Shia Hijri calendar, teaching of theology at Madrasa, and preaching in month of Moharram. Their scope of activities was limited to few segments where they had a cleric pursued education from an Islamic seminary in Najaf, Iraq. They would also function as a judiciary as per the Shia Sharia law to mostly solve domestic issues and land disputes among villagers. However, they lacked a power to enforce their judgement that remained dependent on the parties in dispute to accept or not. Influenced by its patron Sheikh Mohammad Mufeed, the AJUIAK remained reluctant to formal secular education especially for girls, prohibited keeping long hairs for male, disliked wearing "western cloth" and abandoned use of technology like radio, and mic in gatherings.

With the gaining of momentum to uprisings in Iran before the success of Islamic Revolution in 1979, the people in Kargil took interest in their daily events. The news would get from Radio Tehran. In absence of resource for listening to radio, a group called Anjuman Muntazereen Sahib Zaman (Organisation of the Awaited People of Contemporary Imam) collected news from radio, translated into Urdu and applied on public place in Bazar at morning. This process continued for many years. The organisation also distributed literature on Islamic Revolution and developed a reading culture among youth. Another organisation named Anjuman Ashaab Safeena also embarked activities that were first of its kind in the region, like, calling of Azan, providing lessons on Quran, recitation of Dua al Kumail etc. The AJUIAK did not liked activities by these organisations and got the Anjuman Ashaab Safeena dissolved. These organisations were small but instrumental in breaking the ice that dissolved to later form IKMT.

The point of division and formation of the IKMT was spontaneous. On the demise of Ayatollah Khomeini on 4 June 1989, processions from villages

marched towards Kargil town and mass mourning congregation held at Madrasa Isna Ashriya Kargil. After three days of consistent mourning congregation the clerics in the AJUIAK asked to roll out the event citing that no Ulema has mourned for more than three days and continuous gathering at the Madrasa is causing disturbance to the pupil . Accordingly, in a public initiative, congregations were arranged at another place called Qatilgah Hussaini. To manage the events an ad-hoc committee was also formed called Anjuman Itihaadul Muslimeen .

The congregation continued till Chehlum, 40th day after demise. In this period the AJUIAK and other people also appealed to rollout the events. While, this period was instrumental in describing Ayatollah Khomeini and his Islamic revolution. In such a prolonged event, new and young clerics got mimber (pulpit) for preaching which was earlier denied to many of them . In this period deliberations embarked on various issues especially different aspects of Islamic Revolution that caused overt manifestation of pro and anti-Islamic revolution groups. The new speakers questioned the role of cleric in preaching across the district. This resulted in manifestation of a divide. Young clerics and speakers who described the revolution in their preaching sermons became introduced to people. It also served a platform for clerics across the district to share a single stage. The arrangement of meals called "Tabaruk"[vi] also remained well managed.

For the concluding day on Chehlum, then Iranian Ambassador in India Ibrahim Rahimpur was invited to attend the congregation. Arrangements and handing of the event also became a controversy as the AJUIAK wanted to deal the event from their platform. The youth did not allow it to happen. Amidst all the developments a foment was rising. On the conclusion of the events, it was decided to "get organised" to strengthen and permeate the teachings and mission of Ayatollah Khomeini. Accordingly, in a public meeting at Titichumik village, a new organisation was established known as Moasasa e Yadbud-e-Imam Khomeini in Persian language that was translated in English as Imam Khomeini Memorial Trust.

The initial bylaws of the organisation define it as an organisation to spread the Islamic Revolution and teachings of Ayatollah Khomeini and consider the Quran and traditions of Prophet Mohammad and fourteen Shia Imams as a final outline for themselves. It further aimed to work for economic development, political consciousness, social welfare and religious reforms and overall development of the region. It considers all the residents of Ladakh as its general member irrespective of religion, caste, creed and gender .

*v Almost all villages in Kargil have their own Mala family who leads in religious congregations and rituals like birth, marriage and death. Most of the Mala are Sayyed, descendants or progeny of Prophet Mohammad and his infallible Imams. The Sayyed in many villages denied the mimber to non-Sayyed clerics.*

*vi Food or meal served after religious congregation.*





People associated with IKMT introduce themselves as "Inqilabe" means revolutionary against their rivals whom they labelled "Zid", probably a short form of "Zid-e-Inqilab" means opposite to the revolution or "Zid-e-Wilayat Faqi", anti to the system of Wilayat Faqi. The English meaning of Inqilab is revolution. But in Kargil there is no such context for revolution; for layman the word carries the meaning of reforms "Islaah".

**Role of preaching and literature in formalisation of Islamic Revolution:**

The IKMT strengthened the ideological base through literature and preaching. The people associated subscribed to books, periodicals and journals. The Urdu translated books of top ideologues of the Iranian Revolution Ayatollah Baqir al Sadr, Ayatollah Murtada Mutahhary, Dr Ali Shariati, Ayatollah Khomeini and others made easy access in the market. In recent years books and lectures of the "Supreme Leader" of Iran Ayatollah Sayyed Ali Khamenei translated in Urdu and widely circulated in the Indian subcontinent. Groups in Kashmir valley translated the literature in Urdu language, the official language of the erstwhile State of Jammu and Kashmir. Kargil being a district in the State had has Urdu as medium in school curriculum that paved way for the literature to get momentum in circulation.

Similarly, in the last decade of twentieth Century and first decade of twenty-first century few contemporary clerics and pass out from Shia seminary in Iran published various periodicals in Urdu language. Prominent to mention are "Tawheed", "Payame Saqlain" and "Rah-e-Islam". The first two were published by Moulana Qazi Mohammad Askari and Moulana Hassanain Karraravi from Delhi. The last was published by the Iran culture house in Delhi. The periodicals were instrumental in fostering religious fervour especially about the Islamic Revolution in Iran. It also accelerated rethinking in Shia Islam. It carried articles on the system of Wilayat-e-Faqi, Islamic political system, challenges and issues in Muslim world and thoughts and teaching of Ayatollah Khomeini. IKMT's top ideologue and chief patron Sheikh Hussain Zakiri also in his writings advocated for reforms in social system like marriages and rituals. However, his activities echoed louder than his literature and sermons. The group further conducted preaching congregations in the month of Moharram and Ramazan. Steadily, local clerics then studying in seminaries at Iran also got grants for preaching in these months. New clerics also joined the organisation resulted in formalising and strengthening its roots.

**The local "ideologue" Sheikh Hussain Zakiri**

The key figure in functioning of the Anjuman Muntazereen Sahib Zaman and formation of IKMT was Sheikh Mohammad Hussain Zakiri, a cleric who had studied for only two years at Islamic seminary in Najaf. His short stay in Iraq became a subject to ridicule him by other clerics to prove him "incompetent". Later, he became the chief patron of IKMT. Influenced by Ayatollah Khomeini

whom he had seen during his stay in Najaf, Zakiri was an antithesis to the traditional clerics in AJUIAK. Zakiri advocated for secular education, political consciousness and activeness in Assembly and Parliamentary elections and strengthening of locally independent economy.

Zakiri had fluency in Urdu, and his social activism uplifted him to prominence among the clerics of AJUIAK who initially considered him as their occasional spokesperson. Zakiri motivated the clerics in AJUIAK to open the first English medium school for secular education that also with coeducation. On the pattern of Ayatollah Khomeini, Zakiri remained instrumental in initiating a tradition of Friday congregational prayers. He was the ideator for his various upcoming reforms and activities. Being a part of the AJUIAK he probably could not have explored all the avenues. He would have needed permission from the clerics in AJUIAK to execute his ideas. He would need to compromise on some issues, as he had to in establishment of school for secular education.. It was a time where he stuck on a paradoxical situation; either to compromise on his ideas or to take a separation from the Islamia School. Taking a separation was a challenge fearing polarisation of the community. While remaining a member of the AJUIAK, Sheikh Zakiri formed the above-mentioned organisation Anjuman Muntazereen Sahib Zaman to continue his activities. Later, the IKMT came into existence and became the flag holder of Islamic revolution in Kargil.

**Formalisation and Consolidation through welfare and social activities:**

The organisation gained momentum in a very short time of few years. The factors in gaining ground against the AJUIAK was its contribution in economy, politics and social welfare. The pattern is similar to that of Hezbollah in Lebanon. Both Hezbollah and IKMT espouse to modernity and empowerment of its constituents as well as its host society . Hezbollah is Lebanon's largest non-state provider of healthcare, education and other social services. It provides schools of such high-quality that even non-Muslims send their children to them . In Kargil the IKMT also provides quality education and healthcare that the oppositions and non-Muslims also seek service from them. The Baqirya conducts healthcare camps for Hepatitis-B and expensive medicates like knee replacement surgery in far flung and non-Muslim and outgroup populated areas.

The name of the school was ascribed to the top ideologue of the Islamic Revolution, Martyr Ayatollah Murtaza "Mutahhary Public School Kargil" in 1984. The inspiration to establish school for secular education was Ayatollah Khomeini. The notebook provided in the school had written a quote of Ayatollah Khomeini on its cover page, "To learn and teach education is 'Ibadat' (prayer)". Resembling education with prayer manifests the importance of education at a time when it was considered prohibited. The people who were responsible and active for functioning the Mutahhary Public School were close to Sheikh Zakiri and joined the IKMT. The school remained in their possession that later brought up a strong following base among the coming generations. Apart from secular





education it teaches elementary Shia theology as a subject and Urdu as a language. Some of its affiliated schools have also adopted Persian (the official and largest speaking language in Iran) as a language subject in schools. The school has around 16 branches in all over the district that functions under the aegis of "Mutahhary Educational Society". Among its special events, the school mark the "martyrdom" day of its inspiration and Iranian ideologue Ayatollah Murtaza Mutahhary. It also marches a procession in Moharram to honor the teenage "martyr" of Karbala Qasim Son of Imam Hassan.

In the field of economy, the organisation remained instrumental in spoiling monopoly of few non-locals in market. The locals were not adopted to markets in outside the district. Few non-locals had monopoly over the market that provided essential goods. At the time of opening and closing of Zojila pass, which is the only lifeline for the district, the merchants reportedly hiked prices of goods. To spoil the monopoly of non-locals in the market, IKMT opened a marketing society that sold essential goods of daily use on cheaper prices. It remained instrumental in controlling price hike in market. The market was also supported by an "Islamic bank" that the organisation established. It considered Ayatollah Baqir Al-Sadr's book "Our Economy" as a guideline to regulate the economy system. It inspired the organisation to develop a bank of its own where it had the idea to cope with non-Islamic traditions like Soot (interest). However, the bank and the marketing society did not sustain for long due to lack of expertise and manpower. Meanwhile, the organisation spread its area of functioning to other walk of life that include health, agriculture, horticulture, publication and literature, media, youth volunteerism, social welfare, women empowerment and gender.

**Conclusion**

The nature of activities by the IKMT reflected two key ideologies to which the organisation has proximity; that are Islamist and occasionally populist. As an Islamist it was deeply influenced by the Islamic Revolution of Iran 1979 led by Ayatollah Khomeini. The IKMT in the last three decades after its formation aspired to keep alive the memory and teachings of Khomeini. It also defended some key flagship values of the Islamic Revolution that are Wahdat Islami (Islamic Unity ), Baraat al Mushrikeen (side with oppressed and stand against oppressors), and propagation of Wilayat-e-Faqi.

The IKMT in the last three decades has gone through three stages: formation, formalisation and socialisation. The stages may not be able to demarcate in

*vii The Islamic Revolution of Iran propagated the message of Islamic Unity among different sects of Islam. The key event in this aspect is "Islamic Unity Week" that refers to a ceremony held every year between 12-17 of Islamic month of Rabiul Awwal. The two dates are birthday of Prophet Mohammad as per different narrations of Sunni and Shiite.*

certain periods. Because the activities on the basis of which the stages are supposed here are overlapping over one another. The first and initial stage of formation was the challenge to protect the organisational identity and existence due to pressure from out-side groups to dissolve the organisation. The final stage that is not really last but goes together with preaching stage is the socialisation with welfare and social activities. The social activities included humanitarian aids and reliefs, education, health, banking, trade in the first decade of formation. While in the third decade education widened, health sector sophisticated, added agriculture, horticulture, literature, publications, and media while expanding the existing activities. The organisation has now become a largest stakeholder in the Kargil district.

After formation of the Union Territory of Ladakh, it is imperative to research on the functioning of the religious institutions in the region. The formalisation and role of the organisations in the new setup would be of great research interest.

**References**


1. Imam Khomeini Memorial Trust. (n.d.). Aayeen Nama. IKMT, Kargil. J&K, India: IKMT
2. District statistics & Evaluation Office Kargil. (2021). District Kargil at a Glance - 2020-21. Kargil: Planning, Development & Monitoring Department.
3. Guerrero, J. G. (2017). A stage for the revolution: Moharram and the Paradigm of Karbala in the context of Knomeini's Struggle with the Shah. Journal of South Asian and Middle Eastern Studies, 29-42.
4. Ashraf, A., & Banuazizi, A. (1985). The State, Classes and Modes of Mobilization in the Iranian Revolution. Springer, 3-40.
5. Tingu, S. A. (2020, September 21). Interview with Sheikh Ali Najafi . (A. Ali, Interviewer)
6. Norton, A. R. (2007). The Role of Hezbollah in Lebanese domestic politics. Italian Journal of International Affairs.
7. GUPTA, R. (2014). Experiments with Khomeini’s Revolution in Kargil: Contemporary Shi‘a networks between India and West Asia. Modern Asian Studies, 370–398.
8. Fischer, M. M. (1980). Iran From Religious Dispute to Revolution. Madison, London, England: The University of Wisconsin Press.
9. Abdul-Hussain, H. (2009). Hezbollah: A state within state. Current trends in Islamic Ideology, 68-81.
10. Akhter, Z. (2013, March 16). Kargil: Echoes of Attacks against Minorities in Pakistan. Retrieved from ipcs.org.
11. Abdul-Hussain, H. (2009). Hezbollah: A state within state. Current trends in Islamic Ideology, 68-81.
12. Kanoori, A. M. (2021, May 14). Interview with Akhone Mohammad Yousuf Kanoori. (A. Ali, Interviewer)
13. Kanoori, M. Y. (2015). Tazkira Purkistan. Kargil: Akhone Publications.
14. Imam Khomeini Memorial Trust. (n.d.). Aayeen Nama. IKMT, Kargil. J&K, India: IKMT.
15. Norton, A. R. (2007). The Role of Hezbollah in Lebanese domestic politics. Italian Journal of International Affairs.
16. Early, B. R. (2006). "Larger than a party, yet Smaller than a State".

# Mediation under Companies Act, 2013: Convergence of Business Interest and Right to Speedy Justice

*Dr. Anand Kumar Singh**

**Abstract**

The phenomenal growth of trade and commerce in Indian economy has also led to meteoric rise in the number of commercial disputes. The sheer volume of these cases have exposed the limitations of our tradition judicial dispensation system which is incapable to manage such disputes effectively, efficiently and expeditiously. Delay in swift and amicable resolution of corporate disputes normal functioning of the company and leads to erosion of wealth of stakeholders and value of the corporation. Acknowledging the gravity of the situation, the Government responded with a series of structural reforms in the dispute resolution ecosystem to promote ADR mechanisms. Of all the ADR modes, there is a concerted push to promote Mediation in resolution of corporate and commercial disputes. As part of that measure, Mediation was introduced in the new Companies legislation of 2013. In this research paper, the author examines the suitability of mediation in resolving company disputes and also enquires into the shortcomings and strengths of the current framework under the Act. The research paper makes significant observations and suggestions on the role of mediator, power of tribunals and various issues that may help in successful mediation of such disputes.

**Key words:** - *Mediation, ADR Mechanism, Corporate Disputes and Commercial Dispute*

## Introduction

Complete justice is the purpose of Rule of Law. Quick and amicable disposition of cases is an important measure of the strength of Rule of Law in a nation. The

* *Assistant Professor, National Law University, Jodhpur*
*Email Id: anandksingh054@gmail.com*





exhausting judicial process often subjects the victim to mental torture and financial exhaustion thereby causing further victimisation of the victim. Situation such these lends weight to the popular belief that, "Justice delayed is Justice denied" (Gladstone, 1868). It is widely accepted and acknowledged that heavily clogged litigation system in India requires a radical spring-cleaning (Iyer, 1980). The continuing loss of faith in the time-consuming judicial process clubbed with fear and frustration of getting lost in the labyrinth of complex and indeterminable procedures is a covert distress signal for those with a mandate to protect the democracy. If this is not timely attended and properly addressed through large-scale reforms, the current justice dispensing system shall crumble under its own weight. However, this is a daunting task which calls for employment of multiple strategies.

The adversarial method has been the sanctum sanctorum of our legal process. Its significance is as indisputable as its obscurity. This is particularly due to its indeterminable procedures and inconclusive rounds of bouts. Therefore, a revaluation of adversarial method must be undertaken to not only appreciate its values but also to acknowledge its limitations and the perils of its incessant usage. Quite a few scholars4 did undertake such an exercise and came to a common understanding that the effects of elongated legal time, high litigation costs, strained relationships and regression of client are reflective of the inherent nature of the litigation process (Nyhart & Dauer, 1986). It is for this reason that ADR mechanisms have presented themselves as a beautiful and remarkable 'synthesis' to the litigation (an 'antithesis'). To a large extent, Alternate Dispute Resolution (hereinafter, ADR) mechanisms can play a major role as a means of curing this malady. The intent behind the introduction of ADR mechanisms is "not to supplant but to supplement" the traditional dispute resolution process of litigation (Ayog, 2021).

## SUITABILITY OF MEDIATION IN RESOLVING CORPORATE DISPUTES

The explosive expansion of trade and commerce has also led to a phenomenal increase in commercial disputes. The judicial system's inability to handle such disputes expeditiously and efficiently led the business community to explore alternate means. Although, Arbitration was the preferred alternative as it found its place in the Civil procedure Code, 1908 (C.P.C.), mediation had to wait for another five decades for its statutory recognition in India. The big moment came at the time of independence, when mediation was included in the Industrial Disputes Act, 1947. Moreover, in 1999, C.P.C. was further amended with an aim to address huge backlog of disputes in Indian courts. It provided for inclusion of section 89 that allowed reference of pending disputes to alternate mechanisms of dispute resolution, such as mediation.

Mediation is understood as " a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably

resolving their dispute by using specialized communication and negotiation techniques" (Mediation and Conciliation Project Committee, 2005). Its hallmark features of voluntariness, neutrality, confidentiality and informal nature of proceedings have particularly appealed to the business community. It is an assisted negotiation process where the parties are encouraged by a neutral mediator to explore a mutually acceptable settlement of the dispute.

Over the years Mediation has allowed for amicable, effective, efficient and expeditious resolution of disputes while protecting relationships between disputing parties. This has been one of the biggest reasons for its acceptance as preferred mode of resolving disputes in the business community. There exists a common consensus amongst scholars and practitioners that Mediation has finally come out of the shadows of Arbitration and evolved from an 'alternate' dispute resolution to become the most "appropriate" mode of dispute resolution in corporate disputes.

## TRACING THE ADVENT OF MEDIATION IN COMPANIES ACT 2013

### A. THE FIRST MOVE: OUSTING THE JURISDICTION OF CIVIL COURTS

In India, the Civil Procedure Code provides for the civil jurisdictions of courts in India (Civil Procedure Code, 1908). Although there is always a presumption in favour of court's jurisdictional competency, the legislature is equally competent to exclude the jurisdiction of civil courts over certain matters and instead subject them to exclusive jurisdiction of a statutory body constituted by way of a special law (Secretary of State v. Mask, 1940) (Firm Seth Radha Kishan v. Administrator, Municipal Committee Ludhiana). Such power is manifested in the Code through a jurisdiction ouster clause proscribing the jurisdiction of civil courts in respect of matters over which exclusive jurisdiction is conferred to a statutory body created under any law.

The exercise of this power by the legislature often is viewed with much suspicion as a covert strike by legislature to water-down the constitutionally protected principle of Judicial review. As a result, the courts resort to Doctrine of Uno-flatu/ Implied Repeal (Dhulabhai v Madhya Pradesh, 1969) to interpret the validity of statutory exclusion provisions in any Act. However, with time the concern that the government should be allowed greater latitude while framing laws regulating economic activities than laws which have a more profound effect on civil rights found support from the judiciary (R.K. Garg v. Union of India, 1981) (Bhavesh D. Parish v. Union of India, 2000). It came to be widely acknowledged that the legislature must be allowed a greater free-play to explore solutions to complex economic problems and therefore, there is a need of judicial deference and not judicial interference (Morey v. Doud, 1957). Consequentially, such exclusionary clauses in economic laws are accorded validity by the judiciary on counts of quick and relatively cheap adjudication of





disputes by an expert body in an informal procedural atmosphere (Vatticherukuru Village Panchayat v. N V Deekshithulu, 1991).

### B. TRANSITION FROM HIGH COURTS TO TRIBUNALS

The erstwhile legislation governing companies had, initially, vested the jurisdiction only on the High courts. Thereafter, the first step towards ousting the jurisdiction was taken 35 years later in 1991, when the central government established a specialised body, Company Law Boards, to adjudicate on the matters of companies and other associations (Sachar, 1978). But, more importantly, the amendment did not completely oust the jurisdiction of High courts as it did not mandate a transfer of proceedings before it to CLBs (Justice, 1988).

The Eradi Committee Report made important recommendations to the government which became the genesis of a legal quagmire that would continue for more than a decade (Eradi, 2000). The final blow came in the year 2002, when the government, by way of an amendment to the legislation, sought to complete the exercise by barring the jurisdiction of civil courts and consequently empowering the newly constituted bodies (viz. the NCLT and NCLAT) with an exclusive jurisdiction over company matters (MCA, 2002). The intention and the power of the legislature to circumscribe the jurisdiction of the constitutional bodies was made to go through the proverbial trial by fire for the next 13 years (Madras Bar Association v. Union Of India, 2015). After having withstood, one of the longest and most arduous exercise of judicial review by the High Courts as well as the Apex court, the constitution of the quasi-judicial bodies was not only declared to be valid but was also hailed as a welcome move by the business community. Thereafter, the government, acting on the directions of the Court, made necessary corrections in the Act of 2013 so as to bring the Tribunals out from a state of abeyance providing the much needed shot in the arm to the justice dispensation mechanism in matters of corporate litigation in India.

Another important development was the transition of jurisdiction on company matters from the civil courts to the tribunals (Companies Act 2013, s. 430). In light of the constitutional validity accorded to the Tribunals by the apex courts, the message was loud and clear- to disallow and dissuade any kind of unnecessary judicial interference that may present a challenge to the effective functioning of the Tribunals (Shahi Prakash Khemka (Dead) Through LRs. v. NEPC Micon, 2019). This marked the end of first essential step towards better resolutions of corporate disputes.

### C. ARRIVAL OF MEDIATION IN COMPANIES ACT 2013

The government wanted to leave no stone unturned in its effort to make India a globally competitive economy and therefore, was sincerely considering

suggestions on developing a positive corporate environment in the country which would be transparent, simple and globally acceptable. A regulatory framework, based on the idea of self-regulation which would be amenable to accepting new methods of redressing new as well as age old problems, was the need of the hour.

However, an important lesson was learnt by the policy makers and the corporate houses alike, that litigation does not always serve the best interest of a company or lead to value addition in shareholder's wealth maximization objective. Instead it has been, more often than not, the cause of further deterioration in the already strenuous relationship between the owners and managers which ultimately leaves the company worse off than it was before (Grower & Davies, 2003). It is precisely for these reasons that a prudent settlement remains a better alternative to an exasperating prolonged and financially draining litigation.

Therefore, the policy makers were aware that the Tribunal would meet the same fate as the High courts unless they are supplemented by an alternate mechanism of dispute resolution. For the reason discussed in earlier part of this paper, the legislature thought fit to introduce a voluntary mechanism, free from the inconvenience of complex procedures, to amicably resolve disputes through a neutral mediator in a congenial environment. This idea also found support from the Parliamentary Standing Committee in its report on Companies Bill, 2011 suggesting the government to allow for voluntary arbitration by parties (Finance, 2012).

This resulted in the assimilation, through statutory recognition, of one the oldest mechanism of dispute resolution- 'Mediation and Conciliation', in the Act of 2013, as an optional dispute resolution mechanism (Companies Act 2013). Although the provision existed since the beginning, it became an actionable right only after the Companies (Mediation and Conciliation) Rules, 2016 were notified by the government.

## NATURE OF MEDIATION UNDER COMPANIES ACT 2013

Although the Act does not clearly define 'mediation', the M&C Rules 2016 delineate its contour and application to be guided by "principles of self-determination by the parties" and its success depends upon the "ability of the parties to reach a voluntary and undisclosed agreement" (The Companies (Mediation and Conciliation) Rules), 2016).

Though the Act does not expressly mention the kinds of disputes which can be referred to mediation, it provides a negative list of disputes (e.g., "matters involving serious and specific

allegations of fraud; matters involving prosecution of criminal and compoundable offences; matters of public interest or involving interests of multiple parties, etc") which cannot resolved through mediation (The Companies (Mediation and Conciliation) Rules), 2016). Under the Act, an





'Expert Panel of Mediators and Conciliators' is to be constituted and maintained by the Regional Director comprising of such experts who will be appointed as mediators by the Central Government or National Company Law Tribunal (NCLT or National Company Law Appellate Tribunal (NCLAT) (hereinafter, collectively referred as 'designated authorities' ) in disputes (The Companies (Mediation and Conciliation) Rules), 2016). A major concern highlighted by many scholars is that the empanelment of retired judges, bureaucrats and legal practitioners, who have been trained in adversarial adjudicatory process, raises genuine concerns about their ability to engage in 'facilitative mediation' (Xavier, 2016).

Under the Act, mediation promises an informal atmosphere, free from the rigors of a court proceedings and procedural laws as the mediator will be guided by 'Principles of Fairness and Natural Justice' (The Companies (Mediation and Conciliation) Rules), 2016). This will promote meaningful participation of the parties to amicable resolve dispute. At the same time, the Act, through several provisions, also ensures that the informal nature of mediation proceedings is not abused by callous and recalcitrant parties through non- cooperation and lack of commitment to the process. A time period of three months is fixed for the parties to resolve their disputes through mediation and in case there is a deliberate failure to attend two consecutive meetings or sessions, the mediation shall be deemed to have failed and the matter will relegate back to the designated authorities for adjudication (The Companies (Mediation and Conciliation) Rules), 2016). The Act mandates that the parties must appear in person in the proceedings but if a party fails to appear in person, the mediator (as well as the designated authorities) shall be "entitled to direct or ensure the presence of any party to appear in person" (The Companies (Mediation and Conciliation) Rules), 2016). However, the mediator lacks such powers to force attendance of the party. It seems that the upon failure of party to attend in person, mediator will communicate such failure to the designated authority, which may then resort to its inherent powers to summon and enforce the in-person attendance of the party (Vikram Puri v. Universal Buildwell Pvt Ltd., 2022).

Let us now examine the essential attributes of mediation as envisaged and protected under the Companies Act 2013:

**A. Voluntariness** – The parties to a proceeding, before NCLT or NCLAT or Central government, may at any time during the course of proceedings request the authority to " refer the matter to Mediation and Conciliation Panel". The Rules also make it clear that the "parties alone are responsible for taking decision" and arriving at a settlement (The Companies (Mediation and Conciliation) Rules), 2016). However, it is interesting to note that the authorities have also been vested with suo moto power to refer any matter before it to the Mediation panel, "if it deems fit in the interest of parties", even when there is no request from the parties (The Companies (Mediation and Conciliation) Rules), 2016).

The success of mediation depends on the intention and commitment of the parties towards it. The Rules 2016 also encourage the parties "participate in good faith with an intention to settle the dispute" (The Companies (Mediation and Conciliation) Rules), 2016). This is the reason behind the voluntary nature of mediation process. But, the discretionary power of the designated authority to refer the matter to "compulsory mediation" dilutes the "voluntary" nature of the process and casts doubts on its effectiveness to resolve the disputes. It is pertinent to note here that the validity of 'mandatory mediation' (Apporva, 2020) beyond question as it is "a process of coercion into mediation, but not coercion within mediation" (Geetha, 2014) Interestingly, the Supreme court has observed that mediation, being a non-adjudicatory ADR process, "does not require the consent of parties for reference" (Afcons Infra. Ltd. v. Cherian Varkey Construction Co. Ltd., 2010). Thus, the Supreme Court ruled that a conjoint reading of section 89 of C.P.C. with Rule 1A of Order 10 of C.P.C. empowers a court to refer the parties to a dispute to non-adjudicatory ADR processes (Mediation) despite lack of consensus between the parties for the same. However, the Tribunal must ensure that such a non-voluntary reference is not 'forceful'. As such a forceful reference may ensure attendance of the parties but will fail to encourage meaningful participation and consequently, would defeat the purpose. In order to avoid such a scenario, India may take lessons from the Italy's experiment with "Required initial Mediation Session" (D'Urso, 2018). Under this, the parties firstly file a mediation request before the institution of the suit before designated authorities. The parties are then required to compulsorily attend an "initial mediation session with the mediator" to understand the process. Thereafter, the parties are at liberty to opt for mediation or institute the suit before adjudicatory body. This model promotes informed decision making by the parties who decide between institution of suit and mediation after they have been explained the process and compared the benefits of both the modes (Kanuga & Bhosle, 2021).

**B. Neutrality of Mediator** – One of the most critical requirement in a mediation proceeding is preserving the independence and neutrality of the mediator. The successful settlement of dispute in mediation hinges on the role of mediator. He is supposed to be a person who inspires confidence and faith in the parties towards the process; who assists the parties in "identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute. (The Companies (Mediation and Conciliation) Rules), 2016)" Therefore, the credibility and impartiality of the mediator must be of the highest standard and beyond any doubt.

Towards this end, the Rules 2016 cast a duty on the mediator to disclose any circumstance "which may give rise to a reasonable doubt as to his independence or impartiality" (The Companies (Mediation and Conciliation) Rules), 2016).





Upon reporting of such disclosures by the mediator or any other person, which cast reasonable doubts on the independence and impartiality of the mediator, the designated authority may permit either voluntary withdrawal by the mediator or his removal from the mediation proceedings and replace him with another mediator (The Companies (Mediation and Conciliation) Rules), 2016).

**C. Confidentiality of the Process** - Confidentiality is one of highly valued feature of mediation. Settlements in mediations are difficult to come by due to multiple factors like "mistrust or unwarranted suspicion of one party; obstinacy, unwillingness to budge from previously held entrenched positions; plain uncouth or unpleasant behaviour of a party, to spite the other" (Smt. Madan Kansagra v. Perry Kansagra, 2018). At times parties would fear to participate honestly as they fear that any evidence produced, argument and counter-argument advanced, proposals made or any other information discussed or disclosed may be later used in courts or form a basis of its ruling. Mediation proceedings require an atmosphere of mutual trust and cooperation which encourages parties to engage honestly and fearlessly in order to explore swift and amicable settlement of dispute. Such an atmosphere can be created through confidentiality of proceedings which encapsulates the idea of privacy and secrecy. In a landmark judgement, the Supreme Court held that "mediation proceedings are totally confidential… If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process" (Moti Ram v. Ashok Kumar, 2011). On another occasion, the Apex Court highlighted the importance of confidentiality in mediation by observing that "the process of mediation is founded on the element of confidentiality… In the process, the parties may make statements which they otherwise would not have made while the matter was pending adjudication before a court of law. Such statements which are essentially made in order to see if there could be a settlement, ought not to be used against the maker of such statements in case at a later point the attempts at mediation completely fail. If the statements are allowed to be used at subsequent stages, the element of confidence which is essential for healthy mediation/conciliation would be completely lost. The element of confidentiality and the assurance that the statements would not be relied upon helps the parties bury the hatchet and move towards resolution of the disputes. The confidentiality is, thus, an important element of mediation /conciliation." (Perry Kansagra v. Smt. Kansagra, 2019)

Under the Companies Act 2013, principle of confidentiality is adequately safeguarded by imposing severe restrictions on the mediator to not disclose or divulge the details of "any factual information concerning the dispute" received from a party during the course of proceedings, "the receipt or perusal, or preparation of records, reports or other documents by mediator", "what transpired during the proceedings" before any designated authority (The Companies (Mediation and Conciliation) Rules), 2016). The Rules 2016 require mediation proceeding to be conducted in "privacy" and also prohibit

audio/video recording of proceedings. The mediator is also prohibited from "recording the statements of parties or witnesses" (The Companies (Mediation and Conciliation) Rules), 2016). Furthermore, the Act restricts the communication between mediator and the designated authorities, during the continuance of proceedings, to only failure of parties to attend the proceedings; their consent; suitability of the case for settlement through mediation, and settlement of disputes (The Companies (Mediation and Conciliation) Rules), 2016).

The Act also obligates the parties to maintain and uphold confidentiality of proceedings by not relying or introducing information in other proceedings with respect to "(I) views expressed by a party in the course of the mediation or conciliation proceedings; (ii) documents obtained during the mediation or conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the mediator or conciliator; (iii) proposals made or views expressed by the mediator or conciliator ; (iv) admission made by a party in the course of mediation or conciliation proceedings" (The Companies (Mediation and Conciliation) Rules), 2016).

**D. Party Autonomy** – Mediation is a party-centric dispute resolution mechanism where "the parties retain the right to decide for themselves the terms of any settlement. (Mediation and Conciliation Project Committee, 2005)" This right of self -determination forms core of mediation proceedings. The Rules 2016 uphold the right to self-determination of parties by providing that the parties shall be compulsorily consulted by the mediator before fixing of date and time of mediation (The Companies (Mediation and Conciliation) Rules), 2016).

## CONCLUSION

The current legal framework of mediation under Company's Act 2013 is at a nascent stage but is extremely promising and has performed well in this short span of six years. The business community has exuded confidence over this initiative. However, there are certain areas which require streamlining. India has recently signed the Singapore Convention on Mediation (2019) which provides for a uniform framework for settlements through mediation of corporate disputes. It is critical that Companies Act 2013 must also be suitably aligned with the Convention's framework to ensure uniform, efficient and swift resolution of cross border disputes. There is an urgent necessity to explore space for 'e-mediation' under the Act which will further enhance the benefits of mediation through reduction of cost, saving of time and increasing choices with the parties to a dispute. The introduction Mediation Bill, 2021 is definitely a welcome move as it will further bolster the image of India as an 'investor-friendly destination' amongst the global investor community.





## REFERENCES


- Iyer, V. K. (1980). Some Half Hidden Aspects of Indian Social Justice.
- Nyhart, J., & Dauer, E. (1986). A Preliminary Analysis of the Uses of Scientific Models in Dispute Prevention, Management and Resolution. Journal of Dispute Resolution.
- Ayog, N. (2021). THE ODR POLICY PLAN FOR INDIA DESIGNING THE FUTURE OF DISPUTE RESOLUTION. New Delhi: Government of India.
- Mediation and Conciliation Project Committee, S. C. (2005). Mediation Training Manual of India. New Delhi.
- Civil Procedure Code. (1908).
- Secretary of State v. Mask (Privy Council 1940).
- Firm Seth Radha Kishan v. Administrator, Municipal Committee Ludhiana (1963).
- Bhavesh D. Parish v. Union of India, 5 SCC 471 (Supreme Court of India 2000).
- R.K. Garg v. Union of India, 4 SCC 675 (Supreme Court of India 1981).
- Dhulabhai v Madhya Pradesh, SC 78 (Supreme Court of India 1969).
- Morey v. Doud, 351 US 457 (Supreme Court of the United States 1957).
- Vatticherukuru Village Panchayat v. N V Deekshithulu, Supp. (2) SCC 228 (Supreme Court of India 1991).
- Sachar, J. (1978). The Report of the High-Powered Expert Committee on Companies and MRTP Acts. Ministry of Law, Justice and Company Affairs.
- Justice, M. o. (1988). Companies (Amendment) Act.
- Eradi, J. V. (2000). Report of the High-Level Committee on Law relating to Insolvency and Winding up of Companies. Ministry of Law, Justice and Company Affairs.
- MCA. (2002). Companies Amendment Act.
- Madras Bar Association v. Union Of India, 8 SCC 583 (Supreme Court of India 2015).
- Shahi Prakash Khemka (Dead) Through LRs. v. NEPC Micon, SCC Online SC 223 (Supreme Court of India 2019).
- Grower, & Davies. (2003). Principles of Modern Company Law. Sweet & Maxwell.
- Finance, S. C. (2012). The Companies Bill 2011.
- Companies Act 2013, s. 430. (n.d.).
- Companies Act 2013, s. (n.d.).

- The Companies (Mediation and Conciliation) Rules). (2016).
- Xavier, A. (2016, September 30). Mediators for Company Disputes in India. Retrieved from http://mediationblog.kluwerarbitration.com/2016/09/30/mediators-company-disputes-india-effective-will/
- Vikram Puri v. Universal Buildwell Pvt Ltd., SCC Online 45 (2022).
- Apporva, D. K. (2020). Mandatory Mediation in India: Resolving to Resolve. Retrieved from Vidhi Legal Policy: https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India- Resolving-to-Resolve.pdf
- Geetha, K. (2014). Mandatory mediation in India. Retrieved from Galgotias University: https://www.galgotiasuniversity.edu.in/pdfs/Mandatory-Mediation-in-India.pdf
- Afcons Infra. Ltd. v. Cherian Varkey Construction Co. Ltd., 8 SCC 24 (Supreme COurt of India 2010).
- D'Urso, L. (2018). Italy's Required Initial Mediation Session: Bridging The Gap between Mandatory and Voluntary Mediation [Web long post]. Retrieved from. Retrieved from ADR Centre for Development: https://www.adrcenterfordevelopment.com/wp-content/uploads/2020/04/Italys-Required-Initial-Mediation-Session-by-Leonardo-DUrso-5.pdf.
- Kanuga, S., & Bhosle, S. (2021). Mediation of Commercial Disputes in India. NLUJ Law Review, 7(2), 282-298.
- Smt. Madan Kansagra v. Perry Kansagra, 246 DLT 469 (Delhi High Court 2018).
- Moti Ram v. Ashok Kumar, 1 SCC 466 (Supreme Court of India 2011).
- Perry Kansagra v. Smt. Kansagra, 20 SCC 753 (Supreme Court of India 2019).




# Understanding Sri Lanka's Troubled History Through Romesh Gunesekera's The Sandglass

***Laila Nargis****

**Abstract**

Romesh Gunesekera's novel The Sandglass has often been looked at as a murder mystery emanating for a conflict between two families but the historical facts that are entangled in the novel remain unexplored. This paper posits the view that the novel has a very volatile historical undercurrent which reflects not only the chaotic condition of the nation but also the human rights violation against Sri Lankans. The natives of Sri Lanka during the civil war period were caught in the political turmoil of the country resulting in a big exodus to western cities and also a struggle for cultural identity in a vortex of power and cultural ecology. A close reading of the novel allows us to locate the entire text of the novel within the context of history unfurling the whole politics of race, ethnicity, culture and language. The historical facts are inserted in the novel in a manner to understand the genesis of the conflict. The Sandglass delineate a lucid picture of the turbulence of Sri Lanka and its impacts on the lives of common people and bring to light the emotional trauma of those who were the victims of the conflict. History and fiction are weaved together in the novel to bring wakefulness of the past and its effects on the present. The novel weaves a web of interconnected stories that tie Pearl and her children's personal stories to the larger history of colonial Ceylon and post-independence Sri Lanka, focusing for the most part on a dialogic encounter between Prins and Chip.

**Key words:** - *conflict, ethnicity, history, migration and rights.*

## Introduction

Romesh Gunesekera is a British author of Sri Lankan origin. In 1954, he was born in Sri Lanka. Romesh Gunesekera spent his childhood in Sri Lanka before

* *Research Scholar, Department of English, University of Jammu, Email: lailanargis07@gmail.com*

moving to London in 1972. He is currently living in London with his wife Helen and their two daughters. He witnessed the political havoc of his motherland in his early years of life, which left deep impressions on his mind. As a displaced person, it is natural for him to write about his home country in order to learn more about it. All his works revolved around the stories related to his homeland. The Sandglass Romesh Gunesekera's second novel too is a story of a migrant Sri Lankan family. Although it is not a full-fledged historical tale but the torn historical background is visible throughout the story. If one starts to wonder if the stated experience is a result of Sri Lanka's tumultuous recent history. The burden of proof suggests that this is not the case that the novelist is more interested in existential themes than the impact of politics on people's lives. But as in The Sandglass there is an annoying tendency to slip in undeveloped references to outbreaks of violence in the island's post-independence history so one can be convinced that the fragmented nation and psychic dislocation described in the novel has resulted from the writer's own experience.

Nobody can deny that Sri Lanka is a conflict-torn country. Analysing the country's historical background allows one to assess the circumstances that led to it becoming a torn nation. As the study is based on Sri Lanka troubled history, it is critical to have a glance on the country's history first, to understand the situation that gave blot to the nation.

Sri Lanka, formerly known as Ceylon, was a British colony. Sri Lanka is, without a doubt, a multi-ethnic country, but it is never free of conflict. The many ethnic groups of Sri Lanka were at odds, with the Sinhalese and Tamils being the two main parties involved in the conflict. Tamils were treated as minority. The official language of Sri Lanka was Sinhalese as it was the language of majority. Tamils as well as their culture and language were neglected. So to enjoy same power and value in the country, Tamils raised their voice and demanded a separate region within the country. The ethnic conflict, which is known to be the main problem in Sri Lanka and has resulted in a war in the country, has some historical roots. 'Sri Lanka has received so much attention since the mid-1950s because of several episodes, of ethnic tension, erupting regularly into violent clashes between its two main ethnic groups, the Sinhalese and Tamils. The country has a long history of ethnic tensions and conflicts in pre-colonial times; indeed many scholars see these stretching back over several centuries and, as some would have it to the very beginnings of the island's recorded history, over 2000 years.

When the country was under British authority, the conflict arose (1796-1948). The British had planted the seeds of animosity between the country's two largest ethnic groups. The British sparked political unrest in the country with their discriminating policies. Certain commissions and constitutions were established during the British rule that favoured the Sinhalese ethnic group.

K. M. De Silva in his book REAPING THE WHIRL WIND gave a detailed account of Sri Lanka's political instability:

The Sinhalese majority and the Sri Lankan Tamil minority are not the only





players in this intricate political drama even though at present, they play the principal roles. Suffice it to say here that there are two conflicting perceptions of these conflicts. Most Sinhalese believe that the Tamil minority has enjoyed a privileged position under British rule and that the balance has of necessity to shift in favour of the Sinhalese majority. The Sri Lankan Tamil minority is an achievement-oriented, industrious group who still continue to enjoy high state in society, considerable influence in the economy, a significant if diminishing role in bureaucracy and is well placed in all levels of the education system. The Tamils for their part would claim that they are now a harassed minority, the victims of frequent acts of communal violence and of calculated acts and policies of discrimination directed at them. Nevertheless, they could hardly be described as a beleaguered minority, the victims of regular episodes of violence.

Commenting on the factors of the conflict in Sri Lanka Stefan Wolf in his book Ethnic Conflict: A Global Perspective writes:

Violence does not spontaneously erupt between otherwise peacefully coexisting ethnic groups. However, 'ethnicity is not the ultimate, irreducible source of violent conflict in such cases.' Power and material gain can be equally strong motivations, for leaders and followers alike, to choose conflict over cooperation, violence over negotiations. For a proper understanding of the dynamics of different ethnic conflict it is, therefore, not enough simply to look at the degree of violence present. Rather, it is necessary carefully to analyse the different actors and factors that are at work in each conflict and the way in which they combine to lead to violent escalation or constructive conflict management and settlement. Thus, it would be mistaken to assume that ethno politics is only a matter of confrontation between different politically mobilized groups and states.

Even in the present, the conflict is there in the country and the natives have to face the violence and disruptions. An article "Lankan Civil War and Human Rights Violation" written by an international expert, Makhan Saikia clearly depicts the present situation of the country:

Today, the Tamils and other minority groups like the Muslims and Christians are alleging massive violation of human rights by the Lankan forces in the final war against the LTTE in 2009. In fact, the Federal Bureau of Investigation (FBI), in its report published in January 2008, stated that the LTTE was one of the most dangerous and deadly extremist outfits in the world and the world should be concerned about the outfit as they had inspired networks worldwide. . . Further some reports indicate that women were also forced to join the organisation. Only after seven years of its formation in 1983, the organisation opened its Women's Front of the Liberation Tigers under the leadership of Vithusha. Like many other African terror groups, the LTTE used to recruit children for combat forces . . . These were some of the harrowing episodes of the LTTE that rightly underlines how the terror organisation was simply twisting and undermining the epithets of basic human rights. Initially, it seemed to be an endless saga of terror, violence, torture and a parallel state run by an authoritarian leader. Today the Tamils are

calling for accountability and justice for the crimes committed during the Civil War by the Lankan forces.

The writers' approach to the Sri Lankan conflict, which has such a broad background, becomes an easy one. Several writers, particularly those of Sri Lankan origin, preferred to write about their country's demise. The subsequent twenty-six-year war between the LTTE and the state was one of Asia's most brutal and longest-running civil conflicts. It influenced several writers in the country to unearth people's sufferings and how the rights were violated. The Sri Lankan conflict, which led to the country's civil war, is ingrained in the island's literary consciousness. Conflict is inserted in the works of certain writers, whether in the foreground or in the background, directly or indirectly. The tragic condition of the country makes people pause and reflect. The unrest, hatred and its resultant tragedy triggered many writers' imagination; Romesh Gunesekera is also one of them.

Romesh Gunesekera's novel The Sandglass tells the story of two feuding families whose lives are interlinked by the changing fortunes of post-colonial Sri Lanka. The rift between the two families symbolises Sri Lanka's two real life warring factions. The novel alternates between post-war Sri Lanka and 1990s London where Chip a Sri Lankan migrant and narrator of the novel lives. People and places in the novel are solely introduced through the narrator's consciousness. The Ducal family has migrated from one culture to another, yet trapped between the two and frequently involved in either a process of self-recovery through recourse to history and memory or a process of self-preservation through an act of change. People in the novel were all nomadic, moreover they were turned into strangers who were not able to communicate meaningfully across geographical and emotional divides. The majority of the characters were not ready to be involved in the realities of their current society, instead continues to move into the backgrounds of violence and chaos as their entire existence has been shaped by their past. It is extremely difficult for an immigrant to integrate into the culture of his host-country. Cultural dislocation, nostalgia, isolation, indifferent attitude of the host-society and a number of other difficulties are prevalent during immigrant's integration. As shown in the novel, almost all the characters confronted a sense of loss as they were treated as 'outsiders' in the host-land, debarring them from their basic rights. The story through the emotional concern of people depicts the plight of refugees, loss of indigenous culture, uprooting from native cultural traditions and values, treatment as mere outcast and the psychological traumas of dispersed. Analysing the character of Chip, exiled from his mother land, he like many other Sri Lankans, lived a life tinged with longing and nostalgia for the country left behind. Chip while narrating the story narrates his sufferings as a migrant. He left his native land and travelled to London to fulfil his dreams which was not possible in his war torn mother-land. But moving to a foreign land for the better opportunities fills his life with melancholy until he met Pearl, another immigrant.





Pearl, an important character of the novel is the mother of Prins (the central character of the novel). Pearl used to live a troubled life in Sri Lanka with her husband Jason, who was a true colonial man of that time "a man obsessed with place and status-geographical and social." But Jason was murdered mysteriously and his death leads to the migration of Pearl to escape the chaos and turbulence in the mother country. But in her migration she lost her identity and true relations as well, as she left her children in Sri Lanka. Pearl shifting to the new land where she thought she would belong brought loss and dispossession in her life. Her sleepless nights in London were symbolic to her dissatisfaction in the new land. She is representing the dilemma of those who need to migrate to a new land with no past, troubled present and an uncertain future. "For her there was no map. All the places belonged either to the present or the past. The future was a fantasy." Death, without a doubt, is wearying, but for those who were immigrants and endured the loss their entire lives, death's weariness is multiplied, as seen in the death scene of Pearl: Not all our deaths are as vicious or cruel as those who suffer war or famine or the terrors of despots, but the end of a life-even an ordinary life-whether by accident or design, always seems to come too soon to bear. The hurt can never heal. 'Does it hurt?' I asked stupidly. She shook her head. But I knew that she had been in pain for many years. She was not one who complained of pain, although she would often talk of her collapsing bones and disintegrating body as if it were a house no one cared to live in any more. Perhaps she meant there was no new pain, or perhaps it was under control in her hospital bed. Perhaps it didn't matter anymore. Chip and Pearl build a strange kind of attachment with one another as they belong to the same roots. They used to narrate each other the story of their past to escape the hollowness in their lives. The stories they used to narrate each lead back home and the lives they describe depict the tangled tapestry of Sri Lankan history. Gunesekera has made memories of 'home', the quest for fictional home via the realities of war and conflict as the subject of the novel. Victims of emotional and political abuse, memory and desire serve as the basis around which he builds his concept of 'home' as reflected in the stories of Chip and Prins.

In a beautifully constructed work that moves back and forth between two physical and temporal poles, Gunesekera brings to life Prins Ducal and his search for ancestors in Sri Lanka, and his father's rise to wealth, enmity with the Vatunas family, and a murder mystery that further unfolds upon Prins arrival in London for his mother's burial.

Gunesekera has written a book that is a mix of 1990s London and post-colonial Sri Lanka, weaving together themes of memory, exile, trauma and post-colonial upheaval. Minoli Salgado in his book Writing Sri Lanka: Literature, Resistance and the Politics of Place comments on the themes: The recollected past of life in Sri Lanka, the immediate past of the character's experiences as British immigrants, the conditional present in which funeral preparations take place and the unresolved present of writing through which Chip, in transit in a hotel room, opens the novel are all juxtaposed in an intricate and complex mediation of incommensurable space-times that serve to loosen historical narration from

spatial and temporal moorings. History is spatialised, levelled into simultaneity, and space temporalized, marked by the vicissitudes of an emergent time, so that both are rendered inherently provisional and unstable.

The novel is divided into sections, and by analysing each section, readers will discover that each section is a blend of story and country history. The novel portrays the plight of the migrants and how their basic rights are violated in both the home and host countries. As the novel progresses, readers learn about the Ducal's long-standing rivalry with the Vatunase family, Jason's suspicious death in 1956, and Sri Lanka's devastation caused by a relentless civil war. The author never misses an opportunity to reflect on Sri Lanka's political instability and discordant atmosphere. Portrayal of Jason's character and his murder mystery are the two important elements for the reflection of Sri Lanka's history of devastation. By 1956, the year he died, he had a plan to rejuvenate the whole beverages business, including our bloody pol-katu booze. He wanted to take his firm into domestic liquor; he'd had enough of pandering to the Lipton's and Brooke Bonds of this world. He wanted our people to have some pride in what they produced and generate wealth from home base. . . those were the days when every politician seemed to have a party; and no party had a real, responsible politician. And the, when I tried to find out about our lives back home, it was like swimming in treacle. I didn't know where to start. How to find out anything? The entire bloody country seems to have always been one big barrel of rumour and conspiracy. The novelist continues to oscillate back and forth, portraying the chaotic state of his country through Chip's narration. None of the characters were able to achieve the 'wholeness' as they were preoccupied with the sense of rootlessness. The title of the novel The Sandglass is very significant and symbolic as it suggests that events in the novel which are filtered with a significant emphasis on the passage of time. Despite the fact that spatial movement signifies change, Pearl believes that "the world... did not change greatly from place to place; not as much as it changed with time." You know, it's time that plays havoc with us. "Has a field day with everything". Susheila Nasta in her book Home Truths: Fictions of the South Asian Diaspora in Britain comments on the significance of title as: "As Gunesekera indicates then, the sandglass is a potent symbol both for death and for life, for absence and presence, a conduit by which the artist can briefly hold the transformations wrought in human lives by the passing of time." Prins journey from London to Sri Lanka not only solves the mystery of his father's death but also became the source to unveil the country's past. "And then, when I tried to find out about our lives back home, it was like swimming in treacle. I didn't know where to start. How to find out anything? The entire country seems to have always been one big barrel of rumour and conspiracy." The murder mystery ends when Prins mysteriously disappears. About six weeks after I posed my letter to Prins, a parcel arrived for me from Colombo with writing like a spider's web on it. Enclosed in it was a thick, Alwych journal with a weather proof black cover. A folded newspaper clippig was forwarded to the front. The clipping showed a photograph of Dino Vatunas President of the newly formed Great Sands





Corporation, standing proud at his brother Kia's funeral. The article below explained that Kia Vatunas had died in a bomb explosion outside his house. There was one ther casualty: one Mohan Jayasurya, a former journalist. Prins had scribbed on the margin: 'you might as well keep mine too. I have to get the hell out of this hole P.' The journal was crammed with Prin's jottings about the Ducals and all the Vatunases coiled around them. Ten years of tiny entries increasing in frequency as he tried to preserve some vision of hope in a descent into mayhem. Here was a whole history of misfortune, captured in his laconic writing.

When Prins first arrived in London and described the state of his mother-country, it is clear that the ethnic-strife has decimated Sri Lanka as narrated by Prins: "At least it's not like our bloody war: the people's war,' Prins grunted. 'Sinhala kids, Tamil kids, it's all the same. Fodder for the politicos. On every side the rich are scheming and the rest are reeling." Prins had a revelation of the realities of an immigrant's existence when his mother died. After wandering his entire life, he finally acknowledged the fact that an immigrant has no place in the world which he can call 'home'. Through his journey to Sri Lanka, he discovers his real self. "I wanted out of the tangled-up life we had here.

## Conclusion

The Sandglass is unquestionably a work of historical fiction with the delineation of several violations. It is a true depiction of the gloomy picture of Sri Lanka's past and the plight of the natives. By embedding past episodes of Sri Lanka, the novelist represents the discordant environment of his mother land from beginning to end. In the fates of two families, Romesh Gunesekera portrays the agony of his strife-torn homeland and the trauma of those who were displaced. The novel revolves around the stories of Pearl and her children which are intricately woven with Sri Lanka's post-independence history as a whole. The narrator moves between England and Sri Lanka while switching back and forth between the past and present in an effort to put together a tale out of hazy memories and recollections. The Sandglass is all about the movement and settlement in a new land and the inability to recreate another world in the new. Most of the immigrants failed to let go of the history as the everlasting imprints of the past make their escape difficult. To be in the flow of the present, immigrants must 'integrate' and 'assimilate' into the new culture, and if they failed to do so they will be left shattered and broken as portrayed in the whole novel.

## Bibliography

1. Clarance, W. (2007). Ethnic Warfare in Sri Lanka and the U N Crisis. Pluto Press.
2. Conteh, E. (2003). Collective Political Violence: An Introduction to the

Theories and Cases of Violent Conflicts. Routledge

3. De Silva, K.M. (1998). Reaping the Whirlwind: Ethnic Conflict, Ethnic Politics in Sri Lanka. Penguin Books.
4. Grant, P. (2010). Buddhism and Ethnic Conflict in Sri Lanka. State University of New York Press.
5. Gunesekera, R. (2014). The Sandglass. Penguin Books.
6. Gupta, Dipak. (2008). Understanding Terrorism and Political Violence. Routledge.
7. Jeong, H. (2008). Understanding Conflict and Conflict Analysis. SAGE Publications Ltd.
8. Martz, E. (2010). Trauma Rehabilitation After War and Conflict: Community and IndividualPerspectives. Springer.
9. Mathur, C. (2012). "Home as an Emotional Construct in Romesh Gunesekera's The Reef and The Sandglass." Asiatic, vol. 6, no. 1.
10. Muggah, R. (2008). Relocation Failures in Sri Lanka: A Short History of Internal Displacement and Resettlement. Zed Book.
11. Nasta, S. (2002). Home Truths: Fictions of South Asia Diaspora in Britain. Palgrave.
12. Peebles, P. (2006). The History of Sri Lanka. Greenwood press.
13. Salgado, M. (2007). Writing Sri Lanka: Literature, Resistance and the Politics of Place. Routledge.
14. Siriwardhana, C. (2014). "Conflict, forced displacement and health in Sri Lanka: a review of the research landscape". Conflict and Health, Vol. 8, https://conflictandhealth.biomedcentral.com/articles/10.1186/1752-1505-8-22,
15. Spencer, J. (2004). Sri Lanka: History and the Roots of Conflict. Routledge.
16. Uyangoda, J. (2010). Ethnic Conflict in Sri Lanka: Changing Dynamics. State University of New York Press.
17. Vickory, L. (2015). Reading Trauma Narratives: The Contemporary Novel and the Psychology of Oppression. U of Virginia P.
18. Wolff, S. (2007). Ethnic Conflict: A Global Perspective. Oxford University Press U.S.A.
19. Makhan S. (2021). "Lankan Civil War and Human Rights Violation". Retrieved from https://www.dailypioneer.com/2021/columnists/lankan-civil-war-and-human-rights-violation.html



# The Role of Artificial Intelligence in Criminal Justice and Human Rights

***(Dr.) Garima Tiwari*, Mr. Santosh Goswami*****

**Abstract**

Recent advancements in the fields of automation, machine learning, and artificial intelligence have forced us to rethink core criminal justice system issues. Artificial intelligence and machine learning have become critical components in virtually every industry that relies on data processing to uncover relevant data and remove human error. Artificial intelligence applications in the courtroom are still in their infancy, and some countries are aggressively pursuing the automation of the justice delivery system. This article will attempt to analyse the automation of the criminal justice system and will cover the issues of what is automated and who gets replaced as a result. It then looks at issues between artificial intelligence systems and the law and analysing several resulting human rights violations. The paper concludes with ideas for reducing the risks associated with artificial intelligence's usage in the criminal justice system.

**Key words:** - *Criminal justice, Human rights, automation, algorithms, and artificial intelligence*

## 1 Introduction

Both the evaluation of criminal risk and the functioning of criminal justice systems have become increasingly technologically sophisticated because of the development of big data analytics, machine learning, and artificial intelligence systems (together referred to as "AI systems"). While the authors disagree on whether these new technologies will solve criminal justice system problems—for instance, by reducing case backlogs or whether they will intensify social divisions and jeopardize fundamental liberties, but all of them

* *Associate Professor, Bennett University*
** *Research Scholar, Bennett University*
*Email Id.:goswamisantosh235@gmail.com*

agrees that they will have a serious influence on criminal justice systems. Artificial intelligence-enabled automation compels us to pause and analyze crucial criminal justice issues like

a. "What does an explanation of the rationale for the judgement imply?
b. When is the judicial decision-making process transparent?
c. Who should be held accountable for (semi-)automated decisions, and how should responsibility be distributed across the chain of actors when the final decision is helped by artificial intelligence?
d. What is a "fair trial?" And is the accused robbed of due process when AI is utilised in criminal proceedings?

Even for the researchers who created the systems, the operations of "machine learning approaches are opaque," and while this may not be a problem in many areas of applied machine learning, "AI systems must be transparent when used in judicial settings, where transparent decision-making and reasoning are critical." A decision-making process that is opaque and difficult to comprehend is not deemed authentic or non-autocratic. Due to the inherent opaque nature of these AI systems, their application in criminal justice settings may represent a breach of basic rights. When artificial intelligence technologies increase access to courts for those who would otherwise be denied justice, this is dubious and necessitates a broader social conversation that can occur only outside the legal system. "Budget cuts, diminished judicial legitimacy, and a backlog of cases may all lead to the introduction of innovative solutions given to governments by information technology businesses. On the other hand, attempts to outsource a public function to the private sector would elicit (or should elicit) a lengthy political debate that must take place in more democratic channels".

## 2. How does automation affect crime control?

### Law enforcement automation

Through the application of "CompStat", geospatial modelling for forecasting future crime concentrations, or "hot spots" has developed into a paradigm for police administration in the United States of America (COMPuter STATistics, or COMParative STATistics). This has been described as a "multi-layered dynamic approach to crime reduction, quality of life enhancement, and human and resource management, rather than a simple computer software." The objective of this map is not just to visually depict crime, but also to present a holistic managerial approach or philosophy for police management. As a "human resource management tool," it consists of monthly meetings during which police officers analyse existing metrics (crime reports, citations, and other data) and discuss methods to enhance them. Twelve years ago, law enforcement agencies started using computer techniques for "predictive crime mapping". Predictive "big data law enforcement technology" have evolved once again. To begin, "advances in artificial intelligence promised to make sense of massive volumes





of data and to extract meaning from disparate data sets." Second, they suggested a shift from decision support to decisionmaker. Thirdly, they are concerned with "regulating society as a whole, not just criminal behaviour." (for example 'function creep' is Singapore's ambition to create a 'total information awareness system.')

### Automating the Courts

Additionally, courts are using "AI algorithms to predict recidivism and escape risk for defendants awaiting trial or prisoners subject to bail or parole proceedings." The most analyzed and discussed examples come from the "United States, which also happens to be the greatest market for such software." The "Arnold Foundation's technique, which is already being used in 21 states across the country, analyses 1.5 million criminal cases in order to forecast defendant behaviour during the pre-trial phase. Florida uses machine learning algorithms to determinethe amount of the bail bonds. According to a study of 1.36 million pre-trial detention cases, a computer can forecast a suspect's likelihood to flee or reoffend even more better than a human judge".

While this data may appear to be overwhelming, one must evaluate the possibility that the judgments are in fact more unjust. There will always be unique variables in a particular case that transcend the forty or so characteristics analysed by the algorithm in this study and may have a significant impact on the deliberation process's outcome. As a result, "perpetual improvement" is an inevitable requirement. Additionally, we must address the issue of "selective labelling", we see findings for only the subgroups who were analysed, for only those who were released. The data we analyse were gathered during our discussions about who to place in pretrial custody. According to the researchers, judges' tastes may be more diverse than the algorithm's. Finally, there is the question of what we hope to accomplish with "AI systems, what we wish to optimise is while reducing crime is an important goal of criminal justice, it is not the only one. Equally critical is the method's fairness".

European countries, including "Georgia, Poland, Serbia, and Slovakia," use automated decision-making systems to operate their judicial systems, most notably for allocating cases to judges and other public bodies, such as enforcement officers in Serbia. While they are indirect automated decision-making systems, they have the potential to weaken the right to a fair trial substantially. According to the publication "Algorithms—State of Play," none of the four countries that use automated decision-making systems to allocate cases release the algorithm and/or source code. Because automated decision-making systems lack "fundamental transparency," and independent monitoring and auditing are impossible. The core issue is how random these systems truly are, and whether they allow for tinkering and hence are susceptible to manipulation". What's more worrisome is that even judges are unaware of the court administration's use of computerised decision-making technology.

Further there are several developments are going on to identify the potential of AI in courtroom decision-making. “Estonia's Ministry of Justice is funding a team to develop a robot judge capable of adjudicating small claims disputes under €7,000." In this concept, both parties would provide pertinent documents and evidence, and the AI would render a verdict that could be challenged to a human judge."

**Automation in prisons**

New instruments are used in a variety of ways in "post-conviction stage. Artificial intelligence is rapidly being implemented in prisons to automate security and aid in the rehabilitation process. "A Chinese prison which keeps some of the country's most high profile offenders is allegedly developing an artificial intelligence network capable of recognising and tracking each inmate 24 hours a day and alerting guards to anything out of place".

Additionally, these techniques are used to ascertain if the criminogenic demands of an offender can be satisfied through treatment and to monitor such things for sentencing procedure. “In Finnish jails, criminals are trained by using artificial intelligence-powered algorithms. Convicts contribute to the identification and resolution of important questions in user studies, such as those that involve the examination of data obtained from social media and other online sources. Similarly, the English and Wales governments have allocated funds for the training of the prisoners for coding as part of a £1.2 million initiative to assist underrepresented groups in obtaining such careers. Some specialists are even exploring the possibilities to employ artificial intelligence to address the United States of America's solitary confinement crisis by deploying intelligent assistants such as Amazon's Alexa as 'confinement buddies' for prisoners."

## 3. Encounters between AI systems and the laws protecting Human Rights

**Due process of law and AI systems in the USA**

In the American context, where AI system is employed to most of the extents criminal justice system, the decision on a risk assessment algorithm in the judgment in Loomis v. Wisconsin (2016), entitled Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), was a sobering one. This COMPAS algorithm recognised Loomis as an individual who was considered as a high risk to society due to a high risk of re-offending, and the first instance court denied his request to be released on parole. The Wisconsin Supreme Court decided in the appeal that the recommendation from the COMPAS algorithm was not the sole reason for refusing his request for parole, and thus the court's decision did not violate Loomis's due process right. By upholding the constitutionality of the recommendation of risk assessment algorithm, the Supreme Court of Wisconsin rejected the 'automation bias'. By claiming that the lower court could deviate from the proposed algorithmic risk





assessment, the Court ignored social psychology and human-computer interaction research on the biases involved in all algorithmic decision-making systems, which show that once a high-tech tool offers a recommendation, it becomes extremely difficult for a human decision-maker to refuse such a recommendation.' Despite knowing that automated recommendations may be inaccurate, incomplete, or even incorrect, decision-makers consistently rate them more positively than neutral.

The Kansas Court of Appeals reached the opposite conclusion from Loomis in "Kansas v. Walls (2017)," holding that the defendant must be granted access to the entirety of the diagnostic Level of Service Inventory-Revised (LSIR) assessment used by the court to determine the probation conditions to impose on him. The Court of Appeals determined that by concealing the defendant's LSI-R evaluation, the district court deprived him the opportunity to contest the trustworthiness of the evidence used to establish the defendant's probation restrictions. The Court of Appeals concluded that the district court's failure to provide a complete copy of the LSI-R to the defendant violated his constitutional right to procedural due process throughout his criminal proceedings."

**Artificial Intelligence System in the European Union.**

Due to the fact that AI systems "invoke state obligations to respect human rights," they have a significant impact on human rights. Because the data flood has invaded all social domains and algorithmic systems have become increasingly prevalent in all parts of modern life, human rights compliance cannot be considered as the exclusive domain of privacy and personal data protection, as well as anti-discrimination and equality legislation. Automated technologies have been created to take the role of people in financial services, insurance, education, and employment, as well as in armed conflicts. They exert influence over national elections and fundamental democratic processes. As a result, the current framework for data protection is insufficient to satisfy all of the concerns about ensuring that AI systems adhere to human rights. As a result, as "the Committee of Experts on Internet Intermediaries (MSI-NET) of the Council of Europe plainly recognizes, human rights consequences are unavoidable." Automated processing techniques and algorithms may jeopardise the following human rights: "(1) the right to a fair trial and due process; (2) privacy and data protection; (3) freedom of expression; (4) freedom of assembly and association; (5) the right to an effective remedy; (6) prohibition of discrimination; (7) social rights and access to public services; and (8) the right to free elections." Additionally, because basic liberties are intrinsically linked, the employment of algorithmic technology in education, social welfare, democracy, and legal institutions risks jeopardising all human rights. Breakthroughs in artificial intelligence applied to social systems and domains have the potential to "disrupt the fundamental concept of human rights as safeguards against state interference."

### Personal data protection

Concerning the implications of AI systems' "use for personal data protection, the set of safeguards against adverse effects of AI systems includes rights such as data subjects' explicit consent to the processing of their personal data, the principle of data minimisation, the principle of purpose limitation, and the set of rights governing when automated decision-making is permitted." The "General Data Protection Directive" (hereinafter GDPR) establishes some criteria in this regard. When processing is carried out automatically, the data controller is required to take appropriate measures to safeguard the data subject's rights, freedoms, and legitimate interests, including ensuring the data subject's right to "request human intervention from the controller, to express his or her point of view, and to contest the decision" (Article 22, paragraph 3 of the GDPR). GDPR provides data subjects with the right to acquire relevant information about the logic used in automated processing.

"Article 11 of the Law Enforcement Directive prohibits automated decisions that have a negative legal effect on the data subject or a significant impact on him or her, unless authorised by Union or Member State law, which must also include adequate safeguards for the data subject's rights and freedoms". According to the Law Enforcement Directive's rules, "court judgements solely based on algorithmic technology are never lawful."

### A right to a fair trial is a basic one.

The use of algorithms in "criminal justice systems raise grave concerns about Article 6 of the European Convention on Human Rights (which guarantees the right to a fair trial) and Article 47 of the Charter, as well as the principle of equality of arms and adversarial proceedings established by the European Court of Human Rights". Article 6 of the ECHR guarantees "the accused the right to an effective trial, which includes the presumption of innocence, the right to quick notice of the charge's grounds and nature, the right to a fair hearing, and the right to self-defense."

The right to confront, on the other hand, is not absolute and may be limited in certain circumstances. Historically, the European Court of Human Rights held that a conviction breached the right to a fair trial when it was based entirely or largely on an unchallenged statement (the 'single or decisive rule'). However, in "Al Khawaja and Tahery, the Court reversed itself, holding that the admission of untested evidence does not automatically constitute a violation of Article 6 (1): when determining the overall fairness of a trial, the European Court of Human Rights must consider whether the admission of such evidence was necessary and whether adequate counterbalancing factors, including robust procedural safeguards, were present." The use of algorithmic tools in criminal proceedings has the potential to breach multiple other facets of the right to a fair trial, including the right to a judge chosen at random, the right to an independent and impartial tribunal, and the presumption of innocence.





### Presumption of impunity

Apart from affecting numerous dimensions of inequality, artificial intelligence decision-making systems may jeopardise a variety of other fundamental rights. As with “redlining," the concept of a 'sleeping terrorist' in Germany's anti-terrorism laws contradicted the presumption of innocence. The mere possibility that a recognised terrorist's characteristics match those of an asleep terrorist draws the state's attention to the individual. O'Neil illustrates his point with the story of Robert McDaniel, a twenty-two-year-old high school student who came under enhanced police scrutiny as a result of a prediction program's analysis of his social network and residency in a poor and hazardous neighbourhood: "... he was unlucky. He grew up in a crime-ridden environment, and a number of his pals have fallen victim to it. And it is purely because of these circumstances — not because of his own actions — that he has been designated as dangerous. Cops are on his tail now."

### Other rights

The unique concepts of the 'pre-emptive crime paradigm, such as the 'sleeping terrorist,' clash with the legality principle, i.e., lex certa, which requires the legislature to define a criminal offence sufficiently precisely. Standards of evidence serve as a barometer for the extent to which the state may infringe on an individual's right. However, the new mathematical nomenclature, which enables the creation of new categories such as 'person of interest,' focuses law enforcement authorities' attention on individuals who are not yet considered 'suspects.' The novel concepts being developed violate accepted evidentiary standards in criminal proceedings. AI systems should adhere to a set of tribunal-related rights, including the right to a randomly selected judge, which requires that the criteria for determining which court — and which particular judge within it — is competent to hear the case be clearly defined in advance (the rule governing case assignment within the competent court, preventing 'forum shopping'), and the right to an independent and impartial tribunal (as discussed in the section on automation in criminal courts).

## 4. Conclusion

How should we develop AI systems that are human rights compliant and adhere to the rule of law standards of the 'analogue world'? Legislators have taken notice of the trend toward 'algorithmizing' everything. Both express worry about the impact of algorithms on fundamental rights and the most effective means for holding 'algorithms accountable'. To address the threats outlined above in the justice sector in the European context, the Council of Europe's "European Commission for Judicial Efficiency (CEPEJ)" adopted the "European Charter on the Use of Artificial Intelligence in Judicial Systems" at the end of 2018 to address the threats outlined above. Similar concerns have been expressed in other parts of the world, most notably the "United States of America," where the

New York City Council was the first to enact legislation requiring openness in algorithmic decision-making. The Act establishes a task force to ensure that municipal agencies' algorithmic use is fair and legitimate".

The application of artificial intelligence to criminal justice and policing may jeopardise a number of criminal procedure rights, including the presumption of innocence; "the right to a fair trial (which includes the equality of arms in judicial proceedings and the right to cross-examine witnesses); the right to an independent and impartial tribunal (which includes the right to a randomly selected judge); the principle of non-discrimination and equality; and the principle of legality".

There is a popular belief that artificial intelligence (AI) technology would eliminate human judgement and thought's inherent biases and mental shortcuts (heuristics). This is a compelling argument for why artificial intelligence technology has been given much too much authority to manage and resolve issues that are predominantly social in nature (rather than technological). To construct a human rights-compliant system, social scientists, particularly attorneys, must collaborate more closely with computer and data scientists.

If human decision-makers are prone to prejudice, it makes sense to exclude people from the decision-making process. While such a trend toward automation and the abolition of human decision-making may appear intuitively sound, Eubanks' study demonstrates that it may be damaging. What proponents of automated decision-making systems overlook is the critical nature of the ability to bend and reinterpret rules in response to changing social situations. Thus, removing human discretion may aid in the eradication of human prejudice, but it may also exacerbate existing inequities or develop new ones. Apart from human rights, artificial intelligence systems have ramifications. Their consequences may have an effect on the core ideals and architecture of liberal democracies, most notably the concept of separation of powers and the limitation on political authority imposed by the rule of law.

**References:**


1. Pallanca, O., & Read, J. (2021). Principes généraux et définitions en intelligence artificielle. Archives des Maladies du Coeur et des Vaisseaux-Pratique, 2021(294), 3-10.
2. Siddiqui, M. Q., & Ashour, M. W. (2021, November). Object/Obstacles detection system for self-driving cars. In 4th Smart Cities Symposium (SCS 2021) (Vol. 2021, pp. 164-169). IET. Ulenaers, J. (2020).
3. The impact of artificial intelligence on the right to a fair trial: Towards a robot judge?. Asian Journal of Law and Economics, 11(2).
4. Mohammed, Z. (2019). Artificial intelligence definition, ethics and standards. Electronics and communications: Law, standards and practice.
5. Steponenaite, V. K., & Valcke, P. (2020). Judicial analytics on trial: An assessment of legal analytics in judicial systems in light of the right to a fair trial. Maastricht Journal of European and Comparative Law, 27(6), 759-773.
6. Fitterer, J., Nelson, T. A., & Nathoo, F. (2015). Predictive crime mapping. Police Practice and Research, 16(2), 121-135. Saoumya, A. S. B., & Baghel, A. S. (2015). A predictive model for mapping crime using big data analytics. Int J Res Eng Technol, 4(4).
7. Putera, N. S. F. M. S., Saripan, H., Abu, R., & Hassan, S. M. A. (2021). Artificial Intelligence for Construction Dispute Resolution: Justice of the Future.
8. Stević, M. (2014, October). Empowering Intellectual Capital in Serbia With Recycled Servers and MongoDB GridFS NoSQL Database. In ECIC2014-Proceedings of the 6th European Conference on Intellectual Capital: ECIC 2014. Academic Conferences Limited.

# A Threat to Human Rights: Artificial Intelligence

*Dr. Versha Vahini**

***"Whereas the short-term impact of AI depends on who controls it, the long-term impact depends on whether it can be controlled at all"***

***- Stephen Hawkings***

**Abstract**

A broad range of computer science which is associated with trying to build smart machines which are capable of performing tasks that would normally require human brains to perform the said task is said to be Artificial Intelligence. It involves working on machines and even trying to improve what the human mind is capable of doing. Artificial Intelligence basically involves:

- Thinking organically like human mind.
- Thinking intelligently: Logical reasoning.
- Acting humanly: Acting in a way that resembles human behavior.
- Acting wisely: Intending to attain a specific aim.

Artificial intelligence refers to the capacity of a digital computer or robot that is controlled by a computer to carry out actions that are typically associated with intelligent beings. The tasks that need to be completed by artificial intelligence (AI) systems are accomplished by first taking in massive volumes of labelled training data, then analyzing that data for correlations and patterns, and finally employing those correlations and patterns to create forecasts about the future. In this method, a Chatbot can learn to have lifelike conversations with humans by being given examples of text chats, and an image recognition programmer can learn to recognize and describe items in images by analyzing millions of examples. Both of these methods are described more below. It is possible for artificial intelligence to be a constructive force, one that may assist societies in

* *Professor, School of Law, Bennett University*
*Email Id.: versha.vahini@bennett.edu.in*





overcoming some of the most serious difficulties of our time. On the other hand, it puts the same society in a position where it could be exposed to a lot of risks.

A report that was based in Geneva made note of the considerable hazards that AI poses to society in light of the aforementioned information. In this day and age, technology has simplified many aspects of our lives, including our jobs, our schooling, our shopping, and even the use of intelligent assistants such as Siri, Alexa, and Chat GPT.AI is developing part of our everyday life and that is the reason why number of companies are ready to invest in Artificial Intelligence and the start-ups associated with it because it is trending and also providing ease of living. Since it has become a part of human life, there are reasons for it to take the employment of humans since it is making their work easy and saving some time and money. The field of human rights is already being affected by artificial intelligence (AI). On the one hand, it has a dormant position to assist in the advancement of human rights by enhancing access to important services such as healthcare, education, and others. On the other side, there are fears that AI systems could perpetuate and intensify current human rights issues such as discrimination, bias, and privacy infringement. These concerns originate from the fact that AI systems are becoming increasingly advanced. It is essential to make certain that artificial intelligence (AI) is developed and deployed in a manner that safeguards human rights and furthers the common good . Powerful machines and algorithms can already do medical diagnoses, surgical procedures, and control driverless vehicles; this is hardly the stuff of science fiction. Even if we benefit from new technologies and see changes in how we go about our daily routines as a result, the long-term effects of AI on our culture remain unknown. A "moratorium" on the distribution and use of AI-related systems was recently advocated by the UN High Commissioner for Human Rights. Artificial intelligence (AI) has taken over the world, but unlike humans, it only thinks clearly and rationally. These algorithms have a finite lifetime and will eventually stop working.If an AI system has the potential to violate human rights, it should be put on hold until we can ensure the safety of our data and ourselves.2

Humans are clumsier than machines. Even though evolution is slow, iteration takes generations. However, robots can enhance their design faster and possibly without our input. Hawking predicts an "intelligence explosion" where computers outsmart us "by more than ours exceeds snails." Many people fear AI turning malicious. “The fundamental risk with AI isn't malice, but competence,” says Hawking. AI will be incredibly good at achieving its goals, thus humans getting in the way could be dangerous. If you run a hydroelectric green-energy project and flood an anthill, too bad for the ants. "Let's not put humanity in that ant's situation," Hawking writes.

## Is AI threatening human rights?

Artificial intelligence has made human life easier, it is likely that it will replace the labour that humans are currently doing and being paid for and also machines are capable of doing the complicated task. AI offering us with the ability of

working on multiple data at the same time and in timely manner is proof of the fact that it has attracted attention on global level and since it is well known, it is under vigilance because it is likely to possess threat to data and privacy of the consumers. Starting from the use of AI in developing face recognizing software to monitoring people working in office, AI is taking over the role of a normal human guard who can also do the same thing of guarding and recognizing people. To construct credit scores, big data platforms increasingly use machine learning to incorporate and analyse non-financial data points such as a person's home, web browsing habits, and purchasing decisions. These systems generate e-scores that are uncontrolled. These can be skewed. AI has spawned new forms of oppression, which frequently target the most vulnerable. Individuals and organizations can use human rights to oppose governments and companies. Human rights are both international law and universal in nature. Human rights must be respected by both businesses and governments, but governments must also defend and fulfil them. Regional, regional, and domestic authorities and organizations offer well-developed redress mechanisms and adapt human rights law to changing situations, including technological advances.

Aapti Institute released Artificial Intelligence and Human Rights in India. The UNDP's Business and Human Rights in Asia programme and the EU commissioned the assessment on AI's influence on human rights in India's business verticals. In India, where the marginalised and underprivileged make up a large population and often fail to rectify technology abuse, human rights are vital. Thus, it protects human rights, creates jobs, and achieves the Sustainable Development Goals.

During COVID-19, machines were introduced to the market in order to monitor the oxygen level, measure the pulse and heart rate, give health related reminders, and so on. These are the applications of AI that are likely to replace the existing healthcare specialists, but the question arises regarding accuracy: can an AI be a good replacement for the work that a normal human being does? When it comes to providing for the needs of a living organism, humans are not the most dependable source. It's true that existing rapid chat bots on various websites have cut down on administrative labour and made it easier for businesses to engage with customers, but they have also lowered the value of customer service representatives. This is because no matter how advanced technology becomes, machines will always be limited in some manner. For example, most chatbots can't modify their language to match that of people, so they can't use slang or misspell words. This indicates that chatbots typically cannot be used for channels that are both public and highly personal, such as Facebook and Instagram. On the other hand, the customer support executive will be able to have a face-to-face conversation with the customer, which will allow them to better understand the situation and provide prompt redress to the issues that the customer is experiencing.6

The right to freedom is guaranteed by the Indian Constitution in Article 19. Invasion of privacy and freedom of expression by artificial intelligence-powered





surveillance. Residents are less inclined to exercise their rights, such as the right to free expression, while they are under constant monitoring. Robots driven by artificial intelligence are now being used to harass dissident and underrepresented voices on the internet. When digital accounts pose as real users, they can send preprogrammed responses to other accounts they recognize or persons who share their views, which is a violation of users' right to free expression. Artificial intelligence has been used by political parties to spread false information about their opponents in numerous recent elections throughout the world, endangering democratic principles and the desire for fair voting.

**Unemployment due to AI**

AI increasingly takes over human jobs, looking at the financial benefits, businesses will choose AI over humans when a single machine can replace the labour of 20 people. Automation of the assembly line increases productivity. By the year 2030, it's possible that 47 percent of high- risk occupations would be eliminated by robots. Even more complex tasks, like driving and medication dispensing, are becoming obsolete as new technologies emerge. Large-scale unemployment and economic disparity could result from AI. Workers stand to gain from both economic growth and decreased prices as a result of automation. Managers will be able to promote workers to positions that better utilize their softer skills, such as emotional and social intelligence.

**Discrimination in Job Opportunities**

AI-driven hiring and firing choices may be discriminatory. Using training data from a homogenous population may violate federal or state discrimination laws in hiring. For another example, if a corporation gets information from public data, it shouldn't assume candidates' personalities or skills. AI and human evaluations can better match candidates to the company's vision. AI overuse can ruin enterprises. Facial recognition-based theft protection AI technologies may bias against shoppers of specific races or ethnicities. The GDPR compels AI users to disclose how the algorithm affects the final choice, although the CCPA does not now demand this further consumer protection. Companies may want to have a human evaluate results before taking action to avoid charges of AI-induced discrimination. If the task of hiring and firing will be given to AI , it is likely to not have the reasonable understanding on the basis of which it could hire new employee or fire the ones who are not working properly.

**Daily use of AI**

There is a growing presence of AI in the everyday life of the typical man. It is impossible to escape its influence on modern-day human life. Its application can be found practically everywhere, in both public and private spheres of life. The following are some examples that can be used to demonstrate the existence of

AI:

1. In internet search engines, the on-line search engines learn to produce correct results based on the information that is provided to them;
2. The most prevalent application of AI in on-line shopping and advertising is to tailor advertisements displayed during on-line purchasing by analyzing prior purchases and other actions carried out on the Internet;
3. Digital assistants and the provision of personalized content on mobile phones;
4. In automobiles, specifically driverless cars as well as autonomous functions found in conventional automobiles and navigation systems;
5. Smart homes, in which the appliances in the dwelling are fitted to the requirements of the people and learn their routines;
6. Health care — in 2018, researchers used a deep learning network for brain hemorrhage detection from a computer tomography scan (Grewal et al., 2018) an artificial intelligence programme was also developed to answer emergency phone calls with the intention of detecting a cardiac arrest faster and more effectively during a call than an emergency medical dispatcher would be able to do;
7. Enhanced performance of production processes as a result of increased automation and optimization of certain processes in industrial production;
8. Agriculture and food production, including the monitoring and control of the temperature at which crops are grown, the optimization of yields, and the monitoring of the amount of feed consumed by animals

## Conclusion

There have been a number of discussions about the effects of AI on civil liberties as the field has grown. Despite AI's impressive progress in a variety of sectors, there are legitimate ethical worries about how it might be implemented in human society, which could lead to the violation of fundamental freedoms. The influence of AI on human rights could be favorable. It can help the justice system run more smoothly by cutting down on the amount of time spent on data analysis and increasing the quality of decisions made. As a result, it can aid in the detection and prevention of prejudice. By spotting patterns that people might miss, AI might also help monitor human rights violations. AI can be used, for instance, to detect and report human trafficking, a major violation of human rights. However, AI may infringe human rights in a number of ways. The role of AI in the labour market is one of the most pressing issues. Artificial intelligence has the potential to displace human labour, leaving those affected by the transition without stable work or income. The right to work, the right to a liveable wage, and the right to a decent standard of living could all be harmed by this. The use of AI in the criminal justice system is another area of worry





since it has the potential to violate fundamental human rights including the right to a fair trial and the right to privacy. In the absence of full disclosure and accountability, AI systems risk contributing to the normalization of harmful biases and discrimination that have the potential to result in unjust convictions. The use of AI in surveillance also poses risks to civil freedoms, including the right to privacy. Concerns about the right to privacy are also raised by AI systems that collect and process personal data. In addition to monitoring behavior, profiling individuals, and making decisions, personal data obtained by AI can be utilized for a variety of other applications. If the information is utilized without the knowledge of people involved, it could lead to discriminatory actions and abuses of human rights. In conclusion, AI may benefit human rights by facilitating better judgment and increasing productivity in a variety of contexts. To prevent infringing human rights, however, the use of AI must be open and accountable. 8To ensure that AI is developed and utilized in a way that respects human rights and that its effects on society are constantly monitored, it is essential to establish clear standards and legislation.

The need of the hour is to have an ethical and fundamental rights impact assessment so that we can actually realize how good or bad is this ease of AI doing to us. How will AI impact the important issues of our daily life? These new technology surely has been invested with lots of money and hope of people especially in case of healthcare and decision making process. AI also imposes certain legal and ethical questions? In order to make regulations we need to completely understand what all things can AI do which can be in our advantage or which can lead to happening of terror attacks via AI, Some sharp and evil minds would not mind using AI for the purpose of creating instant and dangerous weapons, Purpose of AI must be to compliment human life and co-exist it must work with the purpose of replacing or threatening human life. It is impossible to ignore the effects that growing use of AI will have on society. Improved earnings, wider consumer bases, and decreased chance of negative headlines are motivations for businesses to begin discussing human rights. Realizing the full economic and social potential of artificial intelligence will need a concerted effort on the part of enterprises, the creators of AI, organizations representing civil society, and the state.

## References

1. "Urgent Action Needed Over Artificial Intelligence Risks to Human Rights." UN News, 15 Sept. 2021, news.un.org/en/story/2021/09/1099972.
2. Hamet, P., & Tremblay, J. (2017). Artificial intelligence in medicine. Metabolism, 69, S36-S40.
3. Hartwig, Ben. "The Impact of Artificial Intelligence on Human Rights - DATAVERSITY." DATAVERSITY, 8 May 2020, www.dataversity.net/the-impact-of-artificial-intelligence-on-human-rights.

4. Press, Dove, et al. “Systematic Review of Artificial Intelligence and Human Rights | JMDH.” Systematic Review of Artificial Intelligence & Human Rights | JMDH, 12 Jan. 2022, https://doi.org/10.2147/JMDH.S315314.
5. Slotwinska, Karolina. “Artificial Intelligence - an Opportunity or a Threat for the Protection of Human Rights? European Research Studies Journal.” Artificial Intelligence - an Opportunity or a Threat for the Protection of Human Rights? - European Research Studies Journal, ersj.eu/journal/2849/download.
6. Winston, P. H. (1984). Artificial intelligence. Addison-Wesley Longman Publishing Co., Inc..
7. Winston, P. H. (1992). Artificial intelligence. Addison-Wesley Longman Publishing Co., Inc..



# An outreach of competition Law to circumscribe Gig workers and their Human Rights

***Anumeha Sahai*, Prof. (Dr.) J.P. Yadav*****

**Abstract**

Consumers, as well as the technology firms that created and constructed the digital platform models and act as middlemen, stand to gain the most from the rapidly expanding sharing economy (and, more precisely, the "gig" economy). Workers on the platforms have profited as well, but since they are not considered employees but rather businesses or undertakings, they do not get the same perks as employees. In addition, the terms of their employment agreements and contracts may encourage anticompetitive practises.

The study investigates the use of monopsony power in digital marketplaces, specifically how the dominance of certain large platforms as intermediaries may have a deleterious effect on the income and working conditions of independent platform employees very commonly known as Gig workers. While the paper acknowledges the limited scope of competition law enforcement to date, it does suggest that this area of law may have a greater impact on employment and labour market, especially in order to address anti-competitive and anti-trust agreements creating the harmful monopsony power. Furthermore, this article attempts to dive into the effects of restrictive covenants under Section 27, Indian Contract Act, on gig workers and how they trigger competition legislation. In this study, we examine the theoretical and practical difficulties inherent in using standard competition enforcement instruments in these marketplaces.

**Key words:** - *Gig-Workers, Competition law, collective bargaining, employees, undertaking*

* *Research Scholar, Amity Law School. Amity University, Lucknow, UP.*
*Email Id.: anumeha.sahai@gmail.com*
** *Professor & Director/HOI Amity Law School, Chairman SDC Committee, Amity University, Lucknow, UP.*
*Email Id.: anumeha.sahai@gmail.com*

## Introduction about Gig Economy

Without a clear definition, the word "gig" is meaningless. The breadth and variety of events included have expanded throughout time. In this sense, the gig economy fits into the broader category of "nonstandard employment," where jobs are temporary in nature and are not guaranteed. The duration of the employment connection, the worker's legal categorization, and the job itself are all factors that contribute to the many definitions of the "gig economy" workforce.

A perk of being a "gig worker" is having the option to split your time between many companies. Companies may control expenses by modifying the size of their flexible workforce in response to fluctuating demand, while employees get to choose the projects they work on. The independence from being tied down to one employer is often highlighted as a major benefit of the gig economy. To some, the gig economy is the pinnacle of independence, but to others it symbolises "the new precariat," in which people are left to fend for themselves. Depending on the circumstances, gig workers may be paid based on a predetermined charge agreed upon at the outset of a project, a percentage of the total cost, an hourly rate, a per-unit rate, a percentage of the final product, or some other metric.

They put in short shifts throughout the day and value their free time. Many people who work gigs do so as a supplement to their main (and often lower-paying) jobs. Additionally, according to the BCG and Michael & Susan Dell Foundation report “Gig work is not a new concept in India. With its large informal economy and ‘casual workers’ segment, India has always had the equivalent of gig work across urban and rural areas - from temporary farm workers to daily-wage construction labourer to household help.”

Personal networking have long functioned in this country to source and satisfy the need for on-demand services, and what has changed in the last few years is the growing acceptance and use of technology to match and offer on-demand services at scale.

## DELINEATING THE IDENTITY AND STATUS OF GIG WORKERS

Those who participate in the "gig economy" are typically not considered "employees" and thus do not receive the same legal protections and benefits that employees do. If a worker meets all three of the following criteria, the court will determine that he or she is an independent contractor according to the ABC test developed by the Supreme Court of California in Dynamex Operations West, Inc case. At the outset, the organisation that has hired the worker must not interfere with or guide the worker in any way while they go about completing the assignment. Second, the job should be different from what regular staff members do. Last but not least, the employee must be actively engaged in an established independent trade, activity, or company that is similar to the task





being done.

Gig workers are legally defined as contractors, but in practise they are more like employees. The United Kingdom's Court of Appeal had to consider in 2018 whether “Uber drivers were employees or independent contractors” in the case Uber BV v Aslam. As per the terms of the contract between Uber and the drivers, Uber served only as a middleman, processing bookings and payments, while the drivers operated their vehicles independently and supplied their services to riders. The Court of Appeal, however, found that the parties' uneven negotiating positions and the non-negotiable nature of the contracts meant that they did not accurately represent their actual relationship. Due of Uber's extensive oversight, drivers could not be considered independent contractors.

## Employee or Independent Contractors?

The ridesharing industry has seen the most litigation regarding the employment status of gig economy workers, but no ordinary court has held that Uber drivers are employees. But some international bodies have reached such conclusions. Classification of workers in the gig economy is easily defined as either employees or independent contractors. They are neither fully independent nor fully employed by the platform/intermediary; rather, their relationship with the company has characteristics of both. Workers' classifications are determined in different ways under the various labor, employment, and tax laws; however, there is some overlap in the most important factors that are taken into account.

One important aspect of the common law "control test" is the level of control that a prospective employer has over a certain employee. Other significant considerations include the degree of specific skill required to execute the job, the length of time the worker has been with the putative employer, the worker's entrepreneurial potential, the worker's capital investment, and the length of time the worker has been with the putative employer. Hybrids like those seen in the gig economy defy easy categorization.

A recent study found that many members of the gig economy, around 14%, perform their services on more than one marketplace. A Florida appellate court recently found that an Uber driver was not an employee of the Uber platform/intermediary, but rather an independent contractor, because the driver had significant autonomy over his or her work arrangement. It's hard to believe that many companies would give their workers complete freedom to work whenever the worker pleases, to refuse to do any specific tasks even if it means customers will go unserved, and to accept work from direct competitors.

The worker's relationship with the platform or intermediary is typically not as dependent or permanent as that seen in traditional employment relationships, which militates in favour of determining the worker's status as an independent

contractor.

Even if they wanted to be their own boss, most people who work in the gig economy can't since the only way to make more "earnings" is to work more, which isn't typical of freelancers. To decide whether Lyft drivers are employees or independent contractors is, as one district court judge put it in a high-profile case involving the company, "like being handed a square peg and asked to choose between two round holes."

**Undertaking or Employee?**

These new EC guidelines reflect the fact that self-employed individuals are considered "undertakings" and therefore run the risk of violating “Article 101 of the Treaty on the Functioning of the EU (TFEU)” if they enter into anti-competitive agreements with other undertakings.

The Commission has now confirmed that "solo self-employed" people in a position "comparable to workers" can band together to bargain over pay, benefits, schedules, vacation time, and other terms of employment with their employers before signing a collective bargaining agreement.

When policymakers have already addressed an imbalance in bargaining power in national or EU law, the Commission has stated that it will not intervene against collective agreements addressing working conditions that involve categories of sole proprietors.

According to the Competition Act of 2002, a gig worker might be considered a company. Any "natural or legal person" engaged in "the provision of services, of any kind." falls under the Act's definition of "enterprise."

With such a broad definition, all independent contractors are included. The case of gig workers is unique because the scope of collective bargaining permitted by competition law is narrower than that available to associations of workers engaged in a contractual relationship under labour laws.

## EMERGENCE OF COLLECTIVE BARGAINING ISSUES

**“Section 3(3) of the Competition Act”** in India states that there will be a presumptuous appreciable adverse effect on the competition if the agreement between enterprises or person or association of enterprise leads to the determination of purchase and sale price, imposes limitations on market in any manner (including territorial restriction), or which even leads to collusive bidding.

**“CCI in FICCI v United Producers/Distributors Forum”** held that if collective bargaining demonstrates pro-competitive benefits, then only it can be permitted. Following a logic similar to that of Europe, the Court decided that the activities carried out by an organisation should be used to determine whether or not it could be considered a business.





The Court went on to rule that a trade union that does not participate in any economic activity other than collective bargaining on behalf of its members does not fit the definition of business under the Act. So, in this case, the union may conduct collective bargaining. The members of the trade union would be considered businesses only if they were actively engaged in economic activity. In this case, the trade union's actions could be scrutinised under “Section 3(3) of the Competition Act” because it would be deemed to be an association of enterprises by virtue of its support for the enterprises' cause.

In the past, there was a clear divide between employees and independent contractors; the former were subject to their employers' rules, while the latter could pick and choose their clients and compete with one another.

There is no differentiation between employees and workers in today's gig economy. Staff members have more leeway in setting their own schedules and choosing which platforms to work on, but they do not have the same level of autonomy as independent contractors. The platforms limit the rates that workers may charge and keep tabs on customer feedback. The loss of a single client may be devastating to an organisation. While on the clock, employees must act in accordance with the company's policies. Uber and Lyft drivers must now sanitise their cars after discovering they may have been exposed to the coronavirus. Due to the large number of workers, they are unable to bargain for better pay on the platform.

If employees in the gig economy were given the right to establish unions, they might use their increased bargaining power to demand higher pay and more perks from the platforms where they find employment. When gig economy employees are not directly competing with one another, it is sense to extend the antitrust labour exemption to them. They can't lower prices or ask the platform for a smaller cut of the money if they want to bring in more clients. They are in a completely different situation from the self-employed people who were not given the antitrust labour exemption because they were in direct rivalry with one another over pricing or over clients.

**Instances where collective Bargaining was held anti-competitive**

Competition law's end goal is to keep markets competitive, and one way it does this is through investigations into cases of alleged anti-competitive collusion or dominant market position abuse that have already occurred. The CCI learned in one of the earliest cases that the ("Co-ordination Committee") and the East India Motion Pictures Association ("EIMPA") had forced two television stations to cease broadcasting the serial Mahabharta (dubbed in Bengali language). CCI ruled that the Co-ordination Committee, an organisation of artists and technicians from the West Bengal Film and TV industry, had broken the law by ordering television stations to cease airing the dubbed TV series.

## THE CATEGORIZATION OF GIG WORKERS AS EMPLOYEES OR UNDERTAKINGS UNDER COMPETITION LAW HAS PRICE FIXING CONSEQUENCES:

### Vertical Price Fixing

Potential vertical price fixing also depends on whether the involved parties are considered workers or undertakings under antitrust law. For principals to easily dictate what rates independent contractors charge their clients, principals must treat independent contractors like employees. Any pricing agreement might be a breach of antitrust law's prohibition on vertical price fixing if they are, in fact, self-employed and, so, undertakings within the sense of the law. It is possible to interpret the use of a shared algorithm as a forbidden hub-and-spoke situation, in which the platform is held liable for the contractors' insistence that clients pay the same price regardless of which contractor they use.

U.S. litigation actions against Uber for antitrust violations have brought this problem to the forefront. An antitrust violation based on the "hub and spoke" model was alleged. The regulator determined that the use of an algorithm to set pricing constituted a horizontal agreement in violation of Article 101 TFEU. However, a one-time exemption was granted because doing so would increase productivity.

Since no decision has been made in Europe regarding whether a scenario in which a platform sets prices for those offering services via that platform constitutes vertical price-fixing or a hub-and-spoke scenario, neither term can be used to characterise the situation. However, the ECJ does make it crystal clear that antitrust violations can occur via the platform.

Therefore, it may be beneficial to platforms if those offering their services via the platform are deemed employees within the meaning of antitrust law (but not from the perspective of employment and labour law or social insurance law). In that case, platform operators wouldn't have to worry about any further complications arising from antitrust law in this context.

### GIG ECONOMY formulates Labour monopsony

The rise of gig-based services like Uber and Zomato has become the "gig economy" not only a critical component of the modern labour market but also of modern digital culture. In tandem with the skyrocketing success of these platforms, several of these organisations have become monopolies. The difference between a monopoly and a monopsony is that in the latter, just one buyer has the deciding vote in the market.

When there are few viable alternative employment opportunities for workers, businesses gain monopoly power in labour markets. Workers with fewer job opportunities may feel pressured to accept low-paying, insecure jobs by employers. Because the owners of digital platforms are also the regulators and the collectors of user data, gig work, especially that housed on digital platforms,





is more susceptible to monopoly than other platforms. When Uber buys rides from users and then matches them with drivers, it functions like a monopolist.

It has been suggested in the academic community that gig labour platforms are nothing more than price-fixing schemes amongst independent contractors, which is another another example of the monopoly power that exists in the gig economy.

The usage of data by gig platforms may potentially expand the monopoly power they have over their employees.

Anti-competitive behaviour in labour markets can cause serious harm to employees, but it receives little attention from competition authorities. Companies with monopoly power in the labour market have the ability to lower employee pay and benefits, as well as lower working conditions and quality of life. Firms often use wage-fixing agreements, non-compete agreements, and non-poaching agreements as a means of leveraging their monopoly position, according to precedents brought by authorities and private litigants. As competition is reduced as a result of a merger, monopsony power is increased.

### Data driven market:

With data, companies are able to use their monopoly power in the labour market in novel ways. As a fresh form of data-enabled monopsony in the labour market, we see algorithmic management as a crucial point of junction between data and monopoly power. While algorithmic management is touted to boost productivity, investigations by journalists and others have shown that it really has the opposite effect, negatively impacting both job satisfaction and employees' sense of worth.

Due to their position as market regulators, platform operators are able to control the behaviour of employees via the imposition of rules and (dis)incentives (and consumers). The higher the switching costs for employees, the greater the monopsony power of the platform, hence disincentives against "multi-homing" are desirable. Employees are motivated to sign in and accept jobs they may not agree to base on grading systems, bonuses, and the prospect of being penalised by management algorithms.

Platform operators gain more monopoly power to collect economic surplus from labour and customers as a result of their capacity to impose such incentives. Some academics have also claimed that certain platforms should be penalised under competition law since they function essentially as a price-fixing system amongst contract employees.

Given the unique position that platforms are in as de facto market regulators, the question of whether or not they should be held to a higher legal standard to "ensure that competition on their platforms is fair, unbiased, and pro-users" arises.

Underdevelopment of Competition Law:

1. To address the unique challenges posed by data and platform monopolies in the labour market, existing conceptions of competition law may be inadequate. The Committee should evaluate the possible effects of mergers on the labour market as an early step toward addressing monopoly concerns in the labour market. By looking into whether reviewable mergers are likely to result in a weakening or prevention of competition in labour markets, the CCI can proactively prevent accumulations of monopsony power under the existing rules.
2. Second, the Act's abuse of dominance provisions, together with its other civil (non-merger) measures, are probably not helpful in resolving the issues brought up by monopsony power. While these rules are well-intentioned, they fall short because they are tailored to deal with isolated instances of anti-competitive behaviour (for example, in the case of abuse of dominance, the behaviours must be exclusionary, predatory, or disciplinary).
3. In the strictest sense, the poor working conditions generated by algorithmic management and the unpredictability of remuneration that are hallmarks of data-driven platform labour are not anti-competitive. They are effects of unfair market conditions rather than their root cause. To the same extent that competition law is not responsible for controlling pricing in a specific market, it is unable to directly address these problems under its present conceptualization and design.

## GIG ECONOMY FACILITATES VARIOUS RESTRAINTS:

### Vertical Price Restraints:

The gig economy is full with such chain-of-command structures. First, the platform determines the pricing for these purportedly separate transactions, to which it is not a party, at least according to its own pleading. In the language of antitrust, this practise is known as resale price maintenance (or "RPM"). Since the driver has no control over the prices passengers pay, they cannot be encouraged to choose services with a lower take rate and greater compensation by offering discounted tickets. Therefore, it is quite doubtful that platforms would engage in any kind of pricing or salary competition.

Walled gardens with high pricing, low salaries, and limited multi-homing or competition emerge when neither set of counterparties can influence the other, reducing the motivation for platforms to lower prices and/or boost wages. Now of a simple (if legally dangerous) agreement between the platforms not to decrease prices or raise pay, there is instead a tacitly collusive equilibrium preserved by vertical barriers prohibiting drivers from determining pricing (and an overall oligopolistic market structure). The resulting economic impact is unchanged.





### Vertical Non Price Restraints:

Incumbent gig platforms use a variety of tools to enforce the loyalty of their drivers, which in turn impedes platform competition. This goes beyond the inability to set prices so as to steer customers to lower-cost platforms. It's helpful to get a little primer on how gig labour really pans out before continuing: Users who have been "activated" receive job offers from the platform and can choose whether or not to take them. They are not compensated for the time they are on call but not being sent out. They also don't get compensated for the time they have to wait after accepting a job offer before they can get started on the actual work. Therefore, the profit made by gig workers depends on the compensated time, when they are actually performing the service, being greater than the uncompensated time, when they are waiting for fares. Taxi price and entry regulation exists to guarantee this, but in most places, there is no such external authority governing the gig economy's prices or availability.

### Non-linear pay:

Drivers who have agreed to a bonus on a particular platform can, in theory, still turn down some of the gigs they are offered without losing the bonus altogether. However, in practise, doing so gives the platform complete control over whether the worker ends up earning the bonus, since it can choose whether to offer additional jobs in the remaining time. To avoid competing against one another in the moment for drivers' time—which would have the effect of cutting take rates, to the advantage of drivers—the platforms utilise these incentives to line up their labour in advance, depending on their projections of demand. Finally, as drivers acquire expertise on the platform, the conditions of these one-time pay-outs deteriorate. Companies apparently feel that these payments are necessary primarily to "hook" drivers into making substantial financial commitments to the business, which would ultimately result in driver lock-in and decreased labour supply flexibility.

In addition to one-time payments, gig platforms utilise "non-linear compensation." In effect, they provide incentives for completing a set number of tasks. They also set aside "bonus zones" where drivers may earn a premium. Thus, the system functions as a non-linear pay structure intended to create worker dependence, allowing the platform to worsen labour standards and destroy any notion of "flexible work," as the worker cannot leave. Traditional piecework, which compensates based on productivity rather than time, is distinct from non-linear compensation methods. Piecework is considered anti-worker since employers no longer face the risk of production variances or market variables like pricing adjustments. Non-linear remuneration is exploitative since it keeps workers from leaving their firm for greater chances.

**Anti-trust law as a remedy:**

Employees may be required to execute specific work for their employer and not for anyone else throughout their employment, making resale price maintenance, non-linear pay, and minimum acceptance rates lawful. If that happened, gig economy enterprises would have to follow minimum wage and other rules. This poor behaviour has affected employees and resulted to reduced pay and higher take rates for platforms. Antitrust litigation might invalidate contested limitations. When gig workers have access to all relevant data, are paid transparently and linearly, and can choose their own rates, the advantages grow considerably. Based on how gig platforms have reacted to tougher labour laws in other countries, it's conceivable they'll reclassify their workers as employees rather than risk an injunction. Even if they don't, gig workers deserve the opportunity to unionise.

Large, dominating companies gain from the incapacity of any legislation or policy to seriously curb their power, therefore any debate about the link between antitrust and labour law, or between employees and entrepreneurs, is futile and serves only their interests. It's time to abandon the false choice between a decent standard of living and demeaning service to a brutal plutocracy in favour of a larger vision that recognises the unity of interest among the disempowered in every sector of the economy and seeks to forge a coalition that might win power in this country.

## RESTRICTIVE CLAUSES UNDER COMPETITION LAW FOR GIG WORKERS

**Non-compete clause**

When an employer and employee enter a non-compete agreement, the employee agrees not to work for a competing business, either permanently or for a certain period of time. In the same way that no-poaching agreements are used to prevent free riding by rivals with relation to know-how, training, and trade secrets, they may be utilised to generate pro-competitive efficiency outside of the franchise environment. However, these provisions also have the effect of restricting employees' ability to take jobs with other companies. As a result, they may have a dampening effect on salaries and lead to less job turnover, both of which are counterproductive in terms of maximising the effective use of workers' time.

A Non-Compete provision must be "directly relevant and required to the execution of the transaction" in order to comply with the EC Guidelines. Therefore, Non-compete agreements must not go beyond what is reasonably required to meet the legitimate goal of performing the transaction, including in terms of scope (both product and geographic), length, and people subject to the restrictions. CCI has issued a guidance note outlining the overarching principles and general approach it uses to evaluate ancillary restraints in the country.

CCI defines unreasonable as a level of curtailment that goes beyond the





objective commercial necessity of the agreement. CCI's decisional practise shows that it is fine with non-compete agreements that last no more than three to four years.

Identification of Non-compete clause as a Horizontal agreement:

Such a Non-Compete Clause may be viewed as anti-competitive if viewed in isolation. Therefore, the CCI may be able to investigate these under the antitrust provisions of Section 3(1) read with Section 3(3) of the Act.

Any agreement between rivals, either actual or prospective, that has the ability to set sale or purchase prices, restrict or control production and supply, and directly or indirectly lead to bid rigging is illegal under the Act, per Section 3(3). In India, Horizontal Agreements are deemed to have a substantial anticompetitive impact ('AAEC'), making them illegal. Nevertheless, the Act's addendum to Section 3(3) makes an exception for joint ventures that improve efficiency.

**Non-solicitation clause:**

Whether or not companies provide the same product or service, companies that compete for employees are antitrust competitors in the employment sector. Even if the objective is to save money, a company's agreement not to hire another's staff may violate antitrust laws.

CCI has encountered few cases of predatory recruitment or non-compete terms, despite judicial examination of non-solicitation. The CCI has exhibited little excitement for this task and closed the current instances as personnel issues.

Employers in the same value chain tier may agree not to poach or set pay. Section 3 of the Competition Act prohibits anticompetitive agreements between similar enterprises. Businesses that compete for employees may be competitors in the labour market and subject to Section 3 of the Competition Act if they use unfair hiring or retention practises.

The CCI may investigate industries with such pacts. One such field is information technology (IT), which is fast increasing in India and where entry-level compensation has remained essentially stable for many years. The CCI may issue recommendations or a booklet highlighting employment practises that violate competition law. It would be interesting to watch whether the Competition Commission of India (CCI) offers opposing views or tries to reconcile its attitude with that of the High Court of Delhi, which found that a non-solicitation condition between the two businesses is permissible.

## CONCLUSION

The paper essentially discusses about gig workers in the sharing economy. Various parties are benefitted from a fast-running economy and market. There exist disparities in bargaining power, that is workers even though large in

numbers do not have an upper hand. This results in a market of monopsony. Monopsony is a huge threat to competition and anti-trust laws. Further, gig workers are not even recognized as "employees" in Indian as well as EC jurisprudence. Due to the recognition of gig-workers as not employees, these gig-workers lose out on various benefits and perks that are provided to employees. Further, they also are alienated from the rights of "collective bargaining" and competition law also recognizes this right as anti-competitive due to uneven disparity. Further, several restrictive covenants like non-compete clauses and non-solicitation clauses also pose threat to fair course of business. These have been recognized as anti-competitive under Competition Act of India.

In a nutshell, Competition law hasn't been at the forefront of protection of gig-workers. There is an eminent need for competition law to expand to include gig workers.

**References**


1. Anupriya, 'Gig Sector Workers in India- legal considerations, (Lawbhoomi, 28 October 2022) accessed 23 November 2022
2. CCI v. Co-Ordination Committee of Artists and Technicians of W.B. Film and Television and Others (2017) 5 SCC 17
3. CCI v. Co-ordination Committee of Artists and Technicians of West Bengal Film and Television Civil Appeal No. 6691 of 2014
4. Competition Act 2002 s 2 (h)
5. Cremer et al, 'Competition Policy for the Digital Era' (European Commission, 2019) accessed 22 November 2022
6. De Stefano, 'The Rise of the just-in-time workforce: On-demand work, crowdwork and labour protection in the gig economy' (International Labour Office- Geneva, 2016) accessed 21 November 2022
7. GalfandBerger, 'Holding a square peg and choosing between two round holes: The challenge workers' Compensation law faces with Uber and the Sharing Economy' (GalfnadBerger, 2015) accessed 22 November 2022
8. Indian Contract Act 1872 s 27
9. Kalleberg, 'Nonstandard Employment Relations: Part-Time, Temporary and Contract Work' (Annual Review of Sociology, 21 Jan 2008) accessed 21 November 2022
10. L. S. P., & Says:, 'An Antitrust law and collective bargaining in the Gig Economy' (Law School Policy Review & Kautilya Society August 29 2020) Accessed November 23, 2022
11. Mckinsey&Company, 'Independent work: choice, necessity and the Gig economy' (Mckinsey, October 2016) accessed 22 November 2022
12. Niti Aayog, India's Booming Gig and Platform Economy, Ch. 22, 25 June 2022
13. OECD, 'Competition Concerns in Labour Markets- Background Note' (Directorate for Financial and Enterprise Affairs Competition Committee, 13 May 2019) accessed 22 November 2022
14. OECD, 'Monopsony and Business Model of Gig-Economy Platforms- Note by Marshall Steinbaum', (Directorate for Financial and Enterprises Affairs Competition Committee, 17 September 2020) accessed 22 November 2022
15. OECD, 'The Impact of the Growth of the sharing and Gig Economy on VAT/GST Policy and Administration' (OECD, 19 April 2021) accessed 22 November 2022

References

16. Uber BV v Aslam UKSC 5

# Internet of Things in Healthcare during Covid-19- Role of Intellectual Property a way forward

*Aranya Nath*, Antara Paral***

**Abstract**

This Article addresses the role of current Healthcare Techniques used in the Corona Virus battle. Covid-19, a deadly combination of viruses, has an outbreak from Wuhan, China, for the first time in 2019; to date, there's been a lot of revolution taking place in healthcare with many novel techniques. The paper discusses Digital Revolution in the health sector. The Article discusses the novelty of the Internet of things (IoT), which has an increased potential in handling patient data in a traditional form. In Covid-19 Battle where physical distance requires maintenance as it's one of the actual battles for saving lives; therefore, it seeks plausible options. Internet of things (IoT) has a role in this battle, so advocating for collaboration will help the readers better understand.

**Key words:** - *Information technology, Internet of things (IoT), Healthcare, Covid-19, Intellectual Property*

## 1. Introduction of Covid-19 Battle in Healthcare

All the doctors and nurses are working round the clock for the proper treatment with full safety precautions for defeating the virus and addressing the community about the devastating effect of the Pandemic. Because of the Covid-19 battle, a large number of human losses take place. India reported the first case of Covid-19 on January 27, 2020, in Thrissur Kerala. Within 4-5 months, the Covid-19 hits across the country. Ministry of Health and Family Welfare, on March 24, 2020, issued the first lockdown for twenty-one days which has been increased subsequently as per the recommendations given by the WHO initially, calculated the data based upon the RTPCR test conducted. Although the frontline workers are combating the treatment of thousands of people, they

* *School of Law, GITAM University, Visakhapatnam, India*
*Email Id.: 1684002@kls.ac.in*
** *School of Law, IFIM University, Bangalore, India*





cannot transmit the virus through contact. Our country's current economic status is plummeting as Lockdowns have been initiated to curb the social gatherings among the people so that there's less chance of getting transmission of novel Corona Virus. As a result, markets are fully closed, and daily wage earners are completely setbacks at home. A financial crisis arises, so many problems are coming up every day. The governments are trying to control the spreading of Coronavirus. Irrespective of several precautions adopted, the cases increase rapidly; therefore, the new technique adopted by the doctors for saving the lives of the people.

After implementing radio frequencies, a famous scientist has coined the term Internet of things (IoT), "Kevin Ashton," after implementing radio frequencies. Within a few years Internet of things (IoT) has gained a lot of revolution in the healthcare system. Internet of things (IoT) defines as a technique used to link various technologies like sensors remote devices to advance medical procedures.

This technology was a boon for Medical health care during Covid-19 as it sorted out the health issues by providing prior notifications through sensors. Many people are dying because of a lack of information related to this disease on an initial basis. This technology can monitor a person's everyday activities and send notifications if there is a health crisis. A successful procedure in the medical domain necessitates using the correct equipment. IoT has a strong capability to do effective strategies and assess significant advances after the treatment. During the COVID-19 Pandemic, the Internet of things (IoT) improves inpatient care. Internet of things (IoT) allows for real-time surveillance, which saves lives from many chronic diseases such as diabetes, heart failure, asthma attacks, blood pressure, and so on. Innovative medical equipment is linked through a smartphone to communicate essential health data to the physician seamlessly. These sensors also capture data on oxygen, blood pressure, weight, and sugar levels, among other things.

Since it's booming, it can estimate that by 2025-26 Internet of things (IoT) will gain popularity as a reliable digital information system. Therefore licensing is required to safeguard from third parties/infringers. Thus to comprehend the connection between Intellectual Property and the Internet of Things in medical services, it is essential to feel that Intellectual Property should safeguard its reason.

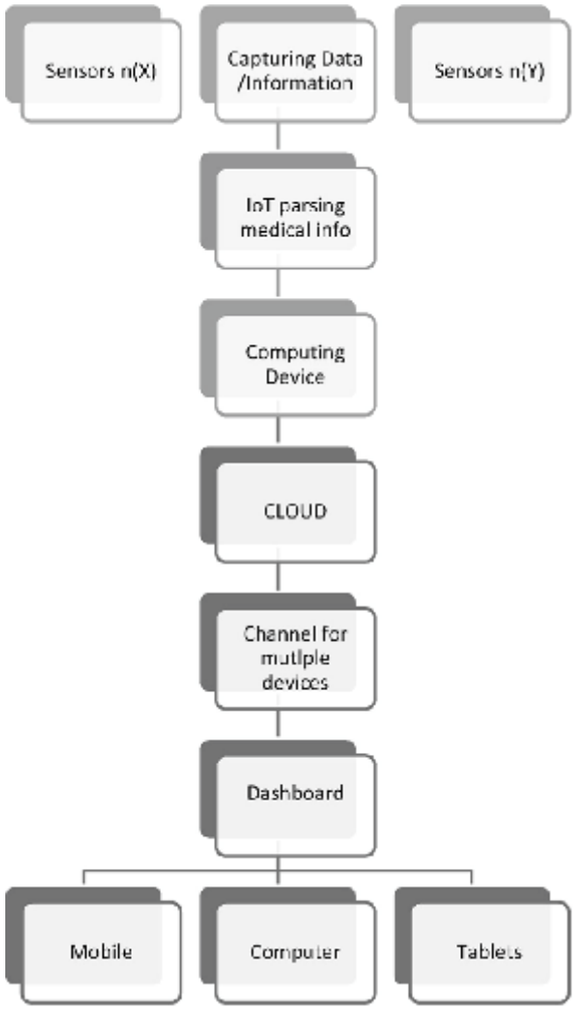
Intellectual Property Rights are legal rights that regulate the application of creativity and innovation. Generally, intellectual Property entailed a distinctive and more challenging set of regulations for misappropriation and possession. However, these dimensions are often inconspicuous and challenging to establish than actual objects.

## 2. Importance of Internet of things (IoT) during Covid-19 Pandemic

It is well-known to everyone that Corona Virus has three phases in the early stages around march- April when the first nationalized Ministry of Healthcare

has initiated lockdown; there's an essential need for faster improvement of Covid-19 diagnosis. It is contagious; therefore, Even an asymptomatic patient can easily be diagnosed with Corona Virus. As a result, the transmission of disease increases rapidly. Internet of things (IoT) plays a considerable role by connecting medical tools to create an intelligent system per Covid patient requirements. Internet of things (IoT) has the excellent capability and high quality of sensors used to accelerate the detection process by capturing the patient's health data stored. It helps to analyze data efficiently; all the records are adequately maintained, which can be shared with doctors in case of emergency arises.

The entire Internet of things (IoT) has been carried out through a systematic process.




**"Fig. 1: Shows the Process of Internet of things (IoT) in medical fields."**





In the second phase, which refers to the quarantine phase, according to WHO mandate, isolation for a couple of periods is better for treating the patients suffering from Covid-19 at that time IoT devices, i.e., IoT buttons drones are there to diagnose the patients with due care.

**Drones Technology**

Drones are referred to as simple aircraft which can easily blow away. It has first come into the eyes of the people during the war between Italy and Austria. It is also referred to as an unmanned aerial vehicle (UAV). When the Internet of things (IoT) is connected with drones, it helps to leverage various possible tasks as it increases the plausibility. During the early phase of Covid-19, the entire world was fighting to survive the deadly Corona Virus.

At that time, this technology was a boon as it had a good track record in finding out the infected people from the crowd so that they should be isolated for treatment and chances of transmission would be less. It helps to check the temperature of the people among the public and can also reach easily towards the possible location where accessibility isn't easily achievable.


**"Fig. 2: It shows the Drone Structure in diagnosis."**

IoT Buttons

In general, an IoT Button is a configurable technology that can implement for repeated operations., During this Pandemic, IoT buttons can play a significant role in notifying authorities or a patient's family of any contaminated zone or emergency. Devices are primarily instructed to inform the authorities in a crisis with necessary maintenance or public health and safety.

**Tele-Robots**

Tele-Robots are an amalgamation of telecommunication services that focus on medicine. Often it is controlled manually by a human and may give various

benefits to patients such as Telemedicine, virtual surgeries, and digital medications with no human interface throughout the procedure. A nurse, for example, uses these robots to analyze patients' temperatures without approaching them. Doing treatments remotely helps to prevent infections.

## 3. Positive Impact of Internet of things (IoT) in Covid-19 Pandemic

Internet of things (IoT) provides the most substantial and most positive impact in the revolution of Healthcare during Covid-19. It quickly detects the ailments. Therefore, it has a strong manifestation in providing the best treatment through early detection, and constant monitoring is there, which helps the doctors to isolate the patients. It establishes a centralized management infrastructure at a hospital where all operations are electronically documented and may leverage other data mining techniques to tackle issues during the COVID-19 Pandemic. This equipment enables effective monitoring of patient health and keeping precise decisions during challenging circumstances. It informs about any impending illnesses and suggests a remedy for their protection by closely monitoring the overall health. It assists in monitoring an upper respiratory infection and serves as a warning to take prescribed medicine.

## 4. IP protections for digital health-tech

### a) Justification of Intellectual Property- special reference to social awareness.

In India, the IPR framework is very stringent. Still, the techniques used in medical science are under the surge of innovation; therefore, it should adopt the licensing policies under Intellectual Property to safeguard the infringer techniques. Intellectual Property has been justified based on "Article 27 of the Universal Declaration of Human Rights", where everyone has the legitimate right to reap the benefits of the scientific art of inventions. Thus the scope of Intellectual Property came into the limelight from the conception of general interest to Human-specific interest. The implementation of the value of Data in Intellectual Property is directly proportional to the benefits of the idea of common goods. Thus it can't be separated from the concept of implementation of Intellectual Property Laws.

Thomas Jefferson stated that individuals might possess rights to an insight that happens about them as provided as he maintains it to himself and thus does not communicate it with others. Nevertheless, once the concept has been disseminated and forwarded onto everyone, the openness of the concept turns instantly accessible. Thomas Jefferson highlights the insight of "divine rights," It thus signifies that must foster an ideology articulated in significant activities to propagate for the public interest to integrate one personal standard of living and conscience. It helps in sustainability, and divine rights are primarily advocated in commodities such as nutrition, healthcare, and schooling.





### b) Development of Healthcare Jurisprudence

"The theory of the Product of Nature is widely accepted in the United States. According to this philosophy, every type of structure artificial is patentable, while things in their original condition, i.e., the product of nature, are not." "The Purified and isolated teaching," on the other hand, is an exception to the "Product of Nature doctrine. According to this idea, pure and separated natural substances are patentable if the act of isolation makes them more valuable than in their original condition." Furthermore, in the landmark decision "Diamond v. Chakrabarty," the "US Supreme Court" set the door for life patents by ruling that "everything under the Sun that man produces is patentable."

The Court ruled in this case that "non-naturally occurring man-made life, such as genetically modified microorganisms, are patent-eligible." "The natural formation and extent of human activity, and even the degree of surplus value by such intervention, are the factors used to determine whether or not a patentable invention has been developed." This ruling paved the way for biotechnology patents to flood the market.

Although it did not address the "eligibility of gene patents," this ruling served as the foundation for DNA patents. "Given the "Isolated and Purified" exception to the "Product of Nature doctrine" and the US Supreme Court's decision in "Diamond v. Chakrabarty," the US Patent and Trademark Office took a more liberal approach to gene patents.

Claiming that "gene sequences were compositions of matter isolated by man and markedly different from what is found in nature." "In 1991, the Federal Court upheld the Patentability of compressed and reproduced DNA sequences in Amgen, Inc. v. Chugai Pharmaceutical Co." However, the legality of patenting the "BRCA112 and BRCA213 genes," In the case "Association for Molecular Pathology v. Myriad Genetics, Inc., "variants that can drastically raise the risk of breast and ovarian cancer were recently brought into doubt."

The United States Supreme Court unanimously declared that "a naturally existing DNA sequence is a product of nature and is not patentable merely because it has been isolated," but that "DNA is patented because it is not naturally occurring." In constitutional interpretation reasons, the idea that they will have life is grossly inadequate to be considered a relevant component within itself. The Court ruled that Congress is better prepared to deliberate on the matter above since it could not balance the various values and interests represented therein. Finally, it clarifies that because patent laws include materials such as those in the conflict in this case within their scope, no legislative framework exists to exempt it. The only suitable finding is that microorganisms produced using Recombinant DNA technology are eligible for patent protection.

### c) The Protection of IP Rights in Digital Health Technologies

Digital Health was increased rapidly with the growing technology before the Covid-19 Pandemic hit. However, its inception after the Healthcare crisis started due to the outbreak of Covid-19. Internet of things (IoT), smart wearables, m-health, Telehealth all have cost and adequate IP protection, with the rapid growth of digitization.

In this context, the Internet of things (IoT) is referred to as machine learning communication, which has a lot of improvement in healthcare owing to 3d Printing. This manufacturing process uses a variety of polymers. It prints three-dimensional figures layer upon layer. Indian market is considered the fastest growing market in every domain. In the case of 3D Printing in India, hospitals are receiving various Applications for this technology, which has helped treat complex heart disease. Earlier patients who were in urgent need of prosthetics had to chip off extra inches of bone, but with the help of 3D Printing, patients can get customized prosthetics and recover speedily. Therefore Intellectual Property has a significant role in incentivizing the development of new technological services by enabling IPR holders to exclude third parties from using their inventions and creations for a set period.

Copyright

The first criterion for Copyright protection is the work's originality. Copyright is a jurisdictional right. It encompasses the registration and authorship of the creative ideas expressed as India is a member of the Berne Convention. Under the "Indian Copyright Act 1957, literary works include computer data protection and databases rights." Software protection is essential as the patents act has a bar on computer inventions. Therefore, all the databases or electronic health records and the software installed in the Internet of things (IoT) are protected under Copyright Act 1957.

Patents

As Indian Patent Act 1970 is stringent in India, there's no such legislation arising in the protection of IoT Devices. As a result, it becomes difficult, but after the advent of "Ferid Allani v Union of India," computer-related innovations (CRI) involving software are analyzed to comply with the "Indian Patent Office's Guidelines for Examining Computer-Related Inventions." However, as companies increasingly rely on computational operation models, Indian courts' opinions on what qualifies for Patentability have become more dynamic. "While deciding a case of a Patentability debate encompassing a CRI, the panel relied on the scope of Section 3(k) of the Patents Act, observing that this bar on patenting is in respect of "computer programs per se."

While rather than "all inventions based on computer software incorporated in words per se" to ensure that inventions based on computer programs were not refused patents. While the integration of the term has exacerbated a little ambiguity about the Patentability of CRIs, it has functioned as a vital objective by removing the complete ban on patent protection in CRIs.





Trade Secrets

Establishing an innovative layout takes a substantial commitment of both finances, however once developed, replicating such a design is affordable and straightforward via decrypting. As a result, while the layout design is going through the registration and evaluation processes, it is essential to know how to maintain the knowledge concealed from competition to boost long-term growth and innovation. It is possible because of the confidentiality offered by trade secrets. When you choose open source development software, the software may also benefit from this protection.

Integrated Layout Design

A device's aesthetic and sensation are just as essential as its performance in today's environment. Although an IoT sector's achievement is focused on its functionality, market dynamics demonstrate that customers favored one device over the other based on its look rather than its utility. Consequently, an IoT development needs to think beyond functionality and build an attractive appearance. Therefore, the safeguarding of this design is essential, as any third party can produce a counterfeit and benefit or damage the reputation and goodwill.

## 5. Managing IP Licensing Agreement

**SEPs Licensing:** It refers to the Technologies that Patents can easily protect. It stated that essential technology is protected by Standard Essential Patent. It is a patented integration product that is recognized as a necessary feature for producing a standard generic product that can be used for smartphones. Without using it, it will not perform. It also raises competition Laws as it results in an agreement between two manufacturing companies competing.

**Patent Pools:** When two companies came to the decision of licensing their patents to free levying charges determined previously as a royalty income among themselves or to third parties, it refers to the pooling of Patent

## 6. Encouraging Social Functions of Intellectual Property

Digital health is a pretty recent business that thrives at the confluence of health, creativity, technology, medical devices, and pharmaceuticals. Most digital health systems rely extensively on data to support diagnosis, treatment, prevention, and disease monitoring. The extensive use of creativity in the digital health system mandates comprehensive IP Rights protection. On the other hand, the public health emergency necessitates the widespread application of the social function to assure availability, accessibility, and cost.

For instance, a patent; a licensing agreement offers the integration of a social role as a counter to the patent's exclusive rights and monopolistic nature. Then it might constitute a significant risk to human health since the patentee wields

tremendous control over the price, the quantity of supply, and the availability of healthcare of a product or technology. As the international framework for Intellectual Property, the TRIPs Agreement constitutes public health protection as part of the "Doha Declaration, which states that should implement the TRIPs Agreement to support WTO member states' efforts to protect public health by providing versatility and protections."

Parallel importation is also essential in protecting public health, specifically in the Covid-19 outbreak, wreaking havoc on several nations. Parallel importation enables importing patented products from a third country to be marketed at a reasonable cost. It is necessary to perpetuate societal discretionary income and satisfy medical requirements. This proposal is intriguing and realistic, specifically for underdeveloped and least-developed nations with relevant industrial factors to enhance their pharmaceuticals.

## Conclusion

Based on the above discussion, it is evident that IoT will analyze the patient's condition instantaneously in the coming years. This technique will electronically record all specific info to avoid recurring complications with the COVID-19 patient's medication. The utilization of slashing technology will dramatically improve the healthcare system, and doctors will be required to embrace them. The Internet of Things (IoT) is a sophisticated advanced field with numerous applications in generating precise medical treatment, giving up an efficient method to evaluate sensitive files, information, and diagnostics. As an incubator, IP Policies are fair enough to safeguard the novel techniques from infringement.

## References


1) Ali ZH, Ali HA, Badawy MM (2015) Internet of things (IoT): definitions, challenges and recent research directions. Int J Comput Appl 128 (1):37–47
2) Amy Corderoy, BRCA1 GENE PATENT RULING TO BE APPEALED THE SYDNEY MORNING HERALD, Available at: http://www.smh.com.au/national/brca1-gene-patent-ruling-to-be-appealed-20130304-2fg1f.html (last visited on March 16, 2022)
3) Ashton K, et al. (2009) That 'internet of things' thing. RFID J 22(7):97–114Return to ref 1 in article
4) Avgousti S, Christoforou EG, Panayides AS, Voskarides S, Novales C, Nouaille L, Pattichis CS, Vieyres P (2016) Medical telerobotic systems: current status and future trends. Biomed Eng Online 15(1):96
5) Chamola V, Hassija V, Gupta V, Guizani M (2020) A comprehensive review of the COVID-19 pandemic and the role of IoT, drones, AI, Blockchain, and 5G in managing its impact. IEEE Access 8:90225–90265
6) Christaki E (2015) New technologies in predicting, preventing and controlling emerging infectious diseases. Virulence 6(6):558–565
7) D'Arcy v Myriad Genetics Inc [2015] HCA 35 HIGH COURT OF AUSTRALIA FRENCH CJ, KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ https://wipolex.wipo.int/zh/text/579044 (last visited on March 16, 2022
8) Diamond v. Chakrabarty, 447 US 303https://supreme.justia.com/cases/federal/us/447/303/ (last visited on March 16, 2022
9) First confirmed case of COVID-19 infection in India: A case report by M.A. Andrews Department of Medicine, Government Medical College, Thrissur 680 596, Kerala, India accessed in https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7530459/
10) Haleem A, Javaid M, Vaishya R, Deshmukh S (2020) Areas of academic research with the impact of COVID-19. The American Journal of Emergency Medicine
11) IoT in healthcare market. (2020) https://www.marketsandmarkets.com/Market-Reports/iot-healthcare-market-160082804.html . Accessed March 16, 2022.
12) Kardasz P, Doskocz J, Hejduk M, Wiejkut P, Zarzycki H (2016) Drones and possibilities of their using. J Civil Environ Eng 6(3):1–7
13) Naughton R (2007) Remote piloted aerial vehicles: an anthology. Centre for Telecommunications and Information Engineering, Monash University,
14) Nomani, M.Z.M. Right To Health: A Socio- Legal Perspective. 56 Uppal Publications. New Delhi; 2004.
15) Nomani, M.Z.M.,Rahman F, Intellection of Trade Secret and Innovation Laws in India: 16(4) Journal of Intellectual Property Right. 2011; p. 341-350
16) Rouse M (2019) Drone (UAV). https://bit.ly/2ZHuonE . Accessed March 16, 2022
17) State V (2020) Visionstate ships first IoT buttons for rapid response to cleaning alerts. https://www.globenewswire.com/news-release/2020/03/23/2004645/0/en/Visionstate-Ships-First-IoT-Buttons-for-Rapid-Response-to-Cleaning-Alerts.html. Accessed March 16, 2022
18) The COVID-19 Pandemic and Mental Health – An Introduction by Pratima Murthy accessed in https://www.mohfw.gov.in/pdf/COVID19Final2020ForOnline9July2020.pdf
19) Zhang SX, Wang Y, Rauch A, Wei F (2020) Unprecedented disruption of lives and work: health, distress and life satisfaction of working adults in China one month into the COVID-19 outbreak. Psychiatry Res 112958

# Conceptual Positioning of Energy Democracy in India's Transition to Green Energy

*Arpit Vihan* and Sasksham Misra***

**Abstract**

This paper attempts to conceptualize the idea of Energy Democracy in the India's Transition to clean energy sources, which has de-carbonization at its core. The authors in this paper have argued that the phenomenon of clean energy transition will have the social and economic implications on Indian society and therefore it needs a democratically guided execution.

The authors have attempted to conceptually position the idea of energy democracy in the energy transition process. They have answered the fundamental questions as to why India needs an energy democracy and what it exactly means. For the purpose of exemplifying the application of energy democracy, the authors have conducted a case study analysis of growing land disputes in India's Renewable energy expansion.

Lastly the authors have concluded the paper by highlight the future scope of research and application of energy democracy in India's clean energy transition.

**Key words:** - *Energy Democracy, Green Energy, Transition, India, etc.*

## 1. Introduction

This research paper attempts to conceptually position the novel idea of energy democracy in India's transition to green energy. Presently India is executing a rapid energy transition with De-carbonization at its core. India has committed to meeting 50 percent of its energy requirement from renewable by the year 2030 (Manohar, 2021a). This needs a strategic transition towards clean energy sources and changing fossil fuel-centric energy systems. India has initiated the shift, and aggressively increasing the installed capacity of renewable energy (Taguibao,

* *Asst. Professor, Karnavati University, Gandhinagar*
*Email Id.: arpitvihan@gmail.com*
** *Asst. Professor, Karnavati University, Gandhinagar*





2019). This transition will introduce new forms of complex technologies to the Indian society. The unique conditions of technologies will change the nature of energy for consumption, energy access patterns, energy distribution systems, energy prices, and infrastructures. These changes will have direct and indirect implications on the lives of the citizens in different manners (Lucas 2021).

This brings us to the fact that technology has a deep nexus with society. Technology-driven changes can diversely impact society. The energy transition is a revolutionary technology-based change in the energy sector that will profoundly affect society (Kaisa, 2022). Some scholarly writings have argued that the technology-driven energy transition will create a societal stimulus. Scholars have argued that the said transition can be an opportunity to fill the existing gaps of energy divide, poor access to energy resources, and affordable energy pricing energy colonialism (Raphael 2016).

There are arguments which also state that green energy transition can lead to instances of severe social injustice. It can deepen the existing social inequalities and create unrest in societies in the context of sharing benefits and burdens (Arugay, 2020). The authors have extended this argument and tried to establish a nexus between energy democracy and green energy transition. The principles of energy democracy will guide the direction of green energy transition and help in consensus building within the citizenry for accepting the technology-driven evolution. Scholars are applying the concept of energy democracy to resolve the social conflicts arising from it (Araujo, 2014).

## 2. Why does India need Energy Democracy?

The idea of democracy in the energy sector or energy governance has emerged because of the transition in the energy sector. This transition is about decarbonizing the energy system and moving towards green energy sources. It is almost equated to a global "third industrial revolution (Pallett, 2018a)."

The global experience of the energy transition has revealed that it has created local unrest among the country's citizens. The technological changes have resulted in a protest by the citizens for issues like loss of land, loss of employment in the coal-based electricity sector, excessively high pricing of clean technologies (Aggarwal, 2022). In India, in the western state of Rajasthan, Gujarat, local communities are protesting against the solar energy plants and wind energy parks (Jain 2018). Renewable energy also has environmental concerns which need to be carefully dealt with. There are reports regarding the harmful effects of power transmission lines in the desert states of Rajasthan. The transmission lines resulted in the death of extinct species of birds due to collusion with power lines (The Hindu, 2021a). Recently the Supreme Court of India has pronounced the decision highlighting the instances of environmental injustices due to the power projects (Times of India, 2022). Thus it is evident that the energy decision making in India with respect to transition towards clean energy, needs to be done considering the interest of society. This requires

strategic democratization of energy governance and decision makings.

Another set of arguments for supporting energy democracy, is that India is witnessing an aggressive expansion of renewable energy, majorly wind and solar energy projects. This leads to massive acquisition or procurement of lands, majorly the rural or wasteland, used by the indigenous communities or rural population of India. Until today there is no policy framework in place that ensures free prior informed consent of the communities who will host the renewable energy projects in their backyard or are asked to give up their land rights for the development of the projects (Kuruvilla 2019).

The idea of energy democracy recognizes and establishes the nexus between society and technology (Biezenbos 2018). It is a framework that enables the conceptualization of social problems related to the energy transition. By infusing the aspect of democratic decision making India's energy transition will become more participatory and inclusive. It will give due representation to the communities interested in energy decision-making and are directly or indirectly affected by the implication of the results (Sahu 2019).

Some scholars have argued that the attitude of the citizen toward new technologies can be changed positively if they are provided with the information and consulted. The flow of correct information about the latest technology helps to change the citizenry's attitude (Bidwell 2016). By making the process of decision making the process of energy decision-making more participatory, the local communities can be well-informed about the said project. This can help in consensus building for the said project and help in fetching social acceptance for the project.

Another problem with the governance of complex technology-based systems (energy) is that it is evolutionary and needs experts. This problem of accelerating technological evolution was supposed to be resolved by including technocrats who were assumed to be playing the educator role and mediating for democratic governance (Gomez 2022). But instead, it was reversed, and the government became technocratic and elitist. Thus, the energy sector, traditionally called highly technology-centric, remained governed by the technocrats. This has ignored the voices of ordinary citizens in policy formulation and reduced the role of social scientists in determining energy policies. But the need for social scientists and participatory policymaking was realized with climate change, energy poverty, unaffordable energy pricing, and other forms of injustice-centric issues (Yuncheol 2022).

Energy democracy-based practices allow the space for social scientists like lawyers, sociologists, or civil societies to indulge in meaningful dialogue on the social issues concerning the energy sector. Many countries are already executing the democracy-based model to ensure participation and representation in energy decision-making.





## 3. What is Energy Democracy?

The idea of energy democracy has its genesis as a political movement, where communities have protested against wind farms or nuclear energy plants (Szulecki 2017). There are scholarly writings which have conceptualized energy democracy as an established principle and differentiated it from other principles like energy justice, environmental justice, or environment democracy (Thombs 2019). There is no uniform definition of energy democracy; it is still not accepted in the academic realm. Though there are many suggestions as to what exactly democracy means in the context of the energy sector. The most common elements of suggested definitions are –

Enhancing the public element in Energy decision-making - Energy decision-making includes decisions about who will produce, for whom to produce, and who will operate or own the energy infrastructures. These decisions are fundamental to energy governance, thus involving a public element, which will make the governance more transparent and democratic.

A public element means encouraging the participation of all the stakeholders in the decision-making processes. This reflects the idea of ensuring procedural justice in energy governance (Pallett, 2018b).

Bringing energy systems under public or community-based ownership – It essentially calls for decentralizing energy production and allowing the public ownership model in the energy production domain. There are arguments against energy dominance by scholars who are against private corporations owning and controlling energy technologies and infrastructures (Burke 2017). Thus energy democracy calls for strategic decentralization of energy production systems.

The authors of this paper have conceptualized the idea of energy democracy using the "Principle – Outcome" approach. Table 1 is the tabular representation of the authors' conceptualization of energy democracy.

| **Principle** | **Outcome** |
|---|---|
| As a Political Goal | De Centralization of Energy Governance |
| As an ongoing Process | Participatory and Inclusive decision making |

**Table 1. "Principle – Outcome" based conceptualization of Energy Democracy**

**As a Political Goal** – It conceptualizes Energy Democracy as a utopian political goal towards which our policies should be directed. The outcome of a political goal-based conception is strategic decentralization of energy governance. The term "Energy Governance" includes laws, policies, decision-making, and politics.

**As an ongoing Process** - By this principle, Energy Democracy is conceptualized as a continuous process that aims to devise a participatory and inclusive energy decision-making process. The outcome of inclusive decision-making will enhance the quality of decision-making, which ultimately reduces the instances of protest and unfriendly attitudes of the citizens towards new technologies like Solar, Wind Energy.

## 4. Case study of Solar and Wind Energy Expansion in the States of Rajasthan and Gujarat

The objective of including a case study in the paper is to exemplify the problems concerning green energy transition in India and how energy democracy can help in resolving the problems. India is heading towards becoming the hub of solar and wind energy-based electricity production. It has already installed around 408.72 GW (Manohar 2021b) of renewable energy-based capacity and aiming to increase it in the coming future.

The Geography of the states of Rajasthan and Gujarat are suitable for harnessing energy from solar and wind-based plants. Accordingly, state and central governments have strategically developed wind and solar energy parks in the said states. The said wind and solar energy parks are land intensive, requiring vast tracks of land for the installation. A series of incidents reported where the citizens of the nearby areas, where the said renewable energy projects are developed have protested against the development (The Hindu, 2021b).

### 4.1 Major Reason for Protests against Land acquisition for Renewable Energy Projects

- State governments acquire fertile Agriculture lands under the land acquisition laws of their respective states. It is one key reason behind the unfriendly attitude of the local communities against renewable energy expansion. These projects are land intensive and require a massive chunk of land. Recently, agricultural land was allotted to the project developers in the States of Rajasthan and Gujarat. This resulted in the loss of land of the local villagers and also the loss of employment opportunities.
- With the loss of land in renewable projects, the local communities are confronting the problems of loss of livelihood and employment opportunities.
- Renewable projects are causing the loss of grazing lands used by cattle.
- Loss of lands that have religious and environmental relevance for the indigenous communities, which they have protected for centuries. In India, the land is not only relevant for agriculture or economic reasons. Some communities worship the land because they consider them religiously sacred. A classic example of this can be seen in the western desert district of Rajasthan, where the Oran land was worshiped and protected by the local communities for over 500 years. Recently the said Oran land was allocated to the renewable energy corporation, which has destroyed the land. The local communities have protested against the arbitrary allotment of lands without taking consent and following due process (Aggarwal 2020).
- Renewable projects are less job-friendly for the rural and indigenous populations. Studies have been conducted by scholars who reveal that renewable energy projects are job friendly only for skilled labour (Devine-Wright, 2007). Renewable energy projects generally provide jobs to skilled workers or to the person who is technically qualified. As the construction phase ends of the renewable energy projects, employment opportunities also decrease, and only jobs like security guards or solar panel cleaners are given to the local community (Sharma 2022).

### 4.2 Non - democratic legal structure for the acquisition of Lands for Renewable Energy Projects

| **At Center Government Level** | **Land Acquisition Act 2013** | **Provides for Adequate Compensation and Rehabilitation of the People whose lands are acquired.** |
|---|---|---|
| At State Government Level | State Government policies for Solar and Wind Energy Project developers dealing with acquiring or procuring lands. | It bypasses the norms of fair and equitable compensation and rehabilitation the central government legislation provides. |
| Environment Impact Notification 2006 | It has classified Wind and Solar energy projects in "White category" projects; therefore, they do not require to abide by the public consultation processes. | Renewable energy-based projects are exempted from the requirement of mandatory EIA. |

**Table 2. Laws governing the procedure for land acquisition for Renewable projects in India**

If the projects are related to the central government's scheme, then the land is generally acquired under the Land Acquisition Act of 2013. Also, sometimes the government allows the project developers to procure the lands directly from the private parties by paying them the price of the land and with their consent. The land acquisition act provides for the adequate compensation and rehabilitation of the people whose lands are acquired under it.

In case the project developers approach the state government, or the project belongs to the state scheme of the state government. Then the state government acquires the land under the concerned state legislation. As per India's constitution, the land is part of the state list. Also, state governments have specific policies enacted for developing renewable energy in the respective state. They provide for the land banks and another portal that provides the data of the land and its nature in the concerned state.

For the environmental impact assessment, the notification of 2006 applies to all the projects concerning the development. As per the present notification, renewable energy projects like solar and wind are classified as white industrial projects, and no EIA is required for developing such projects. Thus technically, no requirement for conducting any EIA or social impact assessment is required (Thapar 2017).

Although the project developers of the renewable energy projects in India conduct the environmental and social impact assessment the World Bank gives, they do this to make their projects bankable. They secure finance from international institutions.

The net effect of these laws and policies is that the renewable energy projects are generally acquired under the scheme of renewable energy policies of central and state governments. As EIA is not a mandate for renewable energy projects, therefore no social impact assessment is conducted. This makes the process of land acquisition for the renewable energy projects highly exclusive and non - democratic.

### 4.3 Participatory and Inclusive Decision Making

The primary reason for the unfavorable public attitude against renewable energy projects in India, is centralized and exclusive decision-making. The decisions regarding site selection for the development of renewable energy projects are made without consulting the local people who will host the said project. This exclusive decision-making has led to a lack of information flow and poor representation of the local people.

The idea of energy democracy calls for participatory and inclusive decision-making. It requires that all the interested stakeholders must be consulted and given adequate representation in the decision-making process. This will allow the local population to share their issue in an open forum and allow the state authorities or the developers to resolve them (Stephens 2017). This process is an effective mechanism to build a positive attitude and social acceptance for renewable energy projects.

## 5. Conclusion and Suggestion

Energy Democracy is the nexus between society and the energy system. This idea holds relevance in the context of India's clean energy transition. The





technology-driven evolution needs to be guided using the principles of democracy and justice. Otherwise, it can lead to serious social injustice issues. The global community has already started the discourse on "Just Energy Transition"; they have institutionalized it through forming commissions and bodies. It is time for India to take energy democracy as a theoretical base and institutionalize it.

The authors would like to propose the following suggestions-

1. Indian academicians and scholars should take "Energy Democracy" as a topic to develop through multiple perspectives.
2. Indian Energy sector policymakers should gradually infuse energy democracy in principles and practice.

## REFERENCES:


- Aggarwal, M. (2020). Wind-solar parks: Conflicts galore but India wants more. Mongabay Series: Just Transitions. https://india.mongabay.com/2020/11/wind-solar-parks-conflicts-galore-but-india-wants-more/
- Aggarwal, M. (2021). Land conflicts on the horizon as India pursues a clean energy future. Clean Energy, Just Transitions. https://india.mongabay.com/2021/07/land-conflicts-on-the-horizon-as-india-pursues-a-clean-energy-future/
- Araújo, K. (2014). The emerging field of energy transitions: Progress, challenges, and opportunities. Energy Research & Social Science, 1, 112–121.
- Arugay, A. (2020). The Resilience of Democracy. Asian Policy & Politics, 12(4), 500–501.
- Arugay, A. (2022). Can democracy be defended globally? Asian Policy & Politics, 14, 5–6.
- Bhardwaj, A., & Kuruvilla, B. (2019). Energy and Climate Change: A Just Transition for Indian Labour. In India in a Warming World: Integrating Climate Change and Development. Oxford Academic. https://doi.org/10.1093/oso/9780199498734.003.0017
- Bidwell, D. (2016). The Effects of Information on Public Attitudes Towards Renewable Energy Energy. Environment and Behavior, 48(6), 743–768.
- Biezenbos, K. (2018). NEGOTIATING ENERGY DEMOCRACY. The Journal of Land Use & Environmental Law, 33(2), 331–342.
- Devine-Wright, P. (2007). Reconsidering public attitudes and public acceptance of renewable energy technologies: A Critical Review. Beyond Nimbyism: A Multidisciplinary Investigation of Public Engagement with Renewable Energy Technologies, 1, 1–15.

- Gomez, S., Peterson, T., Endres, D., & Feldpausch-Parker, A. (2021). Routledge Handbook of Energy Democracy (Vol. 1). Routledge.
- Heffron, R., & Talus, K. (2016). The development of energy law in the 21st century: A paradigm shift? The Journal of World Energy Law & Business, 9(3), 782.
- Jain, P. (2018, January 31). Energy Democracy: Where 'two Indias' meet. Down to Earth. https://www.downtoearth.org.in/blog/energy/energy-democracy-where-two-indias-meet-59590
- Kaisa, H. (2022). The contribution of energy law to the energy transition and energy research. Global Environmental Change, 73. https://www.sciencedirect.com/science/article/pii/S0959378021002338
- Kumar, A., & Thapar, S. (2017). Addressing land issues for the utility scale Renewable energy development in India (pp. 37–42). SHAKTI, Sustainable Energy Foundation, TERI School of Advanced Studies. https://shaktifoundation.in/wp-content/uploads/2018/01/Study-Report-Addressing-Land-Issues-for-Utility-Scale-Renewable-Energy-Deployment-in-India.pdf
- LANGA, M. (2021). Residents of Gujarat village protest against windmills being set up on forestland. The Hindu. https://www.thehindu.com/news/national/other-states/residents-of-gujarat-village-protest-against-windmills-being-set-up-on-forestland/article35781540.ece
- Lucas, H., Carbajo, R., Machiba, T., Cabeza, L., & Zhukov, E. (2021). Improving Public Attitude towards Renewable Energy. Energies MDPI, 14(15), 4521.
- Manohar, A. (2021). India is 3rd most attractive for Renewable Energy investments and deployments. Invest India- National Investment Promotion & Facilitation Agency. https://www.investindia.gov.in/sector/renewable-energy#:~:text=The%20installed%20power%20capacity%20in,the%20total%20installed%20electricity%20capacity
- Nam, Y., & Won, K. (2022). The impact of government partisanship on social policy in a young democracy: The case of South Korea. Asian Policy & Politics, 14(4), 469–489.
- Pallett, H., & Chilvers, J. (2018). Energy Democracies and Publics in the Making: A Relational Agenda for Research and Practice. Frontiers in Communication, 3(1). https://www.frontiersin.org/articles/10.3389/fcomm.2018.00014/full
- Rajasthan: No laying of power lines in GIB habitat without panel's nod, orders Supreme Court. (2022, April
- Sahu, A. (2019). The Democratic Securitization of Climate Change in India. Asian Policy & Politics, 11(3), 438–460.







- Sharma, R., & Bhatia, P. (2022). How Just and Democratic Is India's Solar Energy Transition?: An Analysis of State Solar Policies in India. Cambridge University Press. https://cprindia.org/bookchapters/how-just-and-democratic-is-indias-solar-energy-transition-an-analysis-of-state-solar-policies-in-india/
- Stephens, J., & Burke, M. (2017). Energy democracy: Goals and policy instruments for sociotechnical transitions. Energy Research & Social Science, 33(1), 35–48.
- Szulecki, K. (2017). Conceptualizing energy democracy. Environmental Politics, 27(1), 21–41.
- Taguibao, J. (2019). Sustainable Energy Policy in Southeast Asia: Domestic Variation and Congruence in Policy Discourses. Asian Policy & Politics, 11(2), 327–346.
- The Times of India. https://timesofindia.indiatimes.com/city/jaipur/no-laying-of-power-lines-in-gib-habitat-without-panels-nod-sc/articleshow/91059065.cms
- Thombs, R. (2019). When democracy meets energy transitions: A typology of social power and energy system scale. Energy Research & Social Science, 52, 159–168.
- Watts, R., Jordi, E., Gibian, B., Burke, M., & Stephens, J. (2018). Operationalizing Energy Democracy: Challenges and Opportunities in Vermont's Renewable Energy Transformation. Frontiers in Communication, 3(1). https://www.frontiersin.org/articles/10.3389/fcomm.2018.00043/full

# Cyber-Crime: Intruision To The Personal Domain, A Threat To Human Rights And Its Preventive Measures

*Ashish Sharma*, Dr. Yogender Singh***

**Abstract**

Today we all are living in the world which is continuously developing in all its aspects whether it be science, technology, economy, population, or infrastructure. When it comes to the development and growth of science and technology, it can be easily conferred that human life has become far easier than ever before due to the technological developments. Though technology is a boon for human survival and is full of benefits but it can-not be avoided that it has serious repercussions too. One such problem is cyber-crime. With the advancement of communication technology and invention of mobile phones, people live in constant danger of cyber-crimes as they can be easily committed through the use of mobile phones, laptops, PCs and internet. In this paper, the author discussed on various types of cyber-crimes that are being committed through the mobile phones, the detailed analysis of the NCRB reports of 2020 indicating the various aspects of cyber-crimes and the preventive measures that can be adopted.

**Key words: -** *Human rights, cyber-crime, Technology and Preventive Measures.*

## Introduction

Cyber-crime is a modern form of a crime in which a computer is used and is a perfect example of the misuse of information and communication technology. While committing such crimes, criminals make use of internet and computer technology to hack the user's computer, smartphones, social media handles or to commit various kinds of online banking frauds. It is a matter of great concern that such crimes are increasing with an alarming rate. Although the law making

* *Email Id.: ashish09bhardwaj@gmail.com*
** *Email Id.: prof.ysingh@mdurohtak.ac.in*





agencies along with police personals are trying to cope up with this problem but they failed badly and the law remains a mere paper tiger due to the fact that communication technology is continuously developing and criminals have find more techniques to commit the crimes without getting traced. With the introduction of various types of mobile phones with advanced technology, it has become easy for every prospective criminals to commit the cyber-crimes due to the reason that the security of mobile phones is not as better than the computer security. This is evident from the fact that various new cyber-crimes are being committed with the use of mobiles for example cloning of SIM cards, online stalking, spam calls, smishing, blue bugging, SMS spoofing etc

## LITERATURE REVIEW

Manpreet Kaur, Gurinder Kaur and C.K. Raina (2017) discussed about the various concepts that includes cyber-crime, cyber security, types of cyber-crimes, causes of cyber-crimes along with focusing on the modes and mannerism of committing crime, its consequences and the preventive measures.

Sumanjit Das and Tapaswini Nayak (2013) discussed about the categories of cyber-crimes that includes data crime, network crime, access crime and related crime. The authors also focused on various impacts of cyber-crimes over teenagers and youths, socio-economic political riders, private industry, consumers, over business etc.

Nikhil A. Gupta (2014) discussed about how mobile phones impact the human life and that cell phones are becoming an open door for the criminal. He also mentioned various cyber-crimes that have been committed through the mobile phones i.e. Bluebugging, vishing, smishing, malware.

Monalisa Hati (2016) focused on the aspect as to how cyber-crime is a threat to the nation and why the cyber security is important. She discussed about the cyber security and the missions and visions of the cyber security program.

Saquib Ahmad Khan (2020) discussed about the cyber-crimes and asserted that cyber-crime is a crime wherein a computer can be a tool or a goal or can be both. He discussed about the cyber laws in India and focused on various types of cyber-crime that are being committed and the steps to be taken for the prevention of such crimes.

Hasina MasudKhadas (2020) discussed about the types and causes of cyber-crimes. She focused on various types of cyber-crimes that includes piracy, theft, hacking, terrorism, spamming, spoofing, phishing, identity theft, malware, etc. She also discussed about the preventive measures that can be adopted to tackle the problem of cyber cimes.

## RESEARCH METHODOLOGY

In this paper, the author completely relies on the secondary data that includes published sources, journals, printed media and NCRB report.

## OBJECTIVES OF THE STUDY

- To understand the concept of cyber-crimes.
- To understand the seriousness of use of mobile phones to commit cyber-crimes.
- To understand the causes of cyber-crimes.
- To study the impacts of cyber-crimes.
- To analyze the NCRB report of 2020 to understand the extent and magnitude of the cyber-crime in India.
- To suggest preventive measures.

## CYBER-CRIMES THROUGH MOBILE PHONES

Invention of mobile phones was initially a communication need but the development of science and technology turns it into a fashion resulting into competitive arena between the manufacturing companies. In order to sell more and more and to dominate the markets, the companies are constantly improving their mobile models as a result of which mobile phones has become a tool to play. Even the small children are having their own mobile phones. It has become a tool of misuse and bears more negative aspects rather than positive ones. One such aspect is increasing cyber-crimes. Initially, the cyber-crimes were being committed by the criminals through PCs or laptops but easy availability of mobile phones and that also at cheap rates that they are easily affordable by every strata of the society results into alarming increase of cyber-crimes. The reason being that the security of mobile phones is not at pace with those of computers.Important security measures such as antivirus, firewalls, encryption etc are not available on mobile phones and the operating system of mobiles phones are not as much updated as that of computers. On the other hand various websites and social networking sites we all use lacks the well elaborated and detailed privacy controls. Most of the smartphone users are not even aware of the security measures and softwares being provided on their phones and fail to enable the same as a result of which they continue to surf on their mobile phones under the misconception that surfing on mobile phone is as safe as that of surfing on computers. One other way to commit crime through mobile phone is putting fake applications on the play store and websites. Many users fall prey to such fake apps and that resulted into their data being compromised. Many of such fake applications replicate the original apps as a result of which many users were unable to find the application being fake. This mobile revolution has given cyber-crime a boost.





## CAUSES OF CYBER-CRIMES

The following are the few reasons for increasing cyber-crimes :

- Easy availability of mobile phones and internet connection.
- Negligence being committed by the people by sharing OTPs, sharing their data with unauthorized websites, clicking on links from unknown sources etc.
- Greed to make quick money.
- Easy accessibility to no. of victims at a time.
- Difficulties in tracing the culprits.
- To satisfy some revenge or grudge or for purposes of recreation in case of youngsters.
- Lack of evidence.
- Weak legal provisions.
- Unaware citizenry.

## TYPES OF CYBER-CRIMES

The following are the major types of cyber-crimes:

- Hacking
- SMS Spoofing
- Trojan Attacks
- Identity theft
- Spamming
- Email spoofing
- Phishing
- Cyber stalking
- Smishing
- Cyber terrorism.
- Violation of privacy
- Pornography and obscene materials
- Selling illegal articles.
- Forgery
- Online frauds
- Cheating
- Cyber bullying

- Espionage
- Piracy of softwares.
- Online recruitment frauds
- Malware
- Sharing of fake news
- Virus attacks
- Defamation
- Internet time theft
- Online Sexual advances.

## IMPACTS OF CYBER-CRIMES

The following are the impacts of cyber-crimes

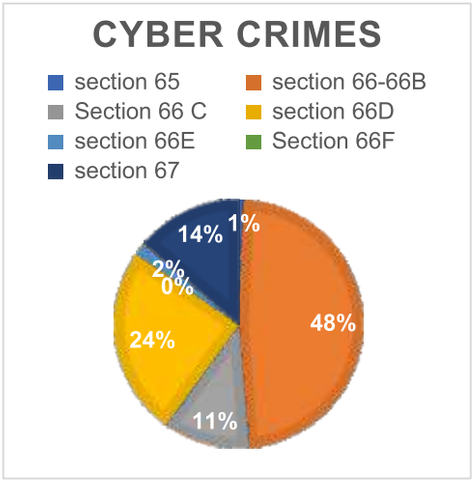
- Loss of revenue.
- Misuse of information and communication technology.
- Fear in the minds of people.
- Wastage of time.
- Wastage of resources.
- Injury to reputation.
- Disturbs mental peace.
- Increase in suicide cases.
- Causes depression.
- Incurred costs for businesses due to loss in sales and increase in cost of protection.
- Alienation of the teens and youth from family and friends as they spend their time on social media.
- Sexual solicitation

## STATISTICAL DATA

There are various types of cyber-crimes being committed by the cyber criminals, the following data only enumerates the offences being committed under various sections of I.T. Act 2000 i.e. tampering with the computer documents, hacking, pornography, cyber terrorism, violation of privacy etc. and has been taken from the NCRB report 2020.



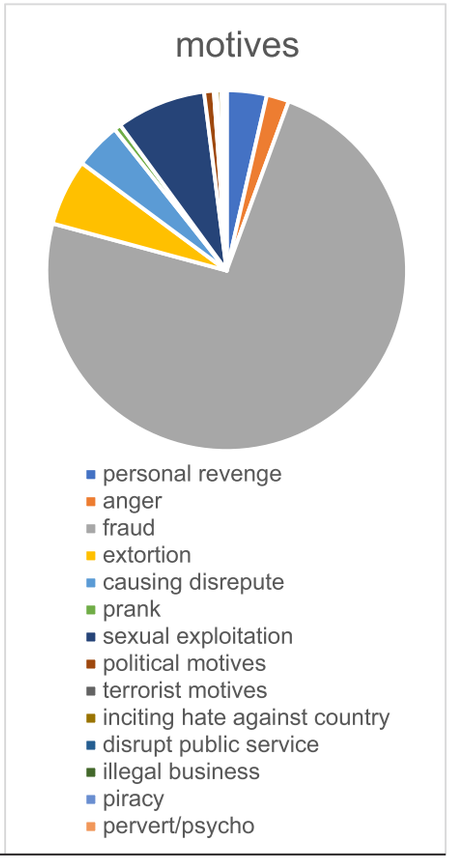





## MOTIVES BEHIND COMMISSION OF CYBER-CRIMES

As per NCRB report of the year 2020, the following are the motives behind the commission of cyber-crimes

- Personal revenge
- Anger
- Fraud
- Extortion
- Causing disrepute
- Pranks/Fun
- Sexual exploitation
- Political motives
- Terrorist purposes including terrorist recruitments, funding etc.
- Incitement of hatred towards the country
- Disruption of public service
- Illegal business
- To spread piracy
- Pervert/psycho.
- Steal information



**PREVENTIVE MEASURES:-**

With increase in cyber-crimes, there emerges a need to develop preventive measures so as to cope up with such crimes. The following are some preventive measures that can help in curbing the cyber-crimes:

- Awareness
- Well developed strong anti virus protection
- Don't be negligent
- Never share your OTPs and passwords.
- Check security features while purchasing the mobile phones.
- Keep your mobile phone safe with locks and passwords.
- Never accept data request from unknown or unpaired devices.
- Delete all the information or factory reset your phone before discarding it.
- Reporting the incidences to cyber cell.
- Mark spam the number or messages you receive from unknown numbers.
- Never open the links or emails received from suspicious sources.
- Always use strong passwords.
- Never use same password for multiple logins.
- Always back up your important data.ever left your laptops, PCs or mobiles unlocked.
- Don't be negligent.
- Keep your personal data private as far as possible.
- Always use website's security features
- Never installs apps from suspicious sources or unsafe websites.Don't accept friend requests from unknown persons.
- Avoid using public wi-fi or a cyber café for doing online transactions.
- If your cell phone is lost or stolen immediately report to the nearest police station, change your account credentials and also report to the mobile service provider and block your SIM.
- Strong legislative measures.

**CONCLUSION:-**

Information and communication technology plays a very important role in our daily life and has transformed every aspect of human life. It has bring revolution in every aspect i.e. the way we all communicate, shopping, financial transactions, playing games and what not. Everything is available at just one click. Although it is beneficial for all of us and new generations is getting more





and more exposure to cyber space. It is noteworthy that every beneficial thing has some negative aspects also. One such negative aspect of technological reforms in the fields of information and communication technology is the emergence of new type of crime i.e. cyber-crime. We all invest our lot of time in using smart phones and gazettes but most of us are unaware of cyber safety which are essential to protect us from these crimes. Thus we all need to be cyber vigilant and must follow the golden rules i.e. not to share personal information, avoid suspicious links and emails from unknown sources, never share passwords and OTPs, don't get panic and just report to cyber cell.

**References:-**

1. Bajaj AK, Jyoti C. Cyber-crime through mobile phones in India and preventivemethods. Int J Res Rev. 2015; 2(3):110-113.
2. Kaur M, Kaur G, Raina CK. Cyber-crime and its preventive measures. Int J Adv Res CCE. 2017;6(3):920-925.
3. Hati M. Cyber-crime: A threat to the nation and its awareness. Int J Adv Rs CCE. 2016;5(7):690-692.
4. Khan SA. Cyber-crime in India: An empirical study. Int J SER. 2020;11(5):690-694.
5. Das S, Nayak T. Impact of cyber-crime :Issues and challenges. Int J ESET. 2013;6(2):142-153.
6. Khadas HM. The Causes of Cyber-crime. Int J ISRT. 2020;5(8):476-478.
7. Gupta NA. Mobile Cell phones and cyber-crimes in India : How safe are we. Bharti Law Review. 2014: 18-23.
8. National Crime Records Bureau (2020).Chapter 9A, Cyber-crimes. Crime in India 2020 Statistics, pp.(759-806).New Delhi : Ministry of Home Affairs.
9. Aggarwal, Gifty (2015), General Awareness on Cyber-crime. International Journal of Advanced Research in Computer Science and Software Engineering. Vol 5, Issue 8.
10. Aparna and Chauhan, Meenal (2012), Preventing Cyber-crime: A Study Regarding Awareness of Cyber-crime in Tricity. International Journal of Enterprise Computing and Business Systems, January, Vol 2, Issue 1.
11. Archana Chanuvai Narahari and Vrajesh Shah (2016).Cyber-crime and Security – A Study on Awareness among Young Netizens of Anand.International Journal of Advance Research and Innovative Ideas in Education.Vol-2 Issue-6.
12. Avais, M. Abdullah et.al. (2014), Awareness regarding cyber victimization among students of University of Sindh, Jamsharo. International Journal of Asian Social Science, Vol. 4(5): 632-641

13. Hasan et al., (2015), Perception and Awareness of Young Internet Users towards Cybercrime: Evidence from Malaysia. Journal of Social Sciences, Vol. 11 (4): 395.404
14. Jamil D. and Khan M.N.A. (2011), Data Protection Act in India with Compared To the European Union Countries. International Journal of Electrical and Computer Sciences, Vol: 11 No: 06.
15. Mehta, Saroj and Singh, Vikram (2013), A Study of Awareness aboutCyber laws in the Indian Society. International Journal of Computing and Business Research, January, Vol.4, Issue. 1.
16. Parmar, Aniruddhsinh and Patel Kuntal (2016), Critical Study and Analysis of Cyber Law Awareness among Netizens. Conference: International Conference on ICT for Sustainable Development, At http://link.springer.com/chapter/10.1007%2F978-981-10-0135-2_32, Volume: 409
17. Singaravelu, S and Pillai, K. Perumal (2014), B.Ed. Students Awareness on Cybercrime in Perambalur District. International Journal of Teacher Educational Research (IJTER) Vol.3 No.3 March.
18. The Times of India(July 22, 2017), http://timesofindia.indiatimes.com/india/one-cybercrime-in-india-every-10-minutes/articleshow/59707605.cms
19. www.statista.com,2016,https://www.statista.com/statistics/309020/india-mobile-phone-internet-user-growth/
20. http://www.ncrb.nic.in/



# The Surrogacy (Regulation) Act, 2021: A Pragmatic or Pessimistic Approach

***Bhawna*, Dr. Sant Lal Nirvaan*****

**Abstract**

Every person has the Right to marriage and begot the children in the civilized societies. This right also includes the right not to have children as well which can be temporary or permanent. The female folk may avoid having children due to physical or other reasons. However, with the development of science and technology women may have children without facing pregnancy via the process of surrogacy. This paper explores the new emerging technology to complete the family as desired. The researcher examines the nature and scope of Surrogacy. The growing awareness and demands of the subject matter require regulation. The regulation is intended to protect the rights of the parties involved. Keeping in view the changing global dynamics over the subject, the Surrogacy (Regulation) Act, 2021 was enacted. The paper is an attempt to critically evaluate the Act and highlight the various gaps which remain unfilled. The paper will suggest some suggestive measures for the overall development of the subject.

**Key words: -** *Surrogate Mother, intended parents, Contractual obligation, Morality and Constitutional Morality*

## Introduction

Procreation is integral for the survival of all forms of life entailing man. Like animals, human beings also employ the coalition of two individuals with distinguish sex structures for the act of procreation. To aisle this, the concept of marriage evolved in the society of human being. The institution of marriage bestows conjugal rights upon the couple to have the family and social

* *Research Scholar, Department of Law, Kurukshetra University, Haryana*
** *Assistant Professor, Institute of Law, Kurukshetra University, Haryana*

legitimacy. The nature has bestowed the women a unique capability of motherhood. Motherhood is the dream and desire of every woman. Having the children is now considering as basic human right of couple. Asthe domain of human rights are being developed and expanded, the recognition has been given to the essential desire of a person to have a child as a fundamental human right and embodied to procreate. However, the legitimacy of procreation is organised only via the institution of marriage while any procreation outside the institution of marriage lacks in establishing the legitimacy.

All men and women are entitled to marry and to find a family without any discrimination of race, nationality or religion via Article 16 of UDHR and this right is inclusive of right to begot the children and establish the family. Family can be establishing only via institution of marriage.Woefully, due to some anatomical or any other ailments, some women cannot have begot and their yearning for motherhood steers them to explore any alternative solutions, and surrogacy exemplifies itself as the vastly feasible alternative.

The surrogacy is a most important method of Assisted Human Procreation for those who cannot procreate in the traditional manner. Surrogacy as a reproductive technology is an arrangement by which a woman agree to be impregnated by assisted conception, carries the resulting foetus, and relinquishes all parental right of the child at birth.4The origin of word “Surrogate” is from a Latin word “Surrogatus” which means substitute, that a womb has been substituted in place of another womb. Surrogacy can also be understood in terms of a mutual agreement between the surrogate mother and the intended parents.

Many organisations, scholars and the reports have attempted to define surrogacy in different ways keeping in view their understanding of the subject. According to 2005 ICMR guidelines, it is a situation where a woman consents to carry a pregnancy that is biologically unrelated to both her and her husband with the goal of delivering the kid to the biological parents for who she is serving as a surrogate. The guidelines define it as a contractual arrangement between the surrogate mother and the intended parents to carry out the child out of others.

According to Warnock Commission Report “The surrogacy is “the practice whereby one woman carries a child for another with the intention that the child should be handed over after the birth”. The commission also defines it based on the concept of ICMR, however it clarifies that without the intention of surrogate to hand over the child to the intended parents after birth, the process cannot be completed.

Surrogacy can be stated as an arrangement or contract where a woman consented to bear the pain of pregnancy through assisted reproductive technology.

As discussed supra, traditionally the child is the outcome of legally wedded marriage and anything outside it shall be treated as illegitimate. Different religions prescribed different conditions or formalities for the marriage. Islam which is the second largest religion in globe prescribes various conditions for





the same. Children’s out of the institution of marriage is not recognized under Islam.

In Islam, the established fundamental rule is that the children are the outcome of legally wedded marriage between husband and the wife. Children outside the institution of marriage is not considered as legitimate. So, the legitimacy of the children in Islamic law is directly linked with the institution of marriage. The child in the process of surrogacy is outside the scope of institution of marriage, hence directly occupies no legitimacy in the Islamic religion. Islamic law has two sources one is primary which derives from holy Quran and hadith while as the second source is secondary which consist of ijma, kiyas, analogy and other. The legitimacy of the children is derived only from the valid marriage derives its authority from the primary sources of Islam. The holy Quran provides that none can be their mothers except those who gave them the birth. So, the motherhood is directly linked with the birth which in turn is linked with the institution of marriage. The offspring’s is considered as one of pious function or objective of the marriage.

Children are the assets and is considered as the heritage of the family. Children are an ornament of life of world. The Islam has recognized only the process of cohabitation entered only through the process of valid marriage as the process of begot the children.

Infertility is viewed as a gift from God and must be accepted by couples with the utmost composure and confidence in a brahamic faith, which includes both Judaism and Christianity. They held the opinion that past sin is what leads to infertility. According to the Islamic faith, the Quran expresses God's omnipotence in the following way: "God produces what He pleases; He grants to whom He pleases, females; and He grants to whom He pleases, males; and He provides them in pairs, males and females." He has knowledge and power. All key life events and situations, including pregnancy or infertility, are viewed in Hinduism and Buddhism as being the result of the "Karmic" cycle.

In ancient society, there were numerous methods to withstand childlessness; one which prevailed in Hindu society was Niyoga. The tradition of niyoga followed and ratified the process by which the sperm somehow reach inside the woman so that the fertilization of ovum could be occurred and the same process was adopted for Ksetraja's son. It was practiced when men were sterile or had a chronic disease or were dead. In ancient Mohammad societies, if the childlessness was due to males, the religious texts stipulated several prayers and rituals be performed by the couple and some medical treatments. However, in the case of female infertility, the spouse had the alternative of remarriage. The advancement of society and the formation of the state led to the evolution of the legal system and the constitution of legal institutions11which steered the evolution of the Adoption Mechanism as an alternative measure for childlessness. However, adoption did not fulfil the desire of a person to have a genetic connection to an adoptive child, and this impulse for a biological child has persuaded mankind to discover modern techniques for begetting biological

children. The advancement of technology and medical science provides numerous solutions and procedures for childless couples, one of them is Assisted Human Reproductive Technologies (ARTs). Kindregan and Mc Brien, defines "ART is a technology that is employed to conceive a child by means other than sexual intercourse". Surrogacy is yet another alternative to conceive a child via Assisted Reproductive Technology.

**Legislative Journey of Surrogacy**

With the dawn of technology, the Law underwent an extreme transition to get harmonious construct with social change. Along with the basic "Right to Procreate", a new promise has blossomed for them with the growth of the technology which encompasses the concept of Artificial Insemination, Donor Egg, Transplantation, and surrogacy. In India, Surrogacy was initiated in 2004 with the birth of daughter's twins via their grandmother. Over the period, India has become a thriving centre of the fertility market ART Clinics, concluding in the abuse, extortion and ethical misuse in surrogacy trafficking and surrogate mothers are botched with the exemption.

**Constitutional Provision**

The Grundnorm of India interprets as the conscience of the state and the cornerstone of the legal and judicial system. The Constitution does not procure expressive rights for reproduction, but it has extensive scope for the materialization of this arena. Starting with the Preamble, which outlines the Constitution's fundamental goals for securing social, economic, and political justice through the protection of fundamental human rights, it is clear that the main objective of social justice cannot be achieved without those rights' protection and promotion. The right to equality before law and equal protection of law, Prohibition of discrimination on the ground of sex, Protection of life, Personal Liberty18which is inclusive of right of human dignity, health and privacy by the judicial interpretation and prohibition of trafficking in Human beings are the key provisions for this purpose. Life and liberty as provided under Art. 21 includes right to have and not to have children's as well.

Article 21 of the constitution which protects the privacy and personal liberty of individuals to reproductive health care information, education and service to a degree of privacy and confidentiality concerning the personal information given to service providers. The court stated that the reproductive right of an individual has been recognized as a basic right under the ambit of Article 21 via referencing the decision of US Supreme Court. The provision debars a person from contesting a Panchayat Election if there are two living children, this rule is an exception to the right of procreation in India. In Suchita Srivastava v. Chandigarh Administration, the apex court held that a women's right to make reproductive choice fall under 'Personal Liberty' as provided under Article 21 of Constitution of India. The judgment is the watershed mark and pushes the





concept of liberty to a new dimension. The apex court through their judicial pronouncements has advanced the jurisprudence over the subject to a new vast extent.

**Indian Contract Act, 1872**

A contract is the legally binding agreement between the promises. It's the promise and the commitment to follow the promise. The voluntary, purposeful, and legally binding agreement between two or more competent people is known as a contract. Similar to this, a surrogacy is a private agreement made between two parties in which a woman agrees to serve as a surrogate, or agrees to use artificial means of reproduction to conceive, or agrees to carry the foetus to term, or agrees to give birth to the child and give up her parental rights in order to give the child to his or her intended parents. The purpose of a surrogacy contract is to specify the obligations and rights of both parties as well as their goals. Money will be a consideration in commercial surrogacy, whereas consent in altruistic surrogacy will only be given out of love and affection. Consequently, the agreement between the intended parent(s) and the surrogate mother qualifies as a contract under the Indian Contract Act of 1872.

Due to either the intended parent or the surrogate mother's failure to keep their end of the bargain, the contract is broken. Breach before Artificial Insemination or Implantation of Embryo, Breach after Artificial Insemination or Implantation of Embryo, and Breach after Birth can all be grouped into three main categories based on the stage where the breach has developed and its relevant reminders. The proper court will offer the remedy in every instance.

**The Code of Civil Procedure, 1908**

In the absence of any codified regulations, the common law of the land would apply to surrogacy agreements. In India, Section 9 of the Code of Civil Procedure must be taken into account when determining whether a suit is cognizable by a civil court. Unless the lawsuit is expressly or implicitly barred, the court will have the authority to launch it if it is of a civil character.

**The Guardian and Ward Act, 1890**

This act provides the right to persons to apply for a Guardianship Order, the jurisdiction of court to entertain the Guardianship Application, form, and procedure of application. The parties under valid surrogacy agreement can be permitted to have remedy under the Guardian and Ward Act, 1890.

**Indian Council of Medical Research Guidelines**

Indian infertility clinics have flourished as a result of the rising demand for ART, according to the 2005 publication of the ICMR Guidelines, National Academy

of Science and medicine (NAMS), of the Reports Indicate for Accreditation, Supervision, and Administration of ART Clinics in India. The majority of these techniques mandate technical expertise and infrastructure Facility, but the prevalence of the clinics does not have satisfactorily qualified staff and reasonable infrastructure to disseminate these services. The infertile couples are sometimes taken advantage of by offering relatively straightforward procedures while charging them for more involved and expensive ones. As a result, National Guidelines for Accreditation, monitoring, and Regulation of ART facilities in India have been released by the (ICMR) and the (NAMS).

The above stated guidelines are the culmination of various discussions, debates and deliberations of various stakeholders on the subject. The guidelines suggest lack of awareness, quality knowledge over the subject, lack of infrastructure, lack of scientific and technological oriented approach on the subject. The National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics 2002 draught guidelines from the ICMR were submitted to the Health and Family welfare ministry. The Government of India did not formally adopt these rules in 2002, nor was it a legislative action. This draught was subsequently amended, and the ICMR formally endorsed it in 2005.

For the purpose of regulating and monitoring the operation of ART clinics in India, the rules have been drawn up in 9 chapters. These regulations would let ART facilities provide safe and morally upstanding care to needy fertile and infertile couples, as well as particular consideration for surrogacy and parental rights for children born using ART technologies.

**Assisted Reproductive Technology (Regulation) Bill, 2008**

The legal issues related with surrogacy, as came into consideration in Baby Manji Yamada V. Union of India and Israel Gay Couple's case has been very complex and need to be addressed by a comprehensive legislation. Therefore, a draught of the ART and Rules 2008 has been released by the ICMR. 50 clauses across 9 chapters make up the draught. The Bill's key characteristics are as follows:

- The Bill recognizes the surrogacy contract and its ability to be enforced in accordance with the Indian Contract Act of 1872.
- The single person is entitled for Surrogacy
- Any non-resident Indian, foreigner, or foreign couple who wishes to become parents through surrogacy in India must name a local guardian.
- The intended parents are required by law to accept the child regardless of any abnormalities, as doing otherwise would be against the law.
- Provides only one surrogacy right to an intending parent/parents
- Pre-determination of sex is prohibited
- Establishes State Boards for ART and National Advisory Boards for ART to provide policies, rules, and guidelines





**The Draft Assisted Reproductive Technology (Regulation) Rules, 2008**

The rules are divided into 7 parts dealing with the ART clinics, requirement regarding staff in Infertility clinics, the ART Procedure to be adopted by infertility clinics, Patient selection, Information, advice and counseling procedure for registration and its validity. But the parliament failed to adopt as Law, however the draft bill and rules were full of lacunas. The measure does not establish or empower any court or quasi-judicial forum to hear cases involving ART and surrogacy contracts.

**Recommendations of Law Commission of India**

The Law Commission of India made recommendations for laws to control assisted reproductive technology as well as the rights and obligations of the parties to surrogacy in its 228th report, which was submitted to the Union Ministry of Law and Justice in 2009. The law commission took on the issue on its own and published a report on the need of legislation, noting that the 2008 draught bill put up by the ICMR is lacking and insufficient. The following recommendations were made by the law commission:

- The surrogacy agreement shall not be for the commercial purposes
- If the commissioning dies or gets divorced before the delivery, the surrogate should be given financial support for the resulting child.
- The agreement should necessarily take care of life insurance of surrogate mother
- If a surrogate kid is born, no adoption or guardianship declaration is required.
- Right of privacy shall be provide to both the parties

**Draft assisted Reproductive Technology (Regulation), Bill, 2010**

On the recommendation of Law Commission of India, the Draft assisted Reproductive Technology (Regulation), Bill, 2010 was drafted by adding those provisions which were left unaddressed in the 2008 bill. It was drafted by a drafting committee appointed by Ministry of Health and Family welfare, Government of India. The proposal was seen as general legislation for the area. The law establishes a National Framework for the certification, regulation, and oversight of clinics using assisted reproductive technology. It also addresses issues related to or incidental to these issues, such as preventing the misuse of ART and ensuring a safe and ethical use of ART services. The legislation falls short of fulfilling its intended legislative aim. However, the measure has a number of flaws because it neglects to address some complicated surrogacy-

related issues. Additionally, the Law Commission of India's advice and the provision of the Bill are in conflict.

**Assisted Reproductive Technology (Regulation) Rules, 2010**

The 17 sections of Rules. It is split into seven sections. It outlines the procedures to be followed in putting the DART Bill, 2010, into effect.

**Indian Visa Regulation 2012, Ministry of Home Affairs**

The 2010 ART bill takes a liberal stance by granting individuals, married couples, and homosexuals the freedom to utilize ART to have a child. The New Indian Visa Regulation went into effect on November 15, 2012. By letter dated July 9, 2012, the Ministry of Home Affairs (MHA) mandated that all foreigners commissioning surrogacy in India must apply for a medical visa for that purpose while adhering to specific rules.

**Assisted Reproduction Technology (Regulation) Bill, 2013**

The Department of Health and Family Welfare has submitted the Assisted Reproduction Technology (Regulation) Bill, 2013, for consideration by the Ministry of Law and Justice. The plan limits surrogacy to "Infertile Married Couples" only, prohibiting foreigners from using it unless they are married to an Indian citizen, Non-Resident Indian, Person of Indian Origin, or Overseas Indian Citizen (OCIs). With some limitations, it permits a single person to undergo the surrogacy process. The aforementioned bill will also cover in-vitro fertilization.

**The Surrogacy (Regulation) Bill, 2014**

Dr. Kirti Premji Bhai Solanki, an individual member of parliament, has taken the initiative to present a bill for surrogacy regulation in the Lok Sabha. The measure includes options for gay couples seeking surrogacy after same-sex relationships are legal in India. The measure permits foreign couples who have a guardian appointed in India to use commercial surrogacy. Since it discusses the surrogacy arrangement, it does not address the arrangements under assisted reproductive technology.

**The Surrogacy (Regulation) Bill, 2016**

In 2015, a government notification prohibited surrogacy for foreign nationals and many other challenges arose, thus. However, the government had introduced on 21, November 2016 the Surrogacy (Regulation) Bill, 2016 in Lok Sabha. The bill restricts the surrogacy only for the couples who cannot conceive the child. The bill relies on the medical conditions rather than social or fictionalreasons. It provides the conditions, eligibility, and the performance with respect to various





contours of surrogacy. The measure also addresses the certificates that will be awarded by the appropriate agencies. According to the law, only "Close Relatives" may be used as surrogates, which means that only the surrogate mother may be a Close Relative. The Surrogacy (Regulation) Bill, 2018, was the name given to the legislation that was approved by the Lok Sabha.

**The Assisted Reproductive Technology (Regulation) Act, 2021**

The bill43 was passed on 18 December 2021. The Act was passed with the intention to regulate, supervise the assisted technology clinics, reproductive banks and other dimensions concerning surrogacy. The Act intends to prevent misuse, of reproductive technology maintain ethical norms, safe transmission of technology and maintain the balance between health and technological developments.

**The Surrogacy (Regulation) Bill, 2019**

The Bill, was Presented by the Ministry of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 201944. The bill was intended to regulate the surrogacy by adopting a balancing approach between the technological developments and the safe health.

**The Surrogacy (Regulation) Act, 2021**

The bill of 2019 was passed by the legislature on 25th December 2021 and becomes the Act of 2021. The Act constitutes various authorise including National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards and other authorities for smooth process and regulation of surrogacy. The act intends to regulate the process of surrogacy by ensuring that misuse and fake process need to be avoided, smooth transactions and adopting a balancing approach between health and surrogacy.

Surrogacy is legal if and only if:

- For intended couples with a history of infertility.
- Altruistic, but not with a profit-making agenda.
- not for any type of prostitution, child procreation for sale, or other forms of exploitation
- For any illness or condition made reference to in rules.

The prospective couple must possess "certificates of essentiality" and "certificates of eligibility" issued by the appropriate body in accordance with the Act. The certificate must, however, meet the following requirements in order to be issued:

1. The District Medical Board must issue the certificate of proved infertility

for any intended pair.

2. The percentage, custody arrangement, and 16-month insurance coverage for the surrogate kid
3. The couple must be nationals of India and have been wed for at least five years.
4. The age must fall between 26 and 55 (for the husband) and 23 to 50 (for the wife) (husband).
5. The intended parents cannot have any living children, whether they are biological, adopted, or born via surrogate.

**Eligibility criteria for surrogate mother**

The Act also provide the criteria for surrogate mother. However, the Act prescribe the following requirements for surrogate mother.

- The intended couple's close relative must be the surrogate mother.
- A married lady with a child of her own must be the surrogate mother.
- The age of surrogate mother should be 25 to 35 years old.
- The surrogate mother must not be involved in any other surrogacy before
- Have a certificate stating that you are physically and mentally fit to be a surrogate.
- The Act also restricts the surrogate mother to give own gametes for surrogacy

**Legislative Gaps**

After analysing the legislative Act governing the Surrogacy, the major legislative gaps can be summed as under -

1. Section 2(h) of the Act need to be interpreted liberally. The section permits the surrogacy only to the heterosexual wedded couple. The post Navtej Singh Johar v. Union of India46 position need to be incorporated. The act needs to be amended and incorporate LGBTQ community and others in its ambit and scope.
2. Through its many judicial pronouncements, the Apex court has outlined how surrogacy can help couples achieve parenthood, which is a fundamental human right. This privilege must also be extended to any pair who is not a traditional married couple. As a result, it's important to grant heterosexual couples as well as homosexual couples and members of the non-binary community the status and privilege of having children.
3. The limitation Bar of five years on surrogacy, which is also a waiting period for the couple from the date of marriage need to be revised. This limitation





is directly interfering in the provisions of liberty and right to choose.

4. The commercial surrogacy which is legal in India from 2002, lacks in having any strong and established legislative support. The commercialisation of surrogacy leads to the exploitation of surrogates, unhygienic environment, health and safety issues. The state fails in regulating it and ensuring that the essential safety standards are maintained. The 228th report of the Law Commission from 2009 suggests that commercial surrogacy be outlawed. Only charitable surrogacy is permitted under the 2021 Act, which forbids commercial surrogacy.
5. The surrogacy contracts need to be regulated and few confusions need to be clarified. The inconsistency between the views adopted by the high courts and the view adopted by the Apex court need to be regulated. The economic consideration in commercial surrogacy needs to be avoided and regulated if not banned in toto.
6. The surrogacy Act need to be amended to include traditional surrogacy under its scope. The act only recognises gestational surrogacy and not traditional surrogacy.
7. The National Assisted Reproductive Technology and Surrogacy Board, which was required by the Act, must be established immediately. Instead of creating obstacles, the state ought to help the Act advance.

Finally, it can be concluded that the identified legislative and administrative gaps need to be filled with suitable solutions. It can also be concluded that the subject demands progressive legislation by marinating the balance between Rights, interest and liberty approaches. Any single approach will hurt the larger interests of sections it's feasible and advisable to take broader view between three different approaches. The various authorities enacted under 2021 Act need to be encouraged by giving them sufficient powers and resources.

**References**

1. "Niyoga is an ancient Hindu tradition in which a woman copulates with her deceased husband's brother or a revered person in society with the sole purpose of having a child". https://www.hinduismfacts.org/niyoga/ visited on 18.06.2022
2. "No personal shall be deprived of his life and personal liberty expect according to procedure established by law".
3. 1984, U.K Para 81
4. 228th, Law Commission Report, "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a surrogacy", 2009, p. 25.

5. Amir Samavati Pirouz, Nassrin Mehra, Legal issues of a Surrogacy Contract Based on Iranian Acts Continuation", Journal of Family and Reproductive Health, Vol. 5, 41 June 2011, p
6. Andrea Messmer, "Assisted Reproductive Technology A lawyers guide to emerging and science", Journal of Health & Biomedical Law, Vol. III. 1, 2007, p. 203-16
7. Anil and Ranjit Malhotra, "Surrogacy in Indian, A law in Making", Universal Law Publishing Co., 2nd Ed.., 2013, p.49
8. B. K Partgasarthi V. Government of Andhra Pradesh, 2000 (I) ALD. 199.
9. Ch.58, verse 2.
10. Dr. B. Shiva Sankara, "Is Surrogacy an Alternative to Adoption in the wake of Social Change of the Globe", Andhra Law Times Journal, Vol. III, 2013, P.7
11. G.V Mahesh and P. Devi Mansa, "A critique on surrogacy Contracts", Andhra Law Times, Journal 2012, p.21.
12. Hari G. Ramasubramanian, "Assisted Reproductive Technology (Regulation) Bill Pending with Legislation Department", www.indiansurrogacylaw.com, visited on 22.06.2022
13. Jack T. Skinner V. State of Okalhoma, 316 US 535 (1942)
14. Jean Leebmann-Smth, Jacqueline Nardi Egan and Johan J. Stangle, "The unofficial Guide to Getting Pregnant", Wiley publishing, New Jersy, 2006 p.250
15. KarthryanVenturatos Lario, "Alternative means of Reproduction: Virgin Territory for Legislation", 44 Louisiana Law Review, 1984, p.1655
16. Kathrine B. Lieber, "Selling the Womb: can the feminist critique of surrogacy be answered", 68, Indian Law Journal, 2005, 1992
17. Krishana Pal Malik, "Women and Law", Allahabad Law Agency, Faridabad, 2011, p.359
18. P.C Pant, "Law of Marriage, Divorce and other Matrimonial Disputes", Orient Publishing Company, New Delhi, 2002, p.3-
19. P.D. Mathew, "Constitution of India", Indian Social Institution, New Delhi, 2004, p.30
20. Rachel Rebecuche, "The limits of Reproductive Rights in Improving Women's Health, Alabana Law Review, Vol 63 (I), 2011, p. 16.
21. Raju Prasad Chagui, "Judicial Response to Reproductive Rights experience of Public Interest Litigation in Nepal", Journal of Health Studies, I, 3 (2008) p. 25.
22. Raju Prasad Chagui, "Judicial Response to Reproductive Rights experience of Public Interest Litigation in Nepal", Journal of Health Studies, I, 3 (2008) p. 23
23. Robert Brom, "Birth Control", www.catholic.com visited on 18-06-2022
24. Rule 1.2.33, National guidelines for accreditation supervision and regulation of ART clinics in India, ICMR Issued by Ministry of Health &family welfare, Government of India, 2005.
25. Universal Declaration of Human Rights, 1948



*The Surrogacy (Regulation) Act, 2021: A Pragmatic or Pessimistic Approach*

# Improvising Transgender Education: The Dire Need for Perseverance

*Mrs. Dipika Bhati*, Dr. Niteesh Kumar Upadhyay***

**Abstract**

For a very long period in the Indian Education Development era, growth has restrictively not come to various lower groups, including 'Transgender' community. The community of 'Transgenders' have faced the worst nightmares in terms of discrimination and have never been given a support pillar in terms of educational scope. After independence, the growth of the nation was so evidently needed that society has created disparities within, and the vicious cycle of richer gets richer has even more deepened. This development wave was further encouraged by Globalisation and a surge in competition. Though all these have bought in positive upliftment, yet there is a bigger scope, and a big gap is still to be filled. Transgender Education coins two of the most important terms, one pertaining to the societal norms and other, a necessity paving the way for development. As the name suggests, 'Transgender' community on an outer circle denotes a different gender from the common ones (male or females). It is recognised as the third gender in India. Educational Developments are considered to be of utmost importance for any economy to grow as more the people are educated, more will be the development both in terms of money and experience. The aim of this article is to analyse the position of the third gender with special emphasis on education. Getting equal opportunities in all stages of education is important for all classes existing in any country, and the article also covers the struggles faced by this community in getting their rights in place. The struggle is still a long way to go, and a complete transition in bringing the minds of people is quite a difficult process. The paper also analyses various supportive judgements given by the Judiciary in favour of the community.

* *Research Scholar, Galgotias University, Greater Noida*
*Email; samarthchandila48@gmail.com*
** *Associate Professor, Galgotias University, Greater Noida*
*Email: niteeshkumar.upadhyay@galgotiasuniversity.edu.in*





The article not just scrutinises the Indian position but also takes a global stand and surveys the worldly position of Transgender Education. This analysis on the overall development, lacunas and judgements are required to have a clear view of what positives have been achieved and what still lies ahead. Additionally, suggestions are added to improvise the condition of Transgender Community when it comes to the Educational Development and emphasis is put on the fact that no development can take place if the mind is still sceptical. Changes have to come from within, and only then a huge positive change can come in the lives of the community.

**Key words:** - *Community, Gender Identity, Legal Sanctions, Third Gender, Transgender Education.*

## 1. Introduction

Transgender, as the name suggests, denotes a completely different section of people who have their gender different from a man or a woman. It is commonly known as an umbrella term and is coined for referring to a third gender. The one common community of Transgenders identified in India are called 'Hijras.' There are other communities across the globe, and Transgender identification is slowly gaining positive support. Most of the times, confusion has arisen over topics relating to their community and often ambiguousness has been raised that 'Transgender' and 'Transsexual' are identical terms. However, the two terms are different and have different meanings attached to them. The former is a trait which no one can help, and people are born naturally as transgenders as they are born as a male or female. Transsexual, on the other hand, is a person who tends to use medical practices to turn into a person of that sort, which in turn may mean turning against nature. The latter is more of a preference-based criterion while the former is the natural way one is born. Howsoever, the mode may be, Transsexuals are also included in the broad genre of Transgenders as they too need the protection of their rights and liberties. Most of the transsexual people prefer to be categorised as transgenders as it gives them a sense of safety and fewer stigmas.

The common terminology 'Hijra' used in the Indian Subcontinent has been in use for a very long time. The term is based on an Urdu terminology denoting 'impotence.' Their body structure, tone, way of behaving and actions have been stigmatised for a long time, and a unique identity has been attached to their kind. They are born as transgenders; however, they may choose to live in their community or can choose a different way of life. Indian Subcontinent is diverse owing to its various cultures and diversities, and hence, every state has its own terminology to refer to the transgender community. For instance, 'Hijras' are referred to as 'Aravani' in the state of Tamil Nadu. The terms may differ in different places, yet the characteristics and commonness of the community remain the same.

It is said that the existence of the community was recognised very long ago in Greece around the 9th century BC. Queen sleeping in the royal palaces required guards who were strong yet harmless, and 'Transgender' community fulfilled the qualities accurately. They were known as "Keeper of beds" and were known to have been protecting the Queens. In the Indian Sub-Continent, Transgender community have been in existence for a very long time. The existence can be traced to the Vedic era where the term 'napumsaka' was frequently used in folklore and early writings and used to denote people who did not have the procreating ability. The traces of this community were even more recognised both in Ramayana and Mahabharata. It is quite a popular story where Lord Ram asked his followers, both men and women, to return to their cities while he was going for the exile period of 14 years. After 14 years, when Lord Rama returned, the people from the transgender community were still standing at the same place. Lord Rama was very pleased with their loyalty, and from then on, these people have always been treated with regard according to Hindu Mythology.

The Mughal Period and the preceding Muslim era in India were quite in favour of 'Hijras' as they were known to have been holding prestigious positions. Even the Islamic Institutions in Mecca and Medina thought high of the transgender community and held respectable positions. However, things worsened for them, starting from the British era in the country. The British Leaders envied the transgender community as they held high status in kingdoms and sought measures to degrade them. By the end of the 18th century and the beginning of the 19th century, certain laws were bought into the light which penalised the Hijra community and took away all their civil rights. Some of the legislation will be covered in brief in the coming chapters and would be elaborated. These legislations played a major role in deteriorating their position and made them vulnerable.

The Post-Independence era also saw a surge in the different number of enactments against Transgenders as a measure to protect criminal justice. Though the legislations were appropriate, these steps worsened the social status of Hijras to a very low level, and people have assumed everyone in their community to be bad. It took a lot of Government initiatives to recognise their rights, including the protection given to them in the Five-year plans. Yet, a lot is remaining to be made right in bringing their rights equal to the rights of the other two genders.

## 2. Stumbling Blocks in the Path of Development

Among the various civil rights, the Transgender community is still at a very backward state when it comes to education. In a country like India, especially after the advent of Globalisation, development is marked in terms of education and literacy. The worst-hit was the group who were minorities, including cultural minority group of Transgenders. Education-based rights are listed as one of the fundamental rights under the Indian Constitution and it is the core duty of the state to not just offer compulsory education but also make it costless to





everyone coming between the age of 6 to 14 years. The scope of Article 21 was further widened to even include educational rights under a subclause added as Article 21-A. In this era of Globalisation, it is of no doubt that education and literacy are directly proportional to the growth of the economy as more educated the workers, more will be the per-person production. The quality of life depends on education primarily as it enhances a deeper understanding of societal themes. Without a good amount of investment in human capital, achieving economic growth is unfeasible.

To understand the barriers faced by the Transgender Community in each stage, it is necessary to understand where they stand in the country. Till 2011, the Indian government failed to recognise the existence of the third gender and have not recorded any detail, be it population density, life expectancy or the literacy rate among people in these communities. It was only in 2011 that the census board took a bold step to include even the Transgenders within the ambit of the census and came with the details recorded as below:

| # | State | Transgenders | Child(0-6) | SC | ST | Literacy |
|---|---|---|---|---|---|---|
| - | India | 487,803 | 54,854 | 78,811 | 33,293 | 56.07% |
| 1 | Uttar Pradesh | 137,465 | 18,734 | 26,404 | 639 | 55.80% |
| 2 | Andhra Pradesh | 43,769 | 4,082 | 6,226 | 3,225 | 53.33% |
| 3 | Maharashtra | 40,891 | 4,101 | 4,691 | 3,529 | 67.57% |
| 4 | Bihar | 40,827 | 5,971 | 6,295 | 506 | 44.35% |
| 5 | West Bengal | 30,349 | 2,376 | 6,474 | 1,474 | 58.83% |
| 6 | Madhya Pradesh | 29,597 | 3,409 | 4,361 | 5,260 | 53.01% |
| 7 | Tamil Nadu | 22,364 | 1,289 | 4,203 | 180 | 57.78% |
| 8 | Orissa | 20,332 | 2,125 | 3,236 | 4,553 | 54.35% |
| 9 | Karnataka | 20,266 | 1,771 | 3,275 | 1,324 | 58.82% |
| 10 | Rajasthan | 16,517 | 2,012 | 2,961 | 1,805 | 48.34% |

**Figure 1: Transgender Data, 2011**

The data showed the true position of the Transgender community in terms of the Literacy Rate, which is only 56.07 per cent as compared to 93.91 per cent in Kerala, among the general public (primarily two genders). For the backwardness of this community, in terms of education, has got its own primary reasons, and some of them are as follows:

- Poverty

  The economic position of the community is not well placed, which makes them even more disadvantaged. The main occupation of 'Hijras' is begging, or community entertainment which does not fetch enough money to be able

to afford a high-class school or college. The vicious cycle continues for generation, creating deeper issues.

- Failure in providing carriable documents

  The Transgender community lack proper identification documents which further worsens their plight. People belonging to their community do not get access to documents with ease as they have to undergo various types of discrimination at all the levels. This causes delay as registration in schools, colleges or any educational institution requires the person to carry documents to complete the process.

- Issues with Special Emphasis on Primary School

  The issues of inequalities start as early as primary school as children have a sense of division in their minds. This division is also known to be induced by parents who are uncomfortable with such community studying in the same school as their children and end up creating gender stereotypes in the minds of children. According to research conducted, it was shown that even the uniform system creates a sense of discrimination among the transgender group. In any school, there is a set uniform style for boys and girls; however, schools lack such facilities when it comes to the Transgender community, which further widens the gap.

- Restroom Issue

  Another major practical obstacle faced by the transgender community is the lack of proper restroom facilities in any educational institution. There are restrooms for both man and woman or boy or girl. But nowhere is a different set of restrooms made for Transgenders where they can be free to go without sacrificing on their safety and privacy.

- Feeling of Unacceptance

  Yet another issue faced by the transgender community in terms of education is the feeling of loneliness or in other terms unacceptance. The community have suffered for a very long time, which makes them sensitive, and most of them tend to self-isolate them as a result. This trend is further deepened at a single instance of discrimination in school or colleges, leading to withdrawal from education.

- Disrespectful Terminology

  To adding to the woes, lack of respect is found everywhere. Only in rare cases, the transgender community is found in equal footing with the two genders, and at all other places, disrespect towards the community is clearly evident. This is further worsened by calling names which are indecent or causes great damage to the community pride.

The above-listed issues are only half of the issues covered and are not exhaustive of many other problems faced by the transgender community. The barriers provided here are simply based on the earlier reports and reflect





majority opinion. However, the fact cannot be denied that in a practical world, issues do not end and the list keeps adding on. More the hurdles, more the difficult it gets to establish a clear footing for the community.

## 3. Global Model of Transgenderism Education

The Global Model of the state of the Transgender community is nothing different as a recognition of the community in the Global was also very delayed. Most often, sexuality was confused with gender, and people across countries thought of transgenderism as an issue within sexuality. Finally, it was only in 1965 when the term Transgender was used for the first time, and by 1970s, it became a common term to underline people who are born different. There are many instances where the term 'transgender' have been misunderstood and used for various meanings.

It is only after 2010 that countries have taken into account the transgender community seriously. The transgender community have been facing a lot of issues, and they are still persisting. Yet, some measures here and there have been taken by countries to bring their development to notice and make them feel equal.

A 2016 survey is important in this regard. Different parameters with regard to the 'Transgender' community such as educational rights, civil rights, restroom freedom, stop discrimination, equal footing etc. were taken into consideration while computing the average. This survey boasts for being the first of its kind, and the following summarisations have been made from the survey:


**Figure 2: Countries marked with darker colours denotes high marks scored in parameters**

The calculation was made against a total of 100 marks and out of the surveying 23 countries, only six countries scored below 60. Spain was recognised as the best country for the transgender community to live in as their policies were quite appreciated. It was noted that various other factors such as income, class and education growth helped people in voting in favour of the transgender community and it was noted that the western countries are placed at a better position than the Eastern Countries as they are broader minded towards changes. Another survey pointed out that knowing even a single transgender person will increase the chances of uniformity and non-discrimination. A survey was conducted in that regard, and the following conclusion was made from it:

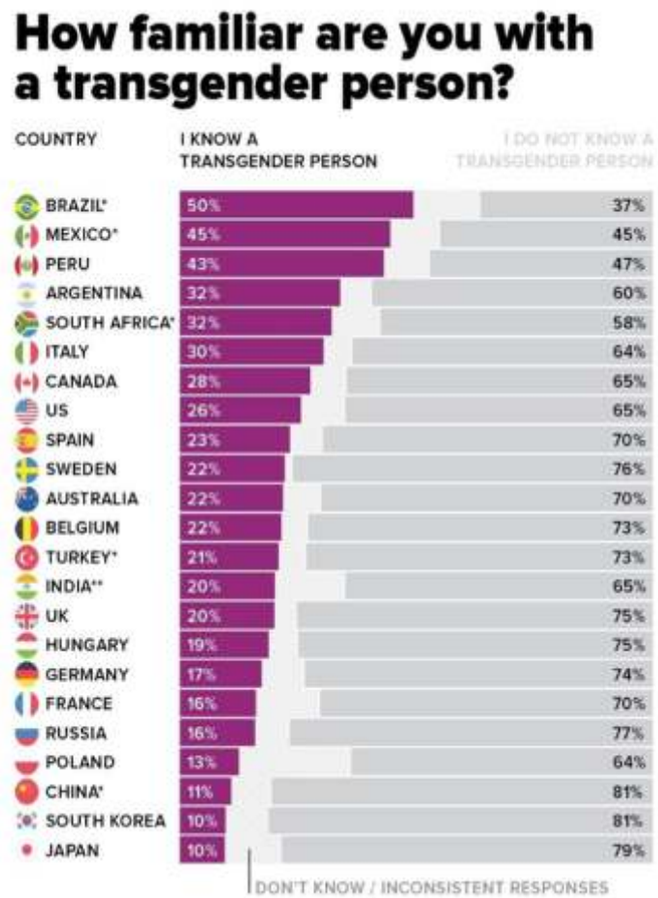



**Figure 3: Familiarity Index with regard to the transgender community**

The survey was influenced by different other parameters, and 23 countries were taken into consideration. Among them, Brazil was the only country to have been scoring over 50 per cent and this in itself is considered to be a big plus for the





Transgender Community.

When it comes to development parameters for any gender, the primary component is education. It is no doubt that education makes people aware of and grow in numerous ways. The earliest reports of social activities in or for the Transgender community also involves a fight for civil and educational rights. Even to identify and instigate people to grow gender identification and respect is mandatory. The first of a kind of legislation which proved very real and effective was that of Argentina. In 2012, the state of Argentina passed legislation called Gender Identity law which authorised sex-change surgery and made it legal. Following its own path is Denmark, wherein 2014 people were allowed to make their own gender decision, and the government even denied the requirement of any medical certificate for the same. Following the trend, many countries, including Iran and India, formulated their own laws and recognised 'Hijras' as a community even though the addition of a third gender was recommended way before by the Indian Parliament.

One bold step towards securing the Educational Rights of the Transgender children was taken by the Malta Government in April 2015. The government ordered all the schools to have a separate uniform code and restroom facilities in all the schools to accommodate such children, and this truly was a welcome step in this regard.

Though many countries recognise transgenders as the third gender, yet many of the provisions lie only in paper and are not practical. For instance, in a recent Judgement by the Supreme Court of USA, they have recognised that not just studying but transgenders are eligible to teach at colleges. The case was filed by Ms Tudor 9 years ago, and the Judgment validating her case of loss of civil rights was in favour of her and allowed her to pursue the dream of teaching.

Right legal recognition is a vital base of other fundamental rights like the right to privacy, right to apply for employment, the right to freedom of expression, education, health, security, and the ability to move freely and access to justice. The position of transgenders has been bought under 'LGBT' rights where 'T' stands for transgenders, yet they do not get the respect they ought to and often are confused with same-sex preference people. It is mandatory to not just recognise them but to give the community a boost so that they also can develop their skills and be a contributing factor for development. Countries, when finding these global patterns, tend to get more attracted towards adopting a national policy. Global recognition is important in this regard as only when something is recognised globally, it creates a greater impact in the minds of people and nations, as was the case with 'Human Rights'.

## Windows of Opportunity

It comes as no surprise that the recognition of 'Transgenders' as a community was done around 2009-2010 in India. However, the community which comprises of various sects such as Hijras, Kinnars, Sakhis, aradhis etc. had always had to

come under the term 'others.' Whenever any form for the educational institution was being filled, these people came under the 'others' category, which further worsened their woes. Many people from their category were denied even the most basic fundamental rights.

To begin with, Article 14 and Article 15 is available for all the citizens in the country, including the transgender community. Article 14 guarantees the right to equality, and Article 15 lays down the prohibition on the grounds of religion, race, caste, sex or birthplace. Following these two articles, Article 21, Article 21-A, and Article 23 is worth mentioning. Nonetheless, all these provisions apply for the common man or woman but do not practically apply to the third gender. The practicality of these provisions and further add on ones started only after 2013 when the Indian government added a new category in all applications 'third gender.' Till then, except male and female option, only 'others' option was left, which was clear discrimination for any person from the community. Some of the opportunities coming in the way of the community include:

- Constitutional Rights of the Third Gender

  A recognition of the Third Gender is regarded as a very important privilege as individuals are now free to choose the gender of their choice. This right particularly is important in the field of education as only now some part of discrimination has been reduced, and even the people of these community may feel free and respected.

- Right Policy at Right Place

  Among the Indian States, Kerala became the 1st state to take the initiative and bring in place a comprehensive and inclusive documented policy in favour of the transgender community. This policy is aimed not only in recognising the transgenders but also to give them an equal footing in the job spectrum. People from the community would be able to apply for jobs without any stigma and discrimination.

- No Payment Educational model

  Not many colleges in India are offering free education. This European model of free education is a requirement even in the Indian parlances and the first university to take up the initiative is MSU or Manomaniam Sundarnar University which is affiliated to the Tamil Nadu Government and offers a complete fee waiver for the students belonging to the transgender community. For a very long time, people belonging to the third gender have suffered from various lacunas, and this step was considered to be a compensation for the same, as commented by many academicians.

- The Unique Tamil Nadu Model

  One of the biggest opportunities was created by the Tamil Nadu Government when it comes to the development of the third gender. The government worked in favour of the third gender and created a complete welfare board for the Transgender Public. This welfare board followed the





steps to make sure that the people from this community were getting houses to live in and access to surgeries without the support of stringent documents which would be difficult for them to get. This Welfare board was hugely appreciated, and many states followed on the same lines thereafter.

One can trace the year by year developments in the state from the given figure:

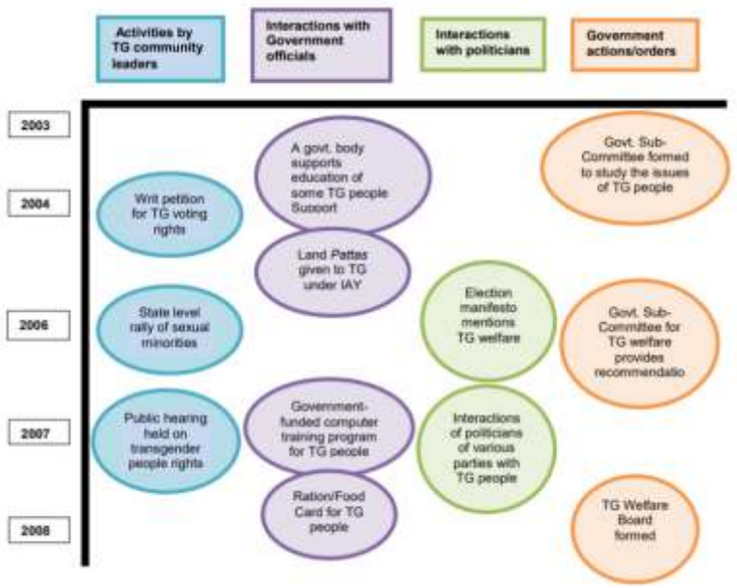



**Figure 4: Historical Evolution of Transgender Welfare Board in Tamil Nadu**

Various steps in a positive outlook led to the successful creation of the Welfare board, and one such step was the thorough research which contributed to a positive result. In 2003, a detailed study was made on "rehabilitation of transgender people" was conducted, which suggested measures to be adopted in regard to growth. The training was given to people, and especially technical training to the people belonging to the third gender and those taking the training were given certificates as a token of appreciation. Following this trend, Indira Awaas Yojana was used as a platform to provide the 'aravanis' with housing facilities which greatly reduced their woes.

The Tamil Nadu Model has stood as an example for many other states to follow and another appreciable model in terms of growth in Kerala, who has inaugurated a separate Justice board for the transgender community for the speedy trials and free legal aid services in all the matters including right infringement. In a very recent turnaround of things, the National Educational Policy is planning to remake the curriculum and textbooks and include details of the transgender community, their struggles and educate everyone with regard to the sensitiveness and importance of dignity of the community. The policy is still in the processing stage and if adopted, would be a major boost for the

community. These bold steps have been time and again welcomed. To add to this is the legal support from Judiciary, which is also given in the form of right judgements. Only such developments and that too, a speedy form of it can match the needs of the third gender and provide them with a quality and dignified life.

## 5. Legal Sanctions in favour of Transgender Education

Legal Sanctions in any nation is the backbone of support for any kind of uproar or activity. It is the sanction from the Government, Legislature or the Judiciary which decides the importance of the matter. In India, as discussed developments with regard to the transgender education came late; however, many other countries across the globe set examples both in a negative and positive way. For instance, if we looked at the position of Uganda in 2009 when the government came out with a bill called as "Anti-Sexuality Bill 2009" it was met with a wide amount of opposition and countries even set to withdraw their support towards Uganda as the bill sought to award death penalty for homosexual couples.

The first major legal sanction in India came in 2009 when the Election Commission allowed even the people from the transgender community to vote from being a different option. They had the option of choosing the 'others' category and were allowed to vote. Yet, it was very depressing for most of them as being not in an equal footing with others was hurting.

Finally, things changed when the Supreme Court of India delivered a key judgment in this regard, which recognised various civil and political rights of the third gender category and offered them an equal footing of being called the third gender. The Judgment was particularly lauded as the Apex Court declared the community as being emerging from various struggles and therefore, to treat them as Socially and Educationally Backward classes (SEBCs) and give the same reservation which is applied to the OBC community.

### The two sides of the coin

1. The Judgment was applauded in one factor where it included the Transgenders in the Reservation column. This could be attributed to the fact that the people belonging to this community have seen a very long era of struggle and discrimination and giving reservation will definitely make sure that the same is rectified.
2. The other part was relating to SEBCs. This came as a shock to many as it is only the Supreme Court which has time and again addressed the state of providing such powers. The power of declaring any community to be under SEBC came under the purview of Article 15(4) of the constitution, and this was also confirmed by the Apex Court itself in many Judicial cases. This was followed by arguments which as in regard to terming the transgender community as a specific 'class.' This term provides a deeper meaning in terms of governance and can cause a lot of issues, as pressed by the





arguments. Class is usually used for a specific homogenous community, but in this case, the class was defined for the entire gender causing damage and reflected a deeper issue.

Following this judgement, many changes were made at the state level, and developments continued to come through. In 2015, the progressive Delhi Government came a step forward and recognised the rights of children belonging to the transgender community and bought them under the purview of 'disadvantaged group.' This provided the community with 25 per cent seat reservation as according to the Right to Education Bill. However, the issue was still persisting as it was only a provision, and the practical application of the same was still in question.

| Supreme Court (2014) | Expert Committee (2014) | Private Member Bill (2014) | Government Bill (2016) |
|---|---|---|---|
| • Persons whose gender identity does not match their biological sex. | • Persons whose sense of gender does not match with the gender assigned at birth.<br>• They express their gender through several identity terms and names. | • Persons whose sense of gender does not match with the gender assigned at birth;<br>• Includes trans-men, trans-women, gender-queers and socio-cultural identities. | • Persons who are (i) neither wholly female nor wholly male; or (ii) a combination of female and male; or (iii) neither female nor male; *and*<br>• the persons' sense of gender does not match with the gender assigned at birth.<br>• Includes trans-men, trans-women, persons with intersex variations and gender queers. |

**Figure 5: Different Legal Bodies of the Country giving definitions for Transgender Community**

Another Legal Sanction in favour of Transgender Education came in the form of 'The Transgender Persons (Protection of Rights) Bill in 2016 which offered the transgenders an opportunity to claim a certificate from the District Magistrate of being an individual belonging to the third gender and this would enable them to claim an array of benefits. Such a certificate would not only ensure the people the benefits but would also enable them to get inclusive education, different opportunities in school with regard to sports and leisure activities.

These steps have definitely helped shape the transgender community in a better way, but there is a wide scope for development. Gender diversity is a common term adopted by schools but how far they have reached in doing it is the debatable point. The number of programmes or the coming in place of welfare boards is quite appreciable but what still remains in question is the practicality or the passion with which the said steps are taken.

## 6. Conclusion and Suggestions

When we think about the very concept of Transgenders and the importance of education in their community, it becomes an undeniable fact. But what is

important is that it is not only pertinent to put the factors in the paper but also to adopt the measures in the real world. When a movement starts, it is always heated, but as time goes on, the importance of the same is dried up. This is the case with the transgender community. It is observed that many initiatives which started for their welfare is now working without a motive or have failed miserably. For instance, the Tamil Nadu Welfare Board is facing backslashes for past sometime owing to the change in administration as there are no members to represent the Transgender community causing havoc.

With all the legal sanctions, Judiciary taking up their sides and favouring the third gender, more developments with positives were expected. Yet, in many parts of the country, discrimination is still persisting. This can be owed to the fact that such issues do not arise from any problem but is rather persisting in people's mind. Till the time the stigmas are completely done away with, providing complete justice to the community will not be feasible.

Any development with regard to education should begin from changes in political and civil rights. The government, in combination with the Judiciary, should play an active role in providing opportunities to the people from the community. These conditions only can play an important role in eradicating other issues which will eventually pave the way for educational opportunities.

Some of the suggestions which could be adopted are:

1. Develop an Inclusive Educational System

   It is no doubt that changing the entire curriculum, education patterns etc. are going to take time as changes have to come from the primary level. But if the government believes in taking it forward, this is one way out where the complete education pattern undergoes a drastic change. Gender identities and Gender growth should be implanted in the minds of all from an early age.

2. Creating more employment opportunities

   Irrespective of qualifications, transgenders who are really talented should be able to get employment at different levels. This will not only boost their lives but would also act as an inspiration to others. For instance, in Kerala, many transgenders are hired for technical works in the Metro Department.

3. Changes at the Corporative Level

   Education gives the power of securing the right job at the right place. However, when it comes to the transgender community, the end result is, however, reverse. For a change at the employment level, it should be the offices and corporate houses who should make sure that the offices have an equal footing when it comes to hiring transgenders and should also make sure to give them their share of freedom, be it restrooms, leading teams or anything of such kind.

4. Restoring the right of inheriting property





   The transgenders born in a normal family face humiliation. The vicious cycle continues to grow. To avoid such issues at the root level, it is advisable to change the inheritance laws, and even the Transgender child should be able to inherit properties from parents. This will instigate them to believe in the power of Judiciary and would restore confidence in society. After all, charity begins at home.

5. Holding Conferences and Informational Meetings

   Be it the respective state governments or heads at the district level in each state; they should ensure that regular meetings about the welfare steps planned and achieved so far should be held with regard to the transgender community. This will ensure that the talks of development are happening on a regular basis, and the possibility of growth will be more. Social Stigmas can be eradicated in this way, and it is one of the most important steps to be carried out to make the situation better.

## References

1. Adv Emerg. Nurs J. 56 (2011). Julie Nicole, "Understanding the transsexual patient: culturally sensitive care in emergency nursing practice", 33 Adv Emerg. Nurs J. 64 (2011). Available at: https://journals.lww.com/aenjournal/Abstract/2011/01000/Understanding_the_Transsexual_Patient__Culturally.8.aspx.
2. Alex Myers, "Trans Terminology Seems Like its changing all the time. And that's a god thing", State Magazine, (May 14, 2018), Available at: https://slate.com/human-interest/2018/05/trans-terminologys-constant-evolution-is-good-for-everyone.html.
3. Anugya Mittra, "Educational Inequality in India: A Review Paper for Transgender Population", 2 IJTSRD 1578-1584 (No.1, 2017), Available at: https://www.ijtsrd.com/humanities-and-the-arts/education/8293/educational-inequality-in-india-a-review-paper-for-transgender-population/ms-anugya-mittra.
4. Arbind Jha, Anita Woolfolk and Girishwar Misra, Fundamentals of Educational Psychology at 106 (2010).
5. B. Bilodeau, "Analysis of LGBT identity development models and implications for practice", 111 New Directions for Student Services 25-39 (2005), Available at: https://doi.org/10.1002/ss.171.
6. Deepika Ganju, "Stigma, violence and HIV vulnerability among transgender persons in sex work in Maharashtra, India", 19 International Journal for Research, Intervention and Care 903-917 (No. 8, 2017), Available at: https://www.tandfonline.com/doi/full/10.1080/13691058.2016.1271141.
7. Dr. Rajkumar, "Education of Transgenders in India: Status and Challenges", 6 IJRESS 15 – 24 (No. 11, 2016)

8. Ilhan Ozturk, "The Role of Education in Economic Development: A Theoretical Perspective", 33 Journal of Rural Development and Administration, 39-47 (No. 1, 2001), Available at: https://mpra.ub.uni-muenchen.de/9023/1/THE_ROLE_OF_EDUCATION_IN_ECONOMIC_DEVELOPMENT.pdf.
9. Indian Constitution (Eighty-sixth Amendment), art. 21-A.
10. Jillian T Weiss, "Teaching Transgender Issues", 358 JSTOR 27-38 (2009), Available at: https://www.jstor.org/stable/i40115882.
11. Jillian T Weiss, "Teaching Transgender Issues", 358 JSTOR 27-38 (2009), Available at: https://www.jstor.org/stable/i40115882.
12. M. Michel Raj, "Historical Evolution of Transgender Community in India", 4 Asian Review of Social Sciences 17-19 (No.1, 2015). Available at: https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf.
13. Mousumi Padhi and Purnima Anjali Mohanty, "Securing Transgender Rights through Capability Development", 54 Economic & Political Weekly (No. 1, 2019), Available at: https://www.epw.in/engage/article/securing-transgender-rights-education-finance.
14. NALSA v. Union of India, (2014) 5 SCC 438.
15. Pew Survey Polling and Analysis, Sept. 28, 2016, Available at: https://www.pewforum.org.
16. Prajanma Das, New education policy: Transgenders to get safe, reliable schools, Edex Live, (May 31, 2019), Available at: https://www.edexlive.com/news/2019/may/31/modi-20-plans-to-provide-safe-reliable-schools-and-quality-education-for-transgender-kids-6382.html.
17. Rajesh and M.D. Aslam Naved, Approach Paper on Education and Employment Opportunities & Challenges for Transgender, Ministry of Social Justice at 108 (2013).
18. Rajesh and M.D. Aslam Naved, Approach Paper on Education and Employment Opportunities & Challenges for Transgender, Ministry of Social Justice at 108 (2013).
19. Ramaswami Mahalingam, "Essentialism, Culture, and Beliefs About Gender Among the Aravanis of Tamil Nadu, India", 49 Sex Roles 489-496 (2003). Available at: http://dx.doi.org/10.1023/A:1025828606094.
20. Ryan Polly, "Understanding the transsexual patient: culturally sensitive care in emergency nursing practice
21. S.P. Gupta and Krishna Lal, Cultural Tourism in India: Museums, Monuments & Arts: Theory and Practice 44 (Reconstructing Indian History and Culture) (1st ed. 2002).
22. S.P. Gupta and Krishna Lal, Cultural Tourism in India: Museums,





Monuments & Arts: Theory and Practice 44 (Reconstructing Indian History and Culture) (1st ed. 2002).
23. Satish Chandra, "Transgender Children's Education and their Reengagement in Society", 2 IJERS 875-890 (May, 2017), Available at: http://www.srjis.com/pages/pdfFiles/15014920732.%20SATISH%20CHANDRA.pdf.
24. Sharful Islam Khan, The Wiley Blackwell Encyclopaedia of Gender and Sexuality Studies (Nancy A. Naples ed., 1st edn. 2016).
25. Sneha Koshy, Kerala becomes First State to Introduce Policy for transgenders, NDTV, (Nov. 16, 2015), Available at: https://www.ndtv.com/kerala-news/kerala-becomes-first-state-to-introduce-policy-for-transgenders-1243420.
26. Social Difference and Constitutionalism in Pan- Asia at *327 (Susan H. Williams ed., 2014)
27. Stephanie Burns & Ruth Leitch, "Barriers and Enablers of Education Equality for Transgender Students", 3 Review of Social Studies 11-20 (Autumn 2016), Available at: https://pureadmin.qub.ac.uk/ws/portalfiles/portal/120614074/barries_2.pdf.
28. Surya Monro, Transgender Politics in UK, 23 Critical Social Policy 433-452 (No. 4, 2003), Available at: http://euroasiapub.org/wp-content/uploads/2016/12/2ESSNov-4296.pdf.
29. Tamil Nadu Aravanigal (Transgender) Welfare Board: Case Study – UNDP Report – 2012, Laws, Policies & Reports, South Asian Translaw Database, Available At: https://translaw.clpr.org.in/laws-policies-reports/tamil-nadu-aravanigal-transgender-welfare-board-case-study-report/.
30. The Indian Express, Transgenders to get edu free of cost, (Apr. 07, 2017), Available at: https://www.newindianexpress.com/states/tamil-nadu/2017/apr/07/transgenders-to-get-edu-free-of-cost-1590936.html#:~:text=TIRUNELVELI%3AIn%20a%20decision%20that,taken%20by%20its%20Syndicate%20recently..
31. Vinay Lal, "Not This, Not That: The Hijras of India and the Cultural Politics of Sexuality", 61 Duke University Press 119-140 (1999).

# Impact of Information Technology on Human Rights

*Dr Ruchika Gupta*, Dr Nidhi Agarwal** and Dr Puneet Kumar****

**Abstract**

Human rights and technology issues have lately garnered a lot of attention from donors and activists. "HR-Tech" workers are optimistic about the possibilities for new technology to extend human rights activism and better data collection and analysis. At the same time, there is a lot of worry about how technology makes it easier for governments and businesses to monitor and control content, endangering fundamental rights and freedoms online. These problems involve a wide range of participants, objectives, frames, and expectations. Furthermore, the “magic bullet” tinge of technology can make it difficult to understand what to anticipate, what to doubt, and what to fear. The global human rights movement is influenced by technology and the internet. Our study concentrates on improving human rights. This involves protecting fundamental rights online and off. Tech isn't the start. Technology affects social, political, and organisational settings as an information and communications infrastructure and a tool to promote human rights organisations and practises. The issue of "what we do with technology to advance our social and human rights objectives" is essential since technology has the potential to be both beneficial and revolutionary. This study examined technological developments in relation to human rights initiatives. The study uses structured questionnaire to collect data using random sampling approach. SPSS 16.0 is used to analyse the data.

**Key words:** - *Human Rights, Technology, Social, Political, Digital Rights, Digital Technology, Liberty, ICT.*

* *Dean Academics, ABES Business School, Ghaziabad, UP, INDIA*
** *Professor, Faculty of Social Science and Humanities, Lincoln University College, Selangor, Malaysia*
*** *Professor, Kalinga University, Naya Raipur, Chhattisgarh, INDIA*





## Introduction

In recent years, the term "digital rights" has been more common in discussions about adapting human rights to the digital era. This kind of language has been inspired in part by groups who focus their efforts in these particular national contexts on issues of online consumer rights, privacy, and freedom of speech by using a "digital rights" paradigm. In the Internet Age, nations and international organisations have published more statements defending individual rights and freedoms. United Nations' WSIS and the Internet Governance Forum have discussed human rights in internet governance issues (Karppinen, 2017). According to Padovani et al. (2010), these conferences have attracted a variety of civil society organisations with various degrees of effectiveness in bringing attention to human rights in the rising information society. In recent years, civil liberties groups have become more informed on concerns pertaining to emerging digital technologies as a result of their increased collaboration with digital rights organisations. However, the ideological roots of this integration are murky.

According to Mohanty et al.(2022), information technologies are very useful in the global promotion of human rights. In the fight against human rights violations, ICTs (information and communication technologies) have shown to be potent tools. We define human rights as the inherent, inalienable entitlements to which every individual is born. For quite some time, people have looked to ICTs as a social platform for promoting human rights. As human rights continue to expand into the digital sphere, individuals face new risks never before encountered. This research keeps tabs on uprisings all across the globe, with a focus on countries where long-standing autocracies have been toppled by means of information and communication technologies. This article also delves into how ICTs might serve to protect human rights. Further, the report highlights growing themes that, in light of human rights protection, call for a more robust legal protection framework. This research examines the empirical evidence and existing literature to establish the key role that ICTs play in fostering a global culture of human rights and protecting its most vulnerable members. It also explains why a more robust legal framework is necessary to permit such uses of ICT platforms.

Cyber libertarianism was initially coined by Winner (1997), and its roots were subsequently traced by Coleman and Golub (1998) to American liberal libertarianism more generally. Although the argument has been reframed in favour of privacy, combining digital rights and civil liberties organisations (Johns and Joyce, 2014), digital rights organisations' emphasis on tools (Daskal, 2018) continues to emphasise disparities with civil liberties activists (Aouragh et al., 2015). These organisations have typically been more concerned in fighting than influencing policy. We may trace this inclination back to liberationist rhetoric.

Silicon Valley in the US and the broader technology industry have a similar philosophical background, having sprung from anti-statism and radical individualism associated with the counter-cultural movement of the 1960s and

1970s (Markoff, 2005; Turner, 2006). Despite having identical origins, digital rights organisations and the business regularly find themselves at odds with one another. Increasingly popular practises that infringe on people's privacy and liberty may offend these groups. Data acquisition in bulk and technological lockdown through intellectual property claims are two such examples. Two communication apps that capture this tension well are called Signal and Telegram. These organisations provide open-source, encrypted communication devices that are almost indistinguishable from those made accessible by the business, further blurring the line between a tech product and activism against corporate and government surveillance. While these open-source projects may not necessarily be industry-produced, they do lend credence to the premise that the finest technological solutions are those that originate from wherever they are needed most. Giridharadas (2019) argues that this is an aspect of the construction of broader ideological types that encourages startups to "zoom-in" on social difficulties until they become limited, solvable technological problems. When the social issue and the technological one is combined, the underlying structural issues of politics, inequality, and power are obscured. Therefore, while being opposed to commercial surveillance, the parts of digital rights activism that put a technical gloss on issues reflect the Silicon Valley philosophy that any one person with access to the correct tools may overthrow a repressive state.

## Technology Trends and Human Rights

To uphold justice and hold powerful people accountable, the internet and other technologies are indispensable tools. However, technology may also be used to violate people's freedoms and widen existing gaps in social standing. Some examples of recent technological developments that have an effect on people's rights are provided below.

The internet has made it much easier for people to express their opinions and share their thoughts freely with one another, thereby advancing the cause of free speech. To this day, however, there have been other incidents of Internet shutdown throughout the world, threatening the right to free expression.

Despite the advantages that may result from the IoT's meteoric ascent, privacy problems have emerged as a direct result of its widespread use. Many little details about people's routines and routine activities may be gathered via Internet of Things devices. Although many of us place a higher value on privacy than ever before, millions of us are handing out sensitive information without realising it.

The rise of AI and automated processes poses serious threats to human rights at work, including the right to fair and decent employment. By 2020, experts predict that chatbots and other forms of self-service technology will enable 85% of all client interactions.

The rise of the "gig economy," made possible in large part by technological advancements, has altered the nature of employment by expanding access to





temporary, contract-based roles that benefit some workers at the expense of others.

## Methodology

For the purpose of this study, we have conducted a survey using structured questionnaire. In questionnaire, we talked about human rights considering technology and included seven questions to discuss this parameter. We gave respondents five weighted options to choose from: Strongly Agree (5 points), Agree (4 points), Neither Agree-Nor Disagree (3 points), Disagree (2 points), and Strongly Disagree (1 point).

For data collection, we use random sampling approach and the questionnaires have been distributed to 230 respondents out of which we have received responses from 200 respondents.

## Data Analysis

The first question relates to the respondents' views whether technology is providing the power to people to express their views globally or not. The recorded data is listed below:-

**Table 1: Response for the Question 1**

| Question | Options | Data Collected Responses 200 | Percentage | Mean |
|---|---|---|---|---|
| Are you agree that technology is providing the power to people to express their view globally? | Strongly Agree | 154 | 77 | 4.43 |
| | Agree | 12 | 6 | |
| | Neither Agree - Nor Disagree | 11 | 5.5 | |
| | Disagree | 12 | 6 | |
| | Strongly Disagree | 11 | 5.5 | |

The impact that technology has on our capacity to hold duty bearers accountable for rights abuses is the second lens through which to view the relationship amid technology & human rights. The following table summarises the general response to this question:-

**Table 2: Response for the Question 2**

| Question | Options | Data Collected Responses 200 | Percentage | Mean |
|---|---|---|---|---|
| Are you accountable for wrong use of technology? | Strongly Agree | 167 | 83.5 | 4.64 |
| | Agree | 12 | 6 | |
| | Neither Agree - Nor Disagree | 9 | 4.5 | |
| | Disagree | 6 | 3 | |
| | Strongly Disagree | 6 | 3 | |

In our third question, we asked them if they believed that the government could not digitally monitor the population using technology. In this way, each respondent received a distinct response. The following table gives a succinct summary of all answers to this question:-

**Table 3: Response for The Question 3**

| Question | Options | Data Collected Responses 200 | Percentage | Mean |
|---|---|---|---|---|
| Do you think that using technology, the government may not surveillance digitally the public? | Strongly Agree | 0 | 0 | 1.03 |
| | Agree | 1 | 0.5 | |
| | Neither Agree Nor Disagree | 1 | 0.5 | |
| | Disagree | 1 | 0.5 | |
| | Strongly Disagree | 197 | 98.5 | |

The fourth question is if you believe that using technology for government surveillance does not violate people's rights. The information gathered is listed below: -





**Table 4: Response for The Question 4**

| Question | Options | Data Collected Responses 200 | Percentage | Mean |
|---|---|---|---|---|
| Do you think that when the government may surveillance by technology then this will not violation of human rights? | Strongly Agree | 179 | 89.5 | 4.78 |
| | Agree | 7 | 3.5 | |
| | Neither Agree Nor Disagree | 7 | 3.5 | |
| | Disagree | 5 | 2.5 | |
| | Strongly Disagree | 2 | 1 | |

Modern technology does not threaten human rights through the creation of autonomous machines like in science fiction and popular culture. We next questioned the respondents whether they thought technology should be under human control. The answers are provided below: -

**Table 5: Response for the Question 5**

| Question | Options | Data Collected Responses 200 | Percentage | Mean |
|---|---|---|---|---|
| Do you think that the human control the technology? | Strongly Agree | 151 | 75.5 | 4.53 |
| | Agree | 28 | 14 | |
| | Neither Agree Nor Disagree | 5 | 2.5 | |
| | Disagree | 8 | 4 | |
| | Strongly Disagree | 8 | 4 | |

For human rights law to stay relevant in the face of intensely intertwined public as well as private action in the field of technological innovation, we must rethink the public/private dichotomy that is ingrained in it. This does not imply that legislation is no longer relevant; rather, it means that it must change in order to fill the gaps in accountability brought about by the adoption of new

technology. The sixth question focuses on legal regulations pertaining to technology and human rights

**Table 6: Response for The Question 6**

| Question | Options | Data Collected Responses 200 | Percentage | Mean |
|---|---|---|---|---|
| Do you think that legal law related to technology should be udated? | Strongly Agree | 3 | 1.5 | 1.12 |
| | Agree | 2 | 1 | |
| | Neither Agree Nor Disagree | 2 | 1 | |
| | Disagree | 2 | 1 | |
| | Strongly Disagree | 191 | 95.5 | |

Even while initiatives to use technology for social benefit have gained momentum, technology cannot as well as does not resolve social issues. That "technology can solve the social concerns of people" is related to the eighth query. Many options were presented to almost all of the respondents in this regard, however the majority considering respondents strongly disagreed with this.

**Table 7: Response for The Question 7**

| Question | Options | Data Collected Responses 200 | Percentage | Mean |
|---|---|---|---|---|
| Do you have opinion that technology can solve the social problems of human beings? | Strongly Agree | 1 | 0.5 | 1.02 |
| | Agree | 0 | 0 | |
| | Neither Agree Nor Disagree | 0 | 0 | |
| | Disagree | 0 | 0 | |
| | Strongly Disagree | 199 | 99.5 | |





**Applying T-Test**

**Mean**

| Questions | Mean of Q1 to Q7 | Mean |
|---|---|---|
| 1 | 4.43 | 3.0786 |
| 2 | 4.64 | |
| 3 | 1.03 | |
| 4 | 4.78 | |
| 5 | 4.53 | |
| 6 | 1.12 | |
| 7 | 1.02 | |

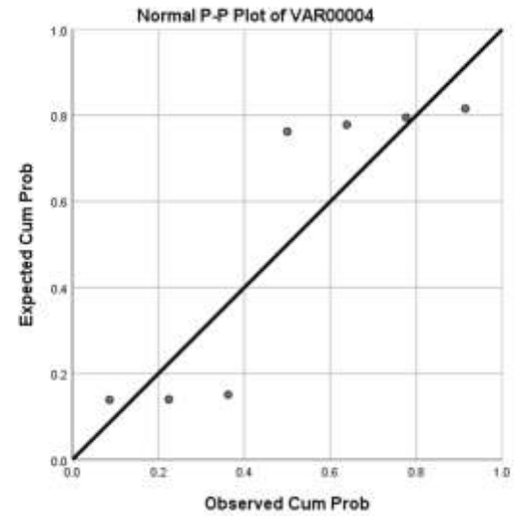
**Model Description**

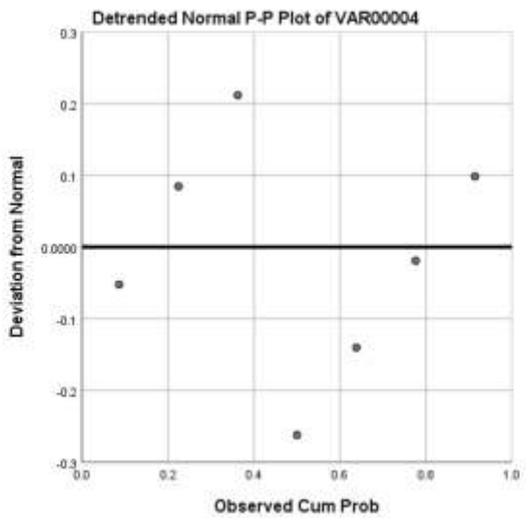
| | | |
|---|---|---|
| Model Name | Human Rights and Technology | |
| Series or Sequence 1 | Human Rights and Technology = VAR00004 | |
| Transformation | None | |
| Non-Seasonal Differencing | Zero | |
| Seasonal Differencing | Zero | |
| Length of Seasonal Period | No periodicity | |
| Standardization | Not applied | |
| Distribution | Type | Normal |
| | Location | Estimated |
| | Scale | Estimated |
| Fractional Rank Estimation Method | Blom's | |
| Rank Assigned to Ties | Mean rank of tied values | |

Applying the model specifications from MOD_3

**Estimated Distribution Parameters**

| | | Human Rights and Technology |
|---|---|---|
| Normal Distribution | Location | 3.0786 |
| | Scale | 1.89457 |
| The cases are unweighted. | | |

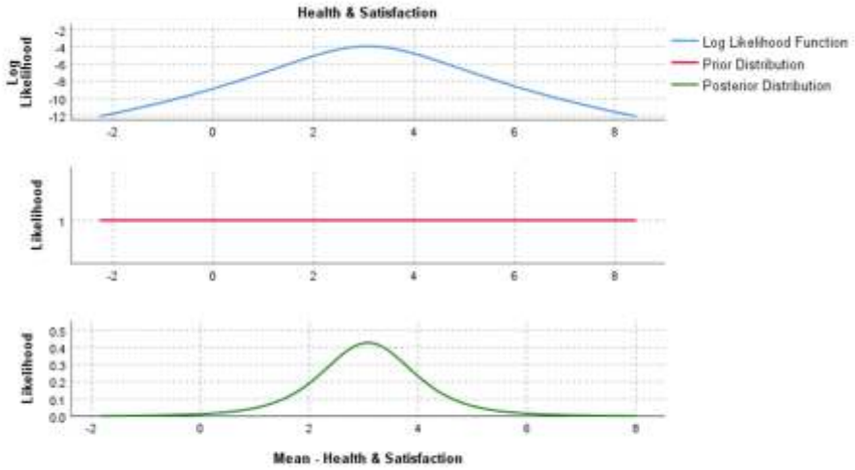







| **Posterior Distribution Characterization for One-Sample Mean** | | | | | | |
|---|---|---|---|---|---|---|
| | N | Posterior | | | 95% Credible Interval | |
| | | Mode | Mean | Variance | Lower Bound | Upper Bound |
| Human Rights and Technology | 7 | 3.0786 | 3.0786 | 1.538 | .6436 | 5.5136 |
| Prior on Variance: Diffuse. Prior on Mean: Diffuse. | | | | | | |




| **One-Sample Statistics** | | | | |
|---|---|---|---|---|
| | N | Mean | Std. Deviation | Std. Error Mean |
| Human Rights and Technology | 7 | 3.0786 | 1.89457 | .71608 |

| One-Sample Test | | | | | | |
|---|---|---|---|---|---|---|
| | Test Value = 0 | | | | | |
| | T | df | Sig. (2-tailed) | Mean Difference | 99.5% Confidence Interval of the Difference | |
| | | | | | Lower | Upper |
| Human Rights and Technology | 4.299 | 6 | .005 | 3.07857 | -.0126 | 6.1698 |

## CONCLUSION

Priorities for action must be established, and for that, understanding which technological forms directly affect human rights is essential. According to the World Economic Forum, there are 12 distinct areas of technology that warrant serious consideration namely- AI, IoT, Robotics, Biotechnologies, Virtual Reality, Additive Manufacturing, Geoengineering and space technologies to name a few. As these twelve technologies develop and proliferate, they give rise to novel classifications, procedures, products, and services, as well as fresh value chains and organisational frameworks.

Also, the voices of the socially marginalised, such as the poor and the handicapped, have been amplified by technological advancements, making it possible for them to utilise their skills to break out of poverty. Increasing access to the web and other forms of ICT may help forward the cause of human rights. The Internet, and by extension technology, has unique and transformative properties that may aid in society development. Human rights education, training, and public awareness have been highlighted as key factors in the development of human rights and the formation of stable and harmonious relationships within communities. While no one technological advancement can solve every problem, it may help people meet their most fundamental requirements and develop to their fullest potential.

If democracy and efficient government are ignored, an examination of the links between technology and human rights will be of little use. Since one might facilitate the spread of the other, it is important to see both in their proper perspective as by-products of the same system. Technological advancements have the greatest impact on democracies when it comes to empowering citizens to participate in government by expanding the reach of interest groups, social movements, non-governmental organisations, transnational policy networks, and political parties that have the organisational agility to adapt to the new medium through increased access to information, electronic communication channels,





and networking capacity. In this manner, we can make sure that the fulfilment of people's human dignity is intertwined with the development of new technologies, and that the interaction between the two may blossom into a fruitful partnership.

## References

1. Aouragh M, Gurses S, Rocha J, et al. (2015). On division of labour and techno-political practices of delegation in times of crisis. The Fibreculture Journal, 26: 208-235. https:// twentysix.fibreculturejournal.org/fcj-196-lets-first-getthings-done-on-division-of-labour-and-techno-politicalpractices-of-delegation-in-times-of-crisis/
2. Agarwal, Nidhi and Verma, Monica, (2019). A Study on Taxonomy of Innovations. Globus An International Journal of Management & IT, 11(1): 57-64.
3. Becker, J. (2012). Campaigning for Justice: Human Rights Advocacy in Practice. Stanford University Press, Stanford, CA.
4. Chivers W (2019). Resisting digital surveillance reform: The arguments and tactics of communications service providers. Surveillance & Society, 17: 517-532.
5. Coleman EG and Golub A (2008). Hacker practice: Moral genres and the cultural articulation of liberalism. Anthropological Theory, 8(3): 255-277.
6. Daskal E (2018). Let's be careful out there: How digital rights advocates educate citizens in the digital age. Information. Communication & Society, 21(2): 241-256.
7. Galvez, Dr. Rosalyn S. (2022). The Effects of Students' Resiliency on Academic Performance Amidst Pandemic. Globus An International Journal of Medical Science, Engineering & Technology, 11(1): 73-79.
8. Gupta, Ruchika and Kumar, Puneet (2013). "Information Technology Business Value Assessment: A Case of State Bank of India". Globus: An International Journal of Management & IT, 4(2): 30-34, ISSN:0975-721X. UGC Approved Journal.
9. Hankey, S. and Clunaigh, D. O. (2013). Rethinking Risk and Security of Human Rights Defenders in the Digital Age. Journal of Human Rights Practice, 5(3): 535-547.
10. Karppinen K (2017). Human Rights and the Digital Age. In: Tumber H and Waisbord S (eds) Routledge Companion to Media and Human Rights. Abingdon: Routledge.
11. Maria Corazon D. Segismundo, Evangeline P. Dayao (2021). Employability and Productivity of The 21st Century Workforce: A Tracer Study of LCUP-CBEA Graduates AY 2015 to 2018. Cosmos Journal of Engineering & Technology, 11(2): 39-47.

12. Maricar S. Dimla, Marilette C. Eusebio, Annaliza C. Mendoza (2021). Social Network Exposure and Students' Vocabulary Proficiency of Second Language: Basis for Reading Enrichment Method. Cosmos An International Journal of Art and Higher Education, 10(2): 97-108.
13. Mishra, Sudhir Kumar (2021). A Study on Growth and Development of Educational Technology and ICT. Globus Journal of Progressive Education, 11(1): 23-25.
14. Mohanty, Hitabhilash and Priyadarshani, Pallavi (2022). Significance of Information and Communication Technology in Spreading Awareness & Promotion of Human Rights: An International Perspective (June 22, 2022). Available at SSRN: https://ssrn.com/abstract=4143826 or http://dx.doi.org/10.2139/ssrn.4143826
15. Padovani C, Musiani F and Pavan E (2010). Investigating evolving discourses on human rights in the digital age. International Communication Gazette, 72(4-5): 359-378.
16. Sharma, Mahesh and Parihar, Dr RS, (2019). Information System and Its Implication in New Emerging Society. Globus An International Journal of Management & IT, 11(1): 01-05.
17. United Nations (2012). Report of the Special Rapporteur to the Human Rights Council on the Protection of Journalists and Media Freedom. A/HRC/20/17 Human Rights Council. Twenty-second session.
18. Vashishtha, Dr Nirdesh and Sanand, Sunidhi (2021). The Dynamic Role of HR in Merger & Acquisitions in IT Sector. Cosmos An International Journal of Management, 10(2): 01-06.
19. Winner L (1997). Cyberlibertarian myths and the prospects for community. ACM Sigcas Computers and Society, 27(3): 14-19.



# Human Rights Myth or Reality: An Analytical Study with reference of Tribal Women

***Dr. Sanjay Yadav*, Jivendra Kumar*****

**Abstract**

This paper highlights that in Indian society people suffers from chronic human rights problems. When we look impunity is a significant issue those officers and members who misuse their power are rearly brought to justice for torture. In India we have three tier government system i.e., Central Governement, State Government and Local Government. Generally, we saw the local governement failed to the implemented the laws. The constitution of India also gives provision to the every citizen of this country in terms of Fundamental Rights to fulfill their liberty as citizen of India. Tribal people are ethnic in nature. In simple terms Human rights are those moral principles that establish certain standards that is related to the behavior of human. The basic rights and freedoms of a person in the world from first breath to last breath. Women that is considered as the second sex. The violation of rights in terms of tribal women in two ways :- the perception about tribal people and other one is women because the patriarchy nature through this exploitation faced by them. Yet women around the world are routinely subjected to violations of their human rights throughout their lives and realizing women's human rights has not always been a priority. We look the constitutional safegards and the ways of enhancing participation in different rights.

**Key words:** - *Human Devlopment, Constitution of India, Tribe, Human Rights, Exploitation.*

## Introduction

When we talk about Human rights that literally means the those rights that are given to the human throughout the world to better way of life. According to

* *Assistant Professor, Department of Tribal Studies, Art, Culture and Folk Literature. Indira Gandhi National Tribal University, Amarkantak, Madhya Pradesh*
*Email: drsy94@gmail.com*
** *Master of Arts, Department of Sociology. Central University of Haryana, Mahendergarh, Haryana*
*Email: jivendrasocio@gmail.com*

United Nations, "Human rights are rights inherent all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education".

According to UNICEF, "Human rights are standards that recognise and protect the dignity of all human beings. Human rights govern how individual human beings live in society and with each other, as well as their relationship with the state and the obligations that the state have towards them".

Tribal communities they are aborigines it means that those who live firstly at any place. They (Tribal people) are very independent in nature. Their lifestyle, economy and livelihood are self sufficent and independent. The above reasons are the main aspects these people (Tribals) don't mix with other peoples. The Scheduled Tribal group are treated as the oppressed class in India. They are also considered as the marginalised section of society. It reflects the situaton of tribal community. When consider women, the terms – gender oppression, discrimination in the social structure. In the social instututions, for instance – Family : where the lack of freedom is easily observed. At the time of socialisation, gender role play an important role. Girls play with dolls and boys with guns and other equipments. Every human being have equal oppurtunity to sustain things. Human rights are of all human beings no partially between so called first, second and third sex. In tribal hamlets, the lack of infrastructure easily observed. Educational setup is in worst situation, lack of health facilities, potable water availability, or we can say the basic needs of people. These are also the reason of worst situation of women. In India, tribes constitute of 8.6 percent of population (According to Census of India, 2011). In loksabha, 47 seats are researved for Scheduled Tribes and out of this 12 Women are Member of Parliament. The number shows that the half population and from these researved seats approx one fourth members are not women. Later, see the constitutional safeguards and other rights of human beings.

**Constitutional provisions :**

Constitution of India provided each citizen educational, economic and public employment related safeguards.

| Article | Title |
|---|---|
| 15 | Prohibition of discrimination on grounds of religon, race, caste, sex or birth place. |
| 16 | Equality of oppurtunity in matters of public employment. |
| 19 | Protection of certain rights regarding freedom of speech, etc |
| 46 | Promotion of Educational and Economic interests of scheduled Castes, scheduled tribes and other weaker section. |
| 335 | Claims of scheduled castes and scheduled tribes to service and Posts. |
| 330 | Reservation of seats for Scheduled castes and Scheduled Tribes in the house of people. |
| 332 | Reservation of seats for Scheduled castes and Scheduled Tribes in the legislative assemblies of the states. |





Article 15 basically talks abot that as a citizen of India, we can not discriminate any human being on the basis of race whether he/she have fair or dark complex, religion whether the person is Hindu, Muslim, Sikh, Jain, Christian. In Indian context, caste play an important role and by upper caste people opprssed backward caste people. We can not discriminate on basis of any sex (Male or Female or Third Gender) and on language also because the nature of India is diversified in nature.

Article 16 mainly states that in the matter of public employment the equal oppurtunity should be given to every citizen. We can not make strata or getting employment.

Article 46 directly talks about we have to promote oppressed or marginalised section community in the sector of education and economic interests. In simple words, through education and economic growth any section easily improve their status.

Article 335 states that to participation in public sector, people from SCs and STs can claim for their involvement of that sector.

Article 330 talks about reservation of seats in house of people for Scheduled Caste and Scheduled Tribes. Political participation is also a way to achieve status in society and through this way the members are from that commuity raise the voice of their section.

Article 332 talks about the participation of Scheduled caste and Scheduled tribes in the state legislative assembly because in some states the number of those communities are good. So, to trying to uplift their situation the members are as the representative and make provisions for them.

Article 21 of the Indian Constitution, "Protection of Life and Personal Liberty" no person shall be deprived of his/her life or personal liberty except according to procedure established by law.

Article 21 provides two kinds of rights:

(A). Right to life

(B). Right to Personal Liberty

**Status of tribal women :**

In society, the importance of both man and woman are equal. According to MacIver and Page, "Society is a web of social relationships". When we look the status of women in society then find that due to patriarchy, status of women is

usually low. The role of women in society is not for noneconomic activities but economic activities also. We have try to maintain socio-economic equality in the society. Women have equal access to participate in all the social activities. Generally, we saw after women got 33 percent reservation in Local election or Panchayat Elections, a term "Pradhan Pati" is much relevant – it means on the name of husband women won and all things done by her husband. After the provisions why we can't give oppurtunity to women to enrich their ideas ? Human rights are voilated in context of tribal women is worst in nature. Due to lack of oppurtunities, lack of infrastructure, lack of awarness women faced a lot of problems to access any things. The political awarreness among the tribal women is also very low. They have also no place in the micro level village (Ahuja,1999:288).

Patriarchal power structures have treated marriage as a license forced sex, thereby denying the self-worth of women. In India, marital rape is seen as legally sanctioned rape, which removes the element of consent from married women. Some days before Justice D. Y. Chandrachud told that man or a husband is not the owner of wife's sexuality. Women have its own right to choosing partner, having sex. The concept of patriarchy is existed in many societies despite the fact that tribal women are dependent throughout their life as daughters, sisters and wives. They have far more power and independence that modern sub urban house wives. A women has always the power to leave her husband if she is displeased, dissatisfied. Women are treated unequally under the social welfare systems that affect their status and power in family. The social status of tribal women is heterogenous; it differs regionally and among the tribes, however, a women's contribution to the family and society is immense (Chaudhary,2015:09).

For the rise of tribals from vulnerable and poor communities in India several welfare policies and programs are implemented and constitutional Safeguards and laws like SC and ST Prevention of Atrocities Act (1989), PESA Act (1996), Forest Rights Act (2006) have been introduced to protect basic human rights of tribal communities including tribal women.

**Development and consideration of Human Rights:**

Within society we saw that stratification is existed. It simply means that the strata or layers in the society. Always we put women in the secondary position. The question must be arise why not we consider women as first sex ?. Human development approach suggests complementary relationship between human development and human rights which go together and are different from each other. The main focus of Human development and Human rights on socio-economic development and it became when developmental initiatives will started. Human rights based approach means that all forms of discrimination in the realisation of rights should be prohibited, prevented and eliminated. It also means that priority should be given to those in the most marginalised or vulnerable situations who face the greatest barriers to achieving their rights.





The Human Rights Based Approach (HRBA) is a way of empowering people to know and claim their rights, and to enhance the capacity and accountability of individuals and institutions that are responsible for respecting, protecting and fulfilling rights.

Development of any nation is not possible if any section of society is ignored or away from the basic necessities. For upliftment of the marginalized section, Indian Constitution gave some rights and acts for the tribal communities. We cannot imagine any kind of development in tribes without the active participation of women.

**Constitutional Safeguards and laws :**

1. Scheduled Caste and Scheduled Tribe (Prevention of Atrocties ) Act, 1989:

The Scheduled Castes and Scheduled Tribes Act, 1989 has prevented a wide range of crimes against SCs and STs. These special courts work to protect the rights and privileges of victims and assist them in obtaining relief. The main aim of this act to provide justice to these communities through proactive efforts to enable their participation in a democratic society and ensure that they enjoy the valuable benefits of a society free from discrimination, oppression nd exploitation by upper caste people. This act works to prevent deprivation and helps marginalized communities to avoid it.

2. PESA Act, 1996:

The main thought to implement and making this act is that the tribal population from exploitation with the active participation of the Gram Sabha. The Panchayat Extension to Scheduled Areas (PESA) Act,1989, gives special power to Gram sabhas in scheduled areas especially for the management of natural resources. The aim of PESA is :

To protect and preserves the traditions and customs of tribal communities. Empowering panchayats at appropriate levels with specific powers suited to tribal needs. Preventing the panchayats at the higher level from assuming the powers and authority of the Panchayats at the lower level of Gram sabha.

3. The Forest Rights Act, 2006 –

The Forest Right Act (FRA), 2006 recognises the rights of forest dwelling tribal communities depended for various needs including livelihood, housing and other socio-cultural needs. It ensures food security of Scheduled Tribes strengthens the forest conservation regime. Community forest resources are monitored and managed in a way that protects the traditional relationships of marginal communities with them.

Some safeguards and laws are mentioned above that introduced to protect basic human rights of tribal communities including tribal women. Constitution of India, constitutes empowering the weaker section of society and ensures their rights.

The participation of women in politics also constitutes human rights. They have equal rights to participate, take decisions and contribute for the nation.

**Government plans for tribal women :**

The major policies of the Ministry of Tribal Affairs are aimed at ensuring the all round development of both men and women belonging to the Scheduled Tribes. In their community women faces lots of disadvantage.

1. Ashram Schools in Tribal areas :

The main aim of this scheme is to provide residential schools for Scheduled Tribes to increase the literacy rate among the students of Scheduled Tribes and bring them at par with the rest of the country's population. To making the schools, central government give 100 percent share.

2. Adivasi Mahila Sashaktikaran Yojna :

National Scheduled Tribes Finance and Development Corporation is implementing Tribal Women Empowerment scheme for tribal women. Under the scheme, scheduled tribe women can do any income generating activity. Loans up to 90 percent are provided at a concessional rate of 4 percent for schemes upto Rs 1 lakh.

3. Micro Credit Scheme for Self Help Groups :

Micro Credit Scheme is a loan scheme offered by Micro Financial Institutions. This scheme is mainly offered for micro enterprise activities like agriulture activities, artisan activities etc. These schemes help low income individuals to engage themselves in income generating activities for sustainable livelihood. Micro credit schemes are also provided to self help groups so that they can set up enterprises and earn income. These schemes are also helpful for tribal women.

**Conclusion :**

Tribal people that are considered as the marginalized or weaker section of society. Human rights for all human being have right to ensure their life. The concept of human rights aims at protecting rights like right to life, light to liberty, right to property. Tribal women live in two types of types of vulnerability : one due to their tribal roots and the other due to their biological sex, mostly unaware of their human rights. Our constitution of India also provided safeguards to the citizen whether they are belong to whatever section of society. Some governmental plans are also for the better life and upliftment of their status. The situation of tribal women are not good after the many years of independence. Women constitutes the half of the population and without development of women, we can't imagine the progress of the society. As a citizen of India, we integrate and make nation stronger. The awareness about any programmes as like- water and sanitation, governmental schemes, health





policies, housing is low among the tribal women is the cause of became oppressed. To uplift the every people awareness programmes are must be organized. Without knowing rights then anyone exploit to anyone. There is need strong a strong motivation among the tribal women to aware their oppurtunities.

**References :**

1. N, Sunitha. (2016). Human rights and Social Status of tribal women, International Journal of Advanced Research, 4(9), 2314-2314.
2. Halavath,Krishna. (2014). Human rights and realities of tribals' lives in India: A perfect Storm, ISOR Journal of Humanities and Social Science, 19(4), 43-46.
3. Xaxa,Virginius. (1999). Tribes as Indigenous people. Economic and Political weekly. 34(51). 3589-3595
4. Accessed from -https://tribal.nic.in>livelihood
5. Accessed from - https://www.un.org.>global-issues
6. Accessed from - https://www.ohchr.org>what-are-human-rights
7. Satpathy,Chinmayee. (2016). Defending Human Right of Tribal Women Through Development Programme Implementation: A Study of Odisha. Journal of the Anthropological Suroey of India ,65(1), 107-125
8. Accessed from:https://lordsoflaw.com/access-to-human-rights-of-the-women-in-the-tribal-areas-of-india/
9. Vidhyarthi,I,P, Rai Binay.(1976). Tribal Culture of India.New Delhi: Concept Publishing Company.
10. Kurukshetra Magzine- September 2022.
11. Doshi,S L, Jain,P C. (2020).Tribal Sociology. Jaipur: Rawat Publications.
12. Ahuja,Ram.1999.Society in India. Rawat Publications, Jaipur.
13. V.A,H.(2015). Tribal women as the victims of the interrelation between the empowerment and domestic violence in India. Indian Journal of Research,33-34.
14. Edited by Chaudhary, S.N. 2015. Tribal women Yesterday, Today and Tomorrow. Jaipur: Rawat Publications.

# Act of 2019 Concerning Socio-Legal analysis of Transgender Persons (Protection of Rights)

*Dr. Yashfeen Ali**

**Abstract**

The term "transgender" was first coined in the mid-1990s by a varied group of people. In this research, the further analysis will be done on the adequate gender recognition of transgender in accordance with international standards.

There have been a number of landmark decisions of Supreme Court which marked significant victory for transgender community. Recently the apex court read down the provision of section 377 of the Indian penal code, Supreme Court took an initiative regarding the status of transgender community.

In 2013 report, the expert committee on transgender issues reflected the importance of educational opportunities and emphasised the need to strengthen and sensitise the educational system to issues relating to discrimination and stigmatisation of transgender people.. Reservation can be considered as a positive step to counter the existing discrimination faced by the members of the community of transgender and liberate them from the religious, social and cultural stigma.Nations across the globe including countries like the United Kingdom and the United States have taken a proactive approach to the Trans network, recognizing them as the third gender and providing them with basic human rights.

The Rajyasabha later passed the Act, and this paper will only provide a critique of its provisions. Despite amendments in Act of 2016 &2018, the 2019Act suffer from several lacunas, even if the definition of 'transgender' has been improved in the new Act which includes persons with social identity as kinnar, arvani, jogta, hijra but the inclusion of all 'person with intersex variations' as transgender is ambiguous for interpretation.

* *Assistant Professor, Integral University, Lucknow,*
*Email: yashfeen231@gmail.com*





Global organisations and nations like the US and the UK have taken a proactive stance towards the Trans community by recognising them as the third gender and granting them the fundamental human rights. This research will aim to bring about the ways through which such mechanism could also be implemented in India.

**Key words:** - *Transgender, Third gender, Transgender Persons Act, 2019 etc.*

## Introduction

Anyone of any sex who experiences a change in appearance, personality, or behaviour due to expectations of what a person ought to look like or act like is considered transgender. Transgender people have existed in every country, race, and religion from the beginning of recorded history.The term "transgender" was first coined during the 1990s by a varied group of people. The dictionary meaning of the term transgender is “a person who does not identify with traditional gender identities”.

The definition given by American Psychological Association of the term transgender must be taken into consideration. According to this association, "Transgender is an umbrella term for persons whose gender identity, expression or behaviour does not conform to that typically associated with the sex to which they were assigned at birth."According to a research issued by UNAIDS in 2014 on transgender, 70 percent of transgender people have gone through multiple experiences which includes verbal as well as sexual abuse, almost 45 percent have experienced physical abuse, and nearly 20 percent have been sexually abused. According to The Los Angeles Transgender Health Study, overall 80% of transgender people suffered verbal abuse and about 50% of them were subjected to physical abuse Many of them, as compared to the general population faces a higher number of people have been abused from childhood to adulthood.In this paper further analysis is doneon adequate gender recognition with international standards.

In 2014, National Legal Services Authority v. Union of India and Others, a significant decision by the Supreme Court that represented a major victory for the transgender community, in this case, it was ruled that Trans individuals have the self-determination right to choose their sexual identity and are entitled to protection within the constitutional ambit enumerated in part third of the Constitution of India. Recently, in the case of Navtej Singh Johar v. Union of India read down the provision of section 377 of the Indian penal code, Supreme Court took an initiative regarding the status of the transgender community.

Furthermore, in ‘Navtej Singh Johar, the Supreme court’ while trimming the bends of security and criminalization of homosexuality, talked about the effect of Puttaswamy dictum, and watched "self-determination incorporates sexual orientation and presentation of sexual personality". Hence, the substance of independence and self-governance has been fittingly settled and reflected in the assessments of the respected Judges.

This essay analyses two things critically. The Transgender Person (Protection of Rights) Act 2019 was passed by Parliament in response to a judicial decision and the NALSA judgement, which considered the rights of transgender people and led the legislature to agree to offer guidance.

**The NALSA judgment**

The NALSA decision, which drew widespread media attention and activists' attention, included recommendations for the legal acknowledgement of transgender people's identities as well as reservations in educationand profession. The NALSA, which was established by the LSA Act of 1997 and is charged with providing free legal services to the poor and underprivileged, has filed a writ petition.Another petitioner was an organization for women's welfare named Poojya Mata Nasib Kaur Ji.

In 2014, a two-judge bench of the apex court established a milestone judgment, maintaining the privileges of the third gender society. In this judgement for the first time, the formal effort made by the apex court in a long over-due acknowledgement of recognizing transgender as a 'third gender' and affirmed that the transgender persons have the right to self-determination of their gender and declared further, they are entitled to all constitutional protections of rights i.e. right against discrimination and all rights available to an individual enumerated in part III of the constitution.

In this case, there were nine directives given by the apex court for the protection of the transgender community. Thereby, the Central and state government directed to make provisions for legal recognition of transgender and to provide recognition of self-identified gender.

**Third-Gender Recognition in Law**

The term 'gender' is of a great social importance but it became obvious just a few years ago when sex was acknowledged as a socially constructed concept and 'gender' was recognized as a natural ingredient of sex character.

The acceptance of transgender people as the "third gender" is the crowning achievement of the NALSA decision. The term 'transgender' is defined by the Court as an 'umbrella term' that covers variants that fall within the category of 'third gender.' The question, who is a transgender? a wide connotation given in Justice Radhakrishnan's text in judgement, "Transgender is generally described as an umbrella term for persons whose identity, gender expression or behaviour does not conform with their biological sex", this does not exactly specify the term 'transgender' but “it may include hijras (who is neither male nor female), pre-operative or post-operative transsexual people who undergo sex reassignment surgery to align their biological sex with their gender identity to become male or female and transvestites who like dress in clothing of opposite gender."





Court further stated thatkothis, aravanis, jogtas, shivshaktisalso come within the term 'transgender.' In justice Sikri's opinion a narrower meaning is given to the term 'transgender', particularly for hijras, the narrower approach adopted by Madras High court, where the police department denied employment to a 'female-to-male transgender' for the post of women constable, in Jacqueline Mary v. superintendent of Police, held that ‘Female to male' does not come within the ambit of 'transgender', it only applies to 'male to female,' it excludes a large number of people in their community despite a wide interpretation of the NALSA case.

**Self Determination of gender identity and sexual orientation**

The Supreme Court relied on the "Yogyakarta principle" to draw a clear demarcation between "sexual orientation" and "gender identity." Justice Radhhakrishnan's observation, titled "Gender Identity and Sexual Orientation," attempted to characterize and remark that:

"Gender identity is one of the most fundamental aspects of the life, it refers to each person's deeply internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including a personal sense of body which may involve a freely chosen, modification of bodily appearance or function by medical, surgical or other means and another expression of gender sexual orientation refers to an individual's enduring physical, romantic or emotional attraction to another person"

Further, the court expanded the horizons of Fundamental rights by upholding the right to self-determination of gender and enumerated as directives in the judgement. J. Radhakrishnan observed that "each person's self-defined sexual orientation and gender identity is an integral part of their personality and is one of the most basic aspects of self-determination, dignity and freedom”. However, the principle of self-determination, recognized in judgement suffers from inconsistent construction and limitation, in several ways. several scholars have pointed out the opinion given by judges in the case is that “hijras to be treated as third gender” for purpose of protection of their rights and on the other hand it also affirms the principle of 'self-determination of gender' which reflects the free will to choose one's gender. Furthermore, apart from 'third gender recognition', 'self-determination principal' have another lacuna in judgement that is, through reference external test by state agencies. The judgement is ambiguous over the manner of external certification and legal recognition of gender. Although the judgement gravitates toward bolstering the 'self-determination principle' but directing state agencies to figure out gender identity, somewhere deters its veracity.

**Providing reservations to the transgender**

The Expert Committee on Transgender Issues emphasised strengthening and

educating the educational system on issues relating to discrimination and stigmatisation of transgender people in its 2013 report, which reflected the importance of educational opportunities. Reservation could be seen as a step in the right direction towards reducing transgender discrimination and releasing them from social, cultural, and religious stigma.

Following the ruling, the court extended the protection of articles 15 and 16 to transgender people, outlawing discrimination based on gender. For reservations, transgender people are given the same status as "backward classes." The court makes the following observations when granting reservation: "TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. The state is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. The state is bound to take affirmative action to give them due representation in public services. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles."

**Transgender Rights and the role of the United Nations**

In 2008, a coalition of 66 nations released a statement in front of the UN General Assembly endorsing LGBT rights. The declaration made reference to the UDHR when criticising human rights violations that depended on a transgender person's sexual orientation as well as their gender. China, Russia, the USA and the Islamic Conference were all against it. They issued a collective notification which accused the coalition of the countries of aiming to deteriorate the law governing human rights internationally by normalizing paedophilia, among other things. Following the 2008 statement, a UN Human Rights Council study in 2011 found discrimination against LGBT individuals in both law and society. In 2015, another report by UNHRC relating to the offences against transgender persons was added to the mix, this time in conformity with international law commitments.

Despite UN efforts for the advancement of Transgender rights, a group of countries still opposed to the reforms create a powerful bloc that can stifle or impede progress. Secretary General, Ban Ki-Moon before leaving the UN in his final years, said that his support for the betterment of the transgender right frequently faced opposition from numerous important member nations. He considered his efforts as mainly futile, despite endorsing LGBT rights as an institutional commitment. This is mirrored in the final edition of the United Nations' Global Development Goals, which fully excluded LGBT rights. Calls for specific language to protect LGBT people were met with hostility by “a bloc of countries, including Russia and most of Africa, Middle Eastern, Asian and Caribbean countries, as well as the Vatican and religious groups.”





Nonetheless, in 2015, only days after the Sustainable Development Goals were adopted, a group of multiple UN agencies (UNESCO, UN Women, UNODC, OHCHR, ILO, UNICEF, UNDP, UNFPA, UNHCR, and WHO) issued a statement stating their commitment to eliminating transgender people from violence and discrimination that occurs against them .Its specific suggestions include accepting transgender identity as a basis for refuge and abolishing anti-discrimination laws "based on their sexual orientation, gender identity or gender expression," and "prohibit[ing] discrimination against LGBTI adults, adolescents and children in all contexts—including in education, employment, healthcare, housing, social protection, criminal justice and in asylum and detention settings." Numerous UN nations retain the ability to sway UN decisions against the addition of transgender rights, although they are not able to entirely stifle reform initiatives by those countries.

The UN Human Rights Council selected a person with expertise in the area to study the abuse and discrimination faced by transgender persons in 2016. Multiple Western, as well as South American countries in the Transgender Group, voted 23 to 18 in favour of the resolution. The The appointment of an impartial expert formalised the LGBT Core Group's operations within recognised UN institutions. Its responsibilities included evaluating and educating states about the need to implement anti-abusive programmes.

**Act for transgender rights**

Following the NALSA judgment, which was a landmark institutional advance for transgender rights, the first legislative effort was launched in 2014, followed by another in 2016and subsequent revisions but failed to achieve their goals? For social, educational & economic empowerment of the transgender community the foundation stone of its legislative recognition was for the first time kept by an altruistic person Tiruchi Siva, a RajyaSabha M.P. as a private member introduced a bill named as a Transgender person(protection of rights) Bill 2014. The scrutiny of the Bill clears that it only follows the partial mandate of the NALSA judgment, though the 2014 Bill was unanimously passed by the Rajyasabha but is still in queue to be presented in LokSabha. Later Ministry of social justice and empowerment presentedthe transgender person (protection of Rights Bill) 2016 which was not more than a dire crafted piece of paper for the Trans community. The entire manual was subsisted of offences against Trans individuals. It vanquishes their right to determine gender and authorizes a district committee comprising of doctors, psychiatrists, social workers etc.

Afterwards, the error of the Act leads it towards the analyses by the parliamentary sitting committee. Later by making 27 amendments to the transgender Persons(protection of rights) Bill 2018 was passed in LokSabha and was under due consideration in RajyaSabha. All we can say is that the 2018 Billwas a pesky amended text which is minimized in the context of law, as bestowed by the supreme court on the grounds which can be easily spotted at its directives, namely (a) acceptance of the third gender under the law (b) Self-

determination (c) reservation in education and employment (d) Medical benefits (e) welfare policies (f) admittance. Later this Bill was duly passed by both the houses and received the assent of the president in 2019.

The scope of this paper will be limited to a critique of the provisions of the Act which was later passed by the Rajyasabha. Despite amendments in Act of 2016 &2018, the 2019Act suffer from several lacunas, even if the definition of 'transgender' has been improved in the new Act which includes persons with social identity as kinnar, arvani, jogta, hijra but the inclusion of all 'person with intersex variations' as transgender is ambiguous for interpretation.

A discourteous provision of the 2019Act deprives the self-determinationright of the transgender which is expressly recognized under the National Legal Services Authorityjudgement. As per the provision of the Act, certification of identification of gender needs to be obtained to be acknowledged as transgender, by making an application to a screening committee set up at the district level, comprising of five persons a psychiatrist and a medical officer. Further, it also mandates sex reassignment surgery for a transgender to be identified as male or female. This amounts to a blatant violation of the decision of the NALSA case which notes that "any procedure for identification of transgender persons' which goes beyond self-identification and is likely to involve an element of medical, biological or mental assessment, would violate transgender persons' rights under Article 19 and 21 of the Constitution."

The concept of the national council for transgender is cited under the Act. This initiative by the central government can be considered a visionary step towards fostering the transgender community in terms of formulation of policies, programs, equality etc, through the national council activities of the governmental and non-governmental organizations can be surveilled and their sleek running can be facilitated. But still, the chapter also bears a flaw, that there is no specific council at District and State levels. It creates a doubt that whether the effective sanction of this part of the Act is possible or not.

Considering the above shortcomings, it can be concluded that the Act has failed to address the problems of the transgender community and it needs to be called out. The government should come up with a better model which protects their rights as per directives of the NALSA case and also in consonance with mandates of Navtej sing johar v. Union of India.

Can we imagine if the proposed Act is enacted and consequently, challenged on the ground of constitutionality, in what words court will reply to it? The reference can be taken from the words of J. Indu Malhotra while reading down section 377, "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."





## Conclusion and Suggestions

Throughout the entire paper, the author has talked about the Historical Foundation, the current situation and the difficulties felt by the transgender in this heterogeneous society which thinks and approves of the authenticity of just paired sexual orientations. Global organisations and numerous other nations, including the United States and the United Kingdom, have taken a proactive stance towards the Trans network, recognising them as the third gender and giving them access to fundamental human rights.

Would we be able to envision if the proposed Act is instituted and therefore, tested on the ground of dependability, in what words court will answer to it? The reference can be taken from the words J. Indu Malhotra while perusing down section 377, "History owes a statement

of regret to the individuals from this network and their families, for the postponement in giving redressal to the disgrace and alienation that they have endured the hundreds of years."

## Reference

1. The GAP Report on People Left behind: Transgender People' (UNAIDS 2014)
2. Reback C and Simon P, 'The Los Angeles Transgender Health Study: Community Report' (CDC 2001).
3. National Legal Services Authority v Union of India [2015] SC 438, 4 SCC.
4. Michelraj M, 'Historical Evolution of Transgender Community in India' (2015) 4 Asian Review of Social Sciences 17 https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf
5. Reback C and Simon P, 'The Los Angeles Transgender Health Study: Community, Report' (CDC 2001)
6. Butler J, 'Sex and Gender in Simone de Beauvoir's Second Sex' (1986) 3 Yale French Studies 35 https://www.jstor.org/stable/2930225.
7. Dutta A, 'Contradictory Tendencies: The Supreme Court NALSA Judgement on Transgender Recognition and Rights' (2014) 5 Journal Indian law and society 225
8. Navtej Singh Johar and Orsvs Union of India (UOI) and Ors (2017) 10 SCC 1

# Criminalisation of illegal migration to India: Crimmigration and its Antagonism to Human Rights of illegal migrants

*Richa Krishan*, Rama Sharma***

**Abstract**

Infiltration is a timeless issue in India and unnerving such unlawful migration on Indian borders has been a baffled task devoid of accomplishment. Consequently, penal retributive methods have become ineluctable to keep a check on clandestine immigrants. Accordingly, the administration of criminal justice and immigration control regimes has come to crossroads lately and they don't stand divided anymore. This interface has culminated into the origin of a new system of law applicable to illegal immigrants, namely "crimmigration". Dealing with both the illegality and criminality of migratory populations, crimmigration sways irregular migrants with punishment, monetary fine, forfeiture, sequestration, detention and deportation, with an objective to maintain sovereignty, safety and security of state and citizens. Though, apparently the contemporary percept of crimmigration proclaims the aspiration of achieving an impregnable nation state, nevertheless it becomes perniciously inimical to the human rights of illegal migrants. Furthermore, as the illegal migrants do not become citizens of India, the detrimental effect on their human rights cannot be eliminated. Therefore, the objective of attaining a secure nation for all by criminalizing illegal migrants in India just remains sketchy. This article commences with exploring the developments in immigration law and its interface with the criminal law. Thereafter, the paper progresses with locating the genesis, interpreting and ascertaining the functioning machinery of the crimmigration framework in India. A meticulous endeavour has been made to compile and discuss relevant English and Indian cases to make the concept simple and coherent. The article further explores and emphasises the negligent attributes and adverse impact of crimmigration on the basic human rights of illegal immigrants.

* *Research Scholar; School of Law, Justice and Governance, Gautam Buddha University, Greater Noida. Email: krishanricha02@gmail.com*

** *Assistant Professor; School of Law, Justice and Governance, Gautam Buddha University, Greater Noida. Email: rama@gbu.ac.in*





**Key words: -** *Criminality, Crimmigration, Human Rights, Illegal Migration, Sovereignty.*

## Introduction

Criminal law regulates, prevents and addresses the harm caused due to violence, both to an individual and society at large. However, the immigration law determines who would be allowed to live in the country after crossing the border and who would be restrained. They both characteristically tend to create a divide by designing pigeonholes to be filled with innocent and guilty or citizens and non-citizens i.e., admitted and excluded or legal and illegal. Nevertheless, the landmark difference between both sectors of laws is that the criminal law dismisses the culprits by punishing and isolating them from the society, within the society itself, whereas the immigration law detains and thrives to finally deport the wrongdoer outside the national territories.

The immigration law and its regulation procedures have gradually come to an intersecting point with the criminal justice system. With the advent of time, the major characteristics of the criminal law have clearly overpowered the approach and stratagem to superintend illegalities related to immigration. Exhibiting in simpler words, immigration law has solely but steadily absorbed the philosophies, methodologies and administration of criminal law. Consequently, in the contemporary times illegal migration is not simply treated as an illegal act. Rather, the formation and implementation of stricter immigration laws in line with the criminal sanctions, simply merges with the element of criminality, creating a completely new system of law for illegal migrants i.e., crimmigration. Ultimately, crimmigration highlights the common design of immigration and criminal law, i.e., segregating the unacceptable from the acceptable members of the society.

This amalgamation of crimmigration results into a major reverberation wherein, the activities which were previously categorised as civil wrongs under the immigration laws are now investigated and inquired like criminal offenses, incarcerating the responsible individuals. The ostensible reasoning of increasing trend in employment of crimmigration is safety, security and sovereignty of a nation. However, there is always a clandestine thought of keeping illegal migrants at clear distance from the citizens of the country and to keep them devoid of rights and privileges available to the natives.

Criminalising illegal migration deteriorates from precarious to pernicious the living conditions of migrants, who are already susceptible to transgression of human rights. Different human rights infringements that take place due to crimmigration are random arrest, interminable detention, ethnic profiling, overcrowding in jails resulting into unhygienic living conditions in jails, severing family relations, inability in availing health safeguards, detention of infants and children due to their parents being illegal migrants, educational rights etc. As there is lack of detailed data on illegal migrants, it becomes really

impossible to keep a track of their family members and in most cases of arrest and detention the illegal migrants are separated from their families forever.

## INFILTRATION AS AN ACT OF AGRESSION AGAINST THE SECURITY OF STATE

United Nations (hereinafter UN) out of its many global purposes has one of the foremost goals of 'maintaining international peace and security'. For attainment of this goal, UN has to adopt measures for controlling intimidating situations that results in breaching peace through antagonism, violence and other similar forms.

Henceforth, the prime responsibility of every individual state is to maintain security and safety of its citizens as well as the state. Manifesting this view, the United States (hereinafter US) Supreme Court (hereinafter SC) held up a petitioner's confinement and exclusion from US.

Facts of the case: Towards the second half of the nineteenth century mass migrations of Chinese laborers happened to US. This was not accepted in good terms by the US and legislations were passed to put a complete constraint on such movements. The Scott Act, an addendum to the Chinese Exclusion Act was challenged and the Scott Act was upheld, forbidding the re-entry of Chinese laborers. In this case a Chinese labourer, who already had worked in US for around a decade from 1875 to 1887, had left United States for the time being to visit his homeland, China. He got a legal permission that he would be allowed re-entry in the US in accordance to the provisions of the Chinese Exclusion Act. He started his journey from China to the US in 1888, on the steamship Belgic. Within a month from then, the ship landed within the port of San Francisco. But the Scott act in the meanwhile became law, restraining his return to the US. Even though he presented his official permission to enter US he wasn't allowed to re-enter and was detained on board.

According to the Chae Chan Ping case, such migrations were 'acts of aggression' against the state and the term aggression here doesn't necessarily need be an aggression in the form of war. According to the court, 'war could just create an add on inescapable situation for the state to take action of detaining the miscreants, but otherwise also when any form of mass exodus is happening the action of the state is to safeguard security of its nationals and itself. It is at government's discretion when to take such action and when not too, so if the government is of the view that the presence of such foreigners is going to affect the peace and national security, detention and deportation of such miscreants is admissible under law'.

Lord Denning refers to intra British colonial migrations as "invasion", accordingly showcasing the wider ambit of aggression as a term. Accordingly, aggression cannot be defined in limited words rather its meaning can be deduced as per the relevant situation.





## INDIAN SCENARIO

Referring back to the age-old ideology of ancient Indian philosopher, economist and jurist Kautilya (also known as Chanakya), responsibility of a king is divided in two dimensions. "The king owes its allegiance to the citizens in protecting them from external physical attacks and prevention of entry of undesirable pagans, and also to protect the nation from internal disturbances and revolts".

In the modern era, the Indian Constitution referred to, "Union's obligation of protecting state from external aggression and internal disturbance". It is to be clubbed and understood with the declaration of, "state's responsibility of preparing for India's defence for war and its aftermath". The language of Article 355 read with Entry 1 of Union List, is very much in consonance to the previously referred international cases and theory of Kautilya.

In 1970s huge number of people were fleeing from then East Pakistan to India, without legal permission. Henceforth, it got important to mention the Indian stance on aggression, in the sixth committee on the definition of 'aggression' of the General Assembly in 1971. Dr. Nagendra Singh was the official representative of India in this committee. He said there, 'Indian delegation wants aggression to be exhaustively defined. And the requirement of a detailed definition cannot be kept secondary to the objective of defining with utmost accuracy. He further said, aggression can be both direct and indirect and it could be with arms and also without arms. If large populations migrate to a state which are unmanageable and certainly are going to impact the state economically, politically and in reference to its safety and security as well, it should fall under aggression'. The emancipation of Indian perception of "aggression" in a nutshell is considering migrations of large number of people as act of aggression against the state.

In Sarbananda Sonowal v Union of India, a detailed discussion on the meaning of the word 'aggression' was made. It was held that, 'though to a layman purportedly aggression seems to be used as a synonym for war but its perspective extends to a range of elements. War is not to be used synonymously for aggression rather war is just a single dimension of aggression. Therefore, the application of the term aggression in article 355 has been done quiet carefully.'

Before the India Pakistan war of 1971, there was mass exodus of people from Pakistan to India, which lead to major demographical change in Assam, forcing the indigenous ethnic populace of Assam to marginalisation in their own homeland. This became one of the major causes behind aggravating insurgency in the state leading to inadvertently impacting the security of the whole country.

Then East Pakistan and today's Bangladesh is a highly populated country with very less job opportunities due to less industries. The natives of Bangladesh tend to move out of their country and reside in whatever place they get for better economic prospects. As India is sharing boundary with Bangladesh, it faces millions of people crossing over Indian borders and occupying lands. Their availability of working in low wages affects the prospects of employment of

people of Assam negatively. Held, this being the situation, undoubtedly India is facing external aggression at the hands of mass illegal migrants.

## CRIMMIGRATION LEADING TO PENETENTIARY DETENTION

As aforementioned, the illegal presence of foreigners abominably impacts the lives of citizens, their safety, ethnicity, demography, their different rights, for example: education, employment, availing benefits from available resources both natural and manmade etc., as well as the sovereignty and security of states. Hence, it is important to find out and deal with the miscreants who have no bearing to their vicinity. In international law, acts of illegal immigrants as already substantiated are taken as acts of invasion and aggression by extraneous criminals, who have slowly rooted themselves internally. Such incursions can only be controlled by keeping them separate from the citizens under sanctions and away from social participation. Eventually the amalgamation of crimmigration targets to curb such impediments and to counter terrorism as well, as the policy and mechanism of detaining illegal immigrants and deporting them is austerely remarkable as compared to criminal law.

Criminalising every illegal migrant simply operates detrimental to their human rights. If held guilty under crimmigration no legal protections are available to such a person. Due consideration is not given to the impetus behind their migration i.e., whether they did it by choice and they are economic migrants, or terrorists or they were forced to do it due to fear of persecution, or are forcefully made stateless due to state succession or other reasons. Detention as a ramification herein is justified as an act of causing incapacitation and deterrence and calling it an action of retribution. Nonetheless while initiating such legal proceedings the time such person has lived in the present country, and his family relationships are considered worthless and generally left unnoticed. Also, there is no differential treatment given to immigrants who have committed minor and major crimes, though ethically the small offenders should be at least treated with humanity and benevolence. This is a clear-cut infringement of human rights of specially those illegal migrants who have been forced to migrate, who were trafficked, who are victims of religious persecution or after migrating who have not committed significant crimes in the host country.

Due to the convergence of illegal migration, crime and their management techniques, immigration detention has evolved as one of the foremost requisite steps, making this practice to be extensively used. The purpose of detention in such cases is not merely to detain and send back the detainees rather at times it has an ulterior motive as well. It is quite discernible in the term 'immigration detention' itself that, it is actually not simple detention rather an act of punishing the detainees while incarcerating them by putting under imprisonment. The immigration detention caused by crimmigration is done under circumstances that are inappropriate for civil detention, as the requisite living conditions therein are excessively painful in relation to noncriminal purposes, making the detention extremely punitive. Such ostensible detention centres which are





alleged for helping and aiding the detainees are actually penitentiary in nature creating a structure of 'immcarceration'. This simply makes the lives of illegal migrants a living hell due to apathy towards their human rights.

In the US, illegal migrants are detained and deported under 'civil penalty' but denied due process protections and rather the constitutional protections they get even they are very less as compared to the normal criminals in the country. Similarly, in UK even though detention in consequence to illegal migration is merely observed as a supervisory process to deport the unwanted without retribution, still as the detention centres operate in prison like conditions the migrants experience it like a punishment.

'Articulating the Indian scenario, nothing is different as here also for governing the illegal migrants, the procedure of criminalization and incarceration have been widely adopted. Crimmigration eventually increases their vulnerability towards human rights.' The illegal immigrants are excluded of Indian citizenship by formation and enforcement of stringent citizenship laws in India. "The principles of non-refoulement are not applicable on illegal migrants as they are applicable over refugees. This makes the lives of such immigrants even worse as neither they can on choice go back to their country of origin as it would not admit them generally, nor they can avail the right to stay in the country they have migrated too."

## CRIMMIGRATION IN INDIA

Crimmigration is not a contemporary postulation in India on the contrary its roots are embedded in the pre independence era when the basic legal provisions on rights of non-citizens came into existence i.e., the Foreigner's Act, 1946 and the Passports Act, 1967. These three are the major immigration laws in India. The foundation of foreigners' act was originally laid in the year 1864 wherein authorization of entry and communication of arrival to the legal authorities was essential for outsiders. It provided for the removal of foreigners accompanied with imprisonment, and once expelled orders of interdiction on their re-entry in India. The Foreigner's Act, 1864 was eventually formalised into 1940 Foreigners Act which was ultimately repealed by the Foreigners Act of 1946, adhering to the racist approach with the objective to control movement of people to and from India to the countries of west. These immigration laws were enforced with utmost severity making crimmigration accompanied with immcarceration a predominant feature of immigration control to achieve the aspiration of full control over migrants. However, even today in the post-independence era these laws which resonates crimmigration as a predominant feature of immigration law enforcement are retained. So, even India is not free of moving on the path of being insensitive and detached to the helplessness of illegal migrant's human rights.

## APPOSITENESS OF THE FOREIGNERS ACT, 1946

The Foreigners Act clearly differentiates between a citizen and a foreigner. Defining a foreigner as a "person who is not a citizen of India" the law misses out to discuss the 'illegal migrants', as no clear-cut demarcation is made between different categories of foreigners. Treating all foreigners alike under the law, the reasons of their arrival are not considered relevant as in: if they have travelled with their own will or out of compulsion like refugees, stateless, asylum seekers or trafficked migrants etc.

According to the Foreigners' act, the centre has the power to hegemonies foreigners in India i.e., to control their entrance and retreat from India. In fact, the foreigners act also enables the government to qualify foreigners with a diverse range of restrictions like, "constraints on entry and exit, restricting presence in a particular area, curtailment of freedom of movement in India and outside through detention etc." The Central Government concludes on the place where a foreigner is to be imprisoned. The SC approving the unfettered power of detention and deportation of the government has stated, "The executive government has unrestricted right to expel a foreigner". Reiterating this view, 'SC directed the Indian Government to deport "illegal Bangladeshis" by making a formal deportation agreement with Bangladesh, as migrants who have trespassed into India do not have any right to remain here'.

Observing the 1964 Foreigners Tribunals Order, the question of a person being a foreigner or not under the foreigners' act, may be represented to the tribunal constituted for the same objective, for its opinion. The Order also provides that, 'the concerned person should be informed by the tribunal of the basis of being suspected as a foreigner accompanied with a prospective chance of speaking his/her truth'. Thereafter, 'the tribunal should grant a reasonable opportunity of representing the case'. Correspondingly, 'the tribunal is empowered like a civil court while dealing with the relevant court proceedings'.

## SANCTIONS ON ILLEGAL MIGRATION

Crimmigration deals with immigrants in different ways simultaneously, namely, punishment under criminal law clubbed with monetary fine, detention in police lockup and detention centres and deportation. Illegal Migration is 'cognizable and non bailable' in nature as the maximum punishment provided for it is 5 years and 8 years under the Foreigners' act. Such lawbreakers can be arrested without warrant as a preventive action, if as per the police officer otherwise the offence cannot be prevented and "can keep him detained even for anytime more than twenty-four hours if the same is allowed under the law according to which the arrest is made".

## BURDEN OF PROOF OF CITIZENSHIP

The burden of proof for legitimate citizenship in such cases is with the offender





but due to weak, 'citizenship confirmation procedures' such people are in limited capacity to accomplish this responsibility. The Foreigners act refers that, if in any case a question arises "whether any person is or is not a foreigner…...the onus of proving that such person is not a foreigner…...shall notwithstanding anything contained in the Indian Evidence Act, 1872 lie upon such person".

In a criminal case as per the Indian Evidence Act, in general the burden of proof lies on the prosecution. However, section 106 works as an exception and the burden of proving a particular fact lies on the accused where it is especially within the knowledge of the accused. Section 106 is not intended to replace and let off the value of section 101.

Mentioning a few English cases here: In R v Turner Bayley J expressed that, "it is a universal rule that when anyone makes a negative assertion but the fact is particularly within the knowledge of another, the second person has to prove it."

The above judgment was referred to in R v Oliver. As per the facts of the case, the defendant was under suspicion of selling sugar bereft of essential certificate as a whole-sale seller. The court held that 'having relevant license was a fact peculiarly within the defendant' knowledge. Therefore, burden of proof of having a license lies upon him only.'

Section 9 of the Indian Foreigners Act is designed to pursue the objectives of section 106 Evidence Act simultaneously, following the similar provisions in English cases, strengthening the persuasiveness of crimmigration in infiltration matters.

Actually, the thing is that, these are such facts which the authorities can in no way be aware of rather they are particularly within the knowledge of the relevant person. Once evidence on these facts is given by the individual, only then the administrative authority as and when required, can either verify or rebut the same through evidence. However, it is critical for person accused of being an illegal migrant to prove as there is no one to authenticate his/her stance, eventually affecting human rights perniciously. Point to be noted here is that, in case the state disagrees with the citizenship claim and argues for him/her to be a foreigner, it gets nearly impossible for the concerned person to prove the fact asserted by them for acquiring citizenship.

## TERRITORIAL SOVEREIGNTY AND ILLICIT FOREIGNERS

Talking of territorial sovereignty, J.G. Starke has stated that "excluding aliens on choice is corresponding to the power of a sovereign state to refuse admission to them. Also, there is no compulsion on any state to allow foreigners to enter into their dominion or to allow to live there if anyone has infiltrated, either forever or for any particular time period, or to not to exclude them from the country until it has ratified any international treaty to that effect".

Hence, "the power to exclude foreigners is considered similar to the power to

reject entry of outsiders. Putting in simpler terms, the rejection of mass exodus of people is not prohibited by the international law".

The Universal Declaration of Human Rights, 1948 (hereinafter UDHR), and the International Covenant on Civil and Political Rights, 1966 (hereinafter ICCPR) both asserts the right of an individual to be not capriciously arrested or detained indefinitely. Though India has ratified this convention nevertheless, such an international provision does not inevitably become a part of Indian law. One can't rely on the provisions of such agreements or covenants to claim any rights thereon until some domestic legislation in consonance to such instruments is framed in India.

Examining the "ICCPR's stipulation on aliens" in the Indian context, even if India legislates in consonance to the covenant, this particular provision would be applicable on India only in case when the foreigner is a lawful resident and the ones who have illegal presence are not covered herein.

Mentioning several appurtenant cases here:

In Chae Chan Ping v United States the US SC held that, "The US administration's authority to exclude outsiders is an incident of its sovereignty and this is to be practiced in the interests of US which cannot be granted away or restrained on behalf of anyone.'

Recapitulating the Chae Chan Ping judgment, where the inherent power of the US government to regulate the entry of immigrants as per choice was endorsed, in Fong Yue Ting v United States it was held that the government with the same power can deport and set conditions of residence for foreigners in the country.

In Louis De Raedt v Union of India two foreign nationals who were engaged in Christian missionary services had been living in India from pre independence period, on residential permits which were renewed from time to time. In the year 1985 they were asked by official order to leave India but they kept on making representations of naturalization. There requests were turned down and they were ordered to leave the country. They brought the plea that they have right to get domicile of India as they have been living here from past five years continuously, therefore the order of deportation was not in proper legal authority.

In State of Arunachal Pradesh v Khudiram Chakma, thousands of chakmas came to Indian state of Assam from East Pakistan in 1964 and got shelter as refugees, and in the year 1966 they were to be shifted to Arunachal Pradesh on government's order of resettlement. Few of them ran away from the place sanctioned by the government. They made some agreement with the local ruler and got land to live inside prohibited area for foreigners, on an unregistered deed. Later on, complaints of intrusion on indigenous people's immovable property, activities of unlawfully collecting arms and establishment of links with the extremist groups were made to the government. After a rigorous inquiry the government passed an order to shift them to the original place of settlement as was directed previously in 1966. The chakmas brought up the case of their right





of being citizens of India and full fundamental right therefore to reside and move as per Article 19 anywhere in the territory of India.

In a case of Gujarat high court in April 2009 around 100 people were arrested, detained and deported to Bangladesh from Shiyasatnagar in Ahmedabad. Sorubibi and her three kids, the youngest of whom was Tariq who was mentally ill were also members of this group of people. In the form of a public interest litigation in this case it was alleged that, Sorubibi was an Indian as she had her ration card and voter id card both valid in India, and was also born in India so her children should also be considered citizens of India. The act of detention and deportation was against the foreigners Act, as no proper opportunity was given to them to be heard. Also, the act of raid and arrest was conducted by a crime branch officer was not legal as the state had taken the law in its own hands by conducting an unauthorised act without proper jurisdiction whereas the power of such detention is only with the centre.

It's not only the infiltrators that bear the punishment for their wrong rather even people who are dealing in illegal, unofficial and informal trans-border trafficking are also under the radar of authorities to be taken legal action against them. As a result, punishment and detention which is mostly 'rigorous imprisonment' in prisons and jails, as well as monetary fines. The minimum amount of fine that is sanctioned to such people is mostly either somewhere near the average monthly income of these low-wage detainees or exceeds what they earn for living. Furthermore, if they are unable to fulfil their responsibility of paying their fines which is over and above their capabilities to be endowed, the incarceration period is extended. This inadvertently is affecting the illegal migrants human right of life with dignity.

SC in Assam Sanmilita Mahasangha v Union of India held that the huge invasion of illegal migrants from the neighbouring states stand as a threat to the sovereignty and integrity of the nation. Such exodus results as an assault not only to life rather also on the way of life of the citizens of Assam. There entire culture is so badly affected that it might one day be completely swept out by the people who actually do not have any right as citizens of the country. The decision of Sarbanada case that such an influx is an act of aggression under Article 355 has been reiterated in this judgment.

Certainly, these judgments portray that immigration transgressions are taken as gravely jeopardizing security of state, even though these offenders did not commit any grave act of terrorism that degrades human rights of illegal migrants.

While signifying the importance of 'preventive detention' as a fundamental right, the Indian constitution has fixed 24 hours of custodial detention as an upper limit, keeping 'enemy aliens and persons detained under any law providing for preventive detention' as an exception. In cases of these exceptions the ceiling on detention is of 'three months unless an advisory board decides on further detention'. It is the parliament which decides on any further detention or maximum detention to be provided by any law on preventive detention.

However, the Foreigner's Act has no time limits on detention period of a foreigner. Time limitation is certainly a prerequisite for recognizing fundamental human rights of migrants in general and certainly the Foreigner's Act lacks in providing protection against protracted detention.

## CONCLUSION

Indian immigration laws were comprised of an indispensable penal component for their violations from the very beginning when elementary legislations were made for dealing with foreigners. It was the Foreigner's Act clubbed with criminal enforcements that has cradled crimmigration as a significant desideratum to accomplish the yearning for emancipating India from undocumented immigrants. The government has been accredited with remarkable powers to tackle immigration transgressions while determining the faction of offenders to be supervised and rejecting others at its discretion.

However, though crimmigration is deduced as a much-required propitious arrangement, the Indian crimmigration framework lacks in maintaining a balance between national security and the human rights of the detained immigrants. The thought of fostering punishment to those who 'illegally migrate makes the detention centre a default option which should actually be a step of last resort'. It does not equip the detainees with procedural practical assistance and de jure course of action to be safeguarded from indefinite detention.

A serious attempt is required towards bolstering the significance of natural rights of immigrants which they possess by the mere reasoning of them being humans. Directly putting someone is detention just because of being an infiltrator, without considering the causation of illegal migration should be refrained from. India needs to aspire for creation of a socio legal network that balances security of state and rights of immigrants. Distinguished methods of dealing with voluntary immigrants and coerced migration due to racial or ethnic discrimination, succession of state causing statelessness etc., should be created and pragmatically practiced. People who are compelled to migrate are guiltless and deserve cooperation rather than punishment.

Giving value to the human rights of the illegal migrants in detention, they should be granted proper legal aid and legal counsel so that they can argue their side with equal strength and dignity. Simultaneously, India should venture towards providing such people with assignments and jobs in the areas where they are located to keep their mental health intact which would also aid the nation through better productivity of migrants.

## REFERENCES

1. Banerjee P. (2010). Borders, Histories, Existences: Gender and Beyond. Sage Publications.



*Criminalisation of illegal migration to India: Crimmigration and its Antagonism to Human Rights of illegal migrants*

2. Basworth M. (2013). Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World? In Aas K. F. & Bosworth M. (Eds.), The Borders of Punishment: Migration, Citizenship, and Social Exclusion (pp. 149-165). OUP.
3. Bosworth M. & Turnbull S. (2015). Immigration Detention, Punishment and Criminalization of Migration. In Pickering S. & Ham J. (Eds.), Routledge Handbook on Crime and International Migration (pp. 91-106). Routledge.
4. Bowling B. (2013). Epilogue: The Borders of Punishment: Towards a Criminology of Mobility. In Aas K. F. & Bosworth M. (Eds.), The Borders of Punishment: Migration, Citizenship, and Social Exclusion (pp. 291-306). OUP.
5. Boza T. G. (2010). Notes from the Field: The Criminalization of Undocumented Migrants: Legalities and Realities. Societies Without Borders, 5 (1), 81-84.
6. Demleitner N. V. (2002). Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism. EMORY L J, 51, 1059-1062.
7. Demleitner N. V. (2004). Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators. CRIM L BULL, 40, 550-556.
8. Denning A. (1980). The Due Process of Law. OUP.
9. Jennings R. & Watts A. (Eds.) (1992). Oppenheim's International Law (9th ed.). OUP.
10. Kalhan A. (2010). Rethinking Immigration Detention. Colom L Rev, 110, 43.
11. Mckean W. A. (1985). Equality and Discrimination Under International Law. O Clarendon Press.
12. Ramachandran S. (2015). Capricious Citizenship: Identity, Identification and Banglo Indians. In Howard-Hassmann R. E. & M. W. Roberts (Eds.), Human Right to Citizenship: A Slippery Concept (pp. 115-129). U Penn P.
13. Rangarajan L. N. (1992). Kautilya: The Arthashastra. Penguin Books.
14. Schuster L. & Majidi N. (2015). Deportation Stigma and Re-Migration. J Ethnic and Migration S, 41 (4), 635.
15. Sharma A. (2019). Contextualizing Statelessness in the Indian Legal Framework: Illegal Immigration in Assam. Christ ULJ, 8 (2), 25-27.
16. Singh N. (1971). Statement in UN General Assembly, Question of Defining Aggression 1952. Indian J Intl L, 11, 724-726.
17. Singha R. (2013). The Great War and a 'Proper' Passport for the Colony: Border Crossing in British India c. 1882-1922. The Indian Economic & Social History Rev, 50 (3), 289-315.

18. Starke J.G. (1989). Introduction to International Law (10th ed.). Butterworths.
19. Weisselberg C. D. (2005). The Detention and Treatment of Aliens Three Years After September 11: A New New World? UC DAVIS L REV, 38, 815-825.



# Protection and Promotion of Rights of Tribes in India: A Case Study on Kani Tribe

***Sussana Maharana*, Prof. Kirti Bikram** and Ms. Karthiayani A******

**Abstract**

The violation of the rights of Indian tribes has been the issue of the hour and we have researched those issues keeping in the light the spite of the Kanikaran or Kani Tribe of southern India, who represent the similar Indian tribes and highlight the factors contributing to deprivation of their basic Human rights. The objective of this study was to identify issues constituting human rights violation among the tribes and analyse the legislative and judicial contribution on protection and promotion of rights of Tribal. The research has been conducted using the doctrinal and descriptive methods wherein the statues, reports , journals etc. have been the sources of the data so analysed. The research has shown problems that endanger tribals human rights such as the threat of displacement violating their right to adequate livelihood, inadequacies in implementation of laws violating their rights of being protected from injustices, poor health and sanitation facilities violating their right to live in a clean and healthy environment. The legal regime, both at the national and international level, there is need to frame laws and policies while considering the opinion of the Tribals themselves in order to make it favourable to them. The research's scope can be seen in the light of academic purpose and knowledge contribution while it also suffers from the limitations such as it lacks of primary data and has subjective interpretation. This research shall help us identify threats to tribals in India amounting to human rights violations and suggest the way forward but it is also subjective and, therefore, can be interpreted through a different perspective concerning the research questions mentioned in this study.

**Key words:** - *Human Rights, Indigenous People, Judicial Contribution, Kani Tribe, Legal Regime, Promotion, Protection, Tribes, Violation.*

* *LLM student at Symbiosis Law School, Pune*
*Email: 21010143050@symlaw.ac.in*
** *Assistant Professor at Symbiosis Law School, Pune*
*Email: kirti.bikram@symlaw.ac.in*
*** *Teaching Assistant at Symbiosis Law School, Pune*
*Email: karthiayani.a@symlaw.ac.in*

## Introduction

*'Development of the tribal's should be according to the lines of their own thinking'*

-Jawaharlal Nehru

The STs are native people who possess unique culture, are topographically separated and have low financial standing. For quite a long time, the ancestral gatherings or groups of tribal people have stayed beyond the domain of the overall improvement process because of their home in forests and sloping lots. Government of India after the freedom fight, incorporated in the Constitution reservation for S.T.s and gave exceptional arrangements for their well-being and advancements on account of S.T. people group across the States in India and of whom 75 are the S.T.s are generally in reverse and are named as Primitive Tribal Groups. The more significant part of the ancestral regions are sloping, blocked off undulating level grounds in the woods region of the nation, bringing about the bypassing of Advancement projects for these places. Because of this issue, facilities on growth and advancement in ancestral regions for skilled and educational training, streets, medical services, correspondence, drinking water, sterilization and so on are not guaranteed. These tribal people' s rights are not protected and promoted. Rather they are subjected to the human right violation in form of threat to livelihood, inability to live with dignity, inadequate to clean water and sanitation facilities etc. Kani tribe being one such Indigenous has been discussed about, as a representative sample of other Indian tribes who face similar problems that directly violates their basic Human rights. Therefore, this study shall help us identify the problems faced by Kani tribe and similar Tribes in India, which lead to deprivation of basic human rights and whether the laws related to tribal people protect and promote them adequately or not.

## Statement Of Problem

Unlike every other human beings the tribal people ought to be ensured with every basic human rights as well every fundamental right but however they suffer from the various issues such as lack of basic livelihood, illiteracy, threat of their shelter being taken away, poor living conditions etc. which bereaves them of their basic human rights. Kani Tribe being an indigenous tribe faces similar problems that deprive them of the basic human rights, so in this study we shall highlight the common problems faced by the Kani tribe and similar other tribes in India. The general set of laws of India doesn't work for tribals while in its viable structure. There exists a constant threat of displacement and in case any injury inadequate compensation. These tribals have their own social issues and they are conventional and limited by customs. Because of the absence of training and improvement, they are eccentric and have faith in antiquated and inane practices that can be destructive. Marriage during childhood, killing of infants, manslaughter, creature penance, trade of spouses, dark enchantment and





other adverse practices are as yet common among them. They trust in extraordinary powers and want to keep up with these practices. They would rather not change their huge ancestral person and subsequently it's said that 'tribes are the tribesmen first, the tribesmen last, and the tribesmen all the time.' So therefore we shall in this study look into various problems faced by these tribal people in India and know how their basic liberties or rights are being violated and abused rather than being protected and promoted.

## Research Methodology

The methodology being applied to the study is completely fundamental and for the purpose of increasing the knowledge base through a descriptive research. The methodology that shall be followed in this particular research would be

based upon combination of doctrinal and empirical research methods. The rationale behind using doctrinal research is because it shall be based upon theoretical research on existing legal propositions and contain data from secondary sources such as case laws, text books, statutes, periodical etc. The usage of empirical data includes reports of various organisation that have conducted statistical studies and surveys which have been considered as secondary sources in our study. The research would be carried out in form of reflecting on the identifying the research problem, the proceed with the collection of data and analysis of the same to understand the basic human right violation of Tribal in India with specific reference to Kani Tribe.

## Historical Background

From the 1850s the tribal communities were approximately alluded to as 'Depressed Classes, or Adivasis (unique occupants).' The Raj was a frenzy of activity in the mid-twentieth century, investigating the feasibility of effective self-government for India. The 'Morley-Minto Reforms Report, the Montagu-Chelmsford Reforms Report, and the Simon Commission' were all driving forces in this predicament. Reserving seats for the above-mentioned class in the legislature, both at the federal and state levels, was a very contentious subject in the proposed amendments. The British established the act, intending to give Indian areas more prominent self-rule and establish a public bureaucratic structure. In 1937, the provision for seat reservations for the poor was put into effect. The Act provided a definition for the term 'Schedule Castes,' but after independence, the Constituent Assembly went on to define the term 'Schedule Castes and Tribes', giving (through articles 341 and 342) the Prime Minister of India and the legislative heads of the states the authority to include a full listing of hierarchy and tribal groups. Two orders, 'Scheduled Castes order' and The Constitution (Scheduled Tribes) Order, 1950 , were used to create a comprehensive list of extant tribes and castes in India. The S.C.s are sometimes referred to as Dalits in modern writing. They used to be known as the Untouchables. The Scheduled Castes and Tribes account for around 16.6% and

8.6% of India's population, respectively, or around 104 million people (2011 statistics indicates as above).

**Indian And International Legal Regime On Rights Of Tribal**

With the advancement in the legislative system of India, the privileges of the individual of Tribes have been brought into centre. Their freedoms are guaranteed through the grundnorm that is the Constitution adhered to by other legal regulations which are as per the following:

1. The Constitution of India, 1950:The Constitution accommodates elite assurance and security to S.Ts and explicitly incorporates the various tribes and their groups that have been specified under Article 342 .

   The Schedules of the Constitution, specifically 5th and 6th, set down provide that the organization, including land administration and guidelines of standard residency rehearses, of ancestral overwhelmed regions in the country. The 6th Schedule is applicable to grounds belonging to tribes in upper east India and the Fifth Schedule is material to the STs and the management of Scheduled Areas, other than those where the 6th schedule applies.

   Various Articles that safe the freedoms of tribals incorporate Article 15 which guarantees no segregation to be finished by the states on the grounds of 'religion, race, standing, sex, birt'pace' or any of them , there has been reserved spot for the clans or tribes in work under Article 16(4), there are reserved seats for them in lower house and upper house under Article 330 and 332 of the Constitution. In contrast, Article 19(5) ensures the ancestral individuals right to claim property and appreciate it in any piece of the nation and Article 338 awards the option to name a Commissioner to take care of government assistance exercises of such tribals.

2. Other legislative Provisions

   - 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006' :
   - The rights of the tribes are dealt under this act and various other ancestral inhabitants of the forest who have been living in it for ages, and gives a structure to recording their privileges concerning forestland. The Act recognizes the chronicled unfairness endured by ancestral and other communities residing in forest in India who are necessary to the endurance and supportability of the woodland environment, yet large numbers of whom have been dislodged and compelled to move, because of the state's implied improvement intercessions. The Forest Rights Act records rights of people as well rights of the community that vest in Scheduled Tribes and the people residing in the forests as given under section 3. These incorporate, entomb alia, freedoms of possession, holding and control of land for work, admittance to biodiversity etc. The





Sections 3 (1) (m), 4 (2), and 4 (8) provides rights and guarantee recovery and 'land remuneration' on account of constrained removals, Scheduled Tribes and other conventional backwoods tenants guarantee recovery and 'land remuneration'

- 'The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989':

  It expects to forestall monstrosities happening against individuals belonging to the S.C. and S.Ts, and to give help and ensuring remedy in case of the offense against them. The Act prohibits the unjust conquest or transformation of any land claimed by, owned by, or allocated to folks from a Tribe; the unjustified expulsion of people from a S.T., from the places where they reside in, or impediment to the gratification of the provided rights and freedoms, including rights concerning the forest; and the constraining or forcing individuals from S.T. to leave their place of residence.

- Act on equality and fair compensation :

  The act oversees the course of land procurement in India, and identifies exceptional arrangements for the securing of land having a place with Scheduled Tribes. The Act gives that, beyond what many would consider possible, land ought not be procured in 'Scheduled Areas,' and securing ought to just be completed as an evident final option. The Act gives that in all instances of land securing in 'Scheduled Areas, earlier educated assent regarding the properly chosen neighborhood bodies or the independent District Councils should be received .

- Formation of PESA (Panchayats Extension to Scheduled Areas) Act, 1996:

  This act is a regulation sanctioned by the Government of India to empower the Gram Sabhas of the ancestral locales to self-oversee and safeguard their regular assets. PESA forced limitations on the State Legislature and decentralized more power in possession of the Gram Sabha or Panchayat. It very well might be seen that the powers that can be practiced by the Gram Sabha under this Act connect with the clans' traditions, customs, religion, land and mineral assets. It made the Gram Sabhas free and skilled to save and protect the traditions and the practices of individuals and local area assets. Generally, this act allowed individuals to save their territory and regular assets and proposal of the Gram Sabha at fitting levels for any formative program in the ancestral region.

**International Law And Tribal Rights**

The indigenous groups are characterized as the first, local or first ethnic gatherings residing in their own or unique area or spot (Examples: Aborigines,

American Indians or crude individuals who have not reached the advanced civilization) who may form a tribe or clans. A group of people of a tribe may establish an ethnic gathering, however it has conjugal associations with individuals from different clans and is in persistent versatility or moving from place looking for resource economy, fundamentally grouping creatures (Example, Bedouins or clans residing for the most part in desert). Therefore since our focus is on tribal rights we shall focus on international law that specifically cater to the rights of Tribal people.

1. 'Indigenous and Tribal Peoples Convention, 1989 (ILO Convention 169)':

   Across the world, ancestral people groups' properties are being taken and their groups being crushed. The main worldwide regulation that can get ancestral people groups' property freedoms is the International Labor Organization Convention 169. ILO 169 perceives and safeguards ancestral people groups' property proprietorship privileges, and sets a progression of least U.N. guidelines regarding discussion and assent. It safeguards ancestral people groups' on the whole correct to:

   - Own the land they live on and use

   - Settle on choices regarding projects that influence them

   - Equity and opportunity

2. 'United Nations Declaration on the Rights of Indigenous Peoples':

   This Declaration currently is a complete global instrument on the freedoms of native people groups. It lays out a widespread system of least principles for the endurance, poise and prosperity of the native people groups of the world and it expounds on existing basic liberties norms and crucial opportunities as they apply to the particular circumstance of native people groups. Despite the fact that these tribal people are similar to all organs of society, are accused of endeavouring to get the general and viable acknowledgment and recognition of basic freedoms for everything people, they don't bear enforceable commitments under the significant common liberties arrangements. The tribals which don't have the imperative components of statehood under worldwide regulation, are not qualified for participation in the U.N. or the association of American States and thus, their claims against ancestral legislatures can't be brought before the global bodies that are accused of observing and carrying out common liberties deals.

**Kani Tribe And Identified Rights Violation Against Similar Tribes In India**

In the following research we shall be focusing on Kani tribe as an Indigenous Tribe that is settled in the forests of the Agasthiyamalai hills (Tirunelveli and Kanyakumari districts of Tamil Nadu and Thiruvananthapuram district of Kerala) of Western Ghats. They have been from various names such as the 'Malai Arasars, Malai Arayars, Kanikarans,' Tribals etc. They practise shifting





cultivation. They have Muttu kani as their political head of the tribe. They prefer peace over violence, they enjoy their life in jungle as they consider it as their home from where they get their daily survival items such as medicinal herbs, honey, wild games. As per the 2011 census total population : 'Kerala: 21, 251 (9,975 male and 11, 278 female) and Tamil Nadu: 3, 837 ( 1,879 Male and 1,978 female.' The Kanis are divided in speaking two different languages being Tamil and Malayalam. Their staple diet is Tapioca which is either eaten raw or roasted on fire; they also grow . 'They also grow pepper, chilies, ginger and other spices. They raise paddy by broadcasting the seeds in the rain-fed slopes'. The traditional medicinal knowledge is the highlight of the tribe and there have been many ethnobotanical studies of the tribe that highlighted the speciality of the tribe. The tribe has traditional remedies such as the 'Vayaru vethana for the treating abdominal colic, using curculio orchioides for treating asthma, Hemidesmus for treating cough, etc.' The Kani tribe possessing characteristics of an indigenous community also suffer from threats or limitation such as poverty, scarcity of food due to availability of seasonal foods, lack of access to proper facilities for easy living etc.

Identified Basic Human Rights violation against the Tribal People

Kani Tribe being an indigenous tribe faces various problems that deprived them of the basic human rights so in this study we shall highlight the common problems faced by the Kani tribe and similar other tribes in India. Unlike every other human beings the tribal people ought to be ensured with every basic human rights as well every fundamental right but however they suffer from the various issues such as lack basic livelihood, illiteracy, threat of their shelter being taken away, poor living conditions etc. which deprives them of their basic human rights. So therefore we shall in this study look into various problems faced by these tribal people in India and how their human rights are being violated.

1. Forced Evictions and Displacement:

   Privileges of tribals over their forest areas is a basic and unquestionable chronicled truth. From the hour of British expansionism in India when the Britishers began meddling in the ancestral area to take advantage of the rich ancestral assets. The protection as given in the Schedule five of the Indian Constitution and different regulations at state level which among others preclude move of the grounds of the Tribal people group for securing the lands belonging to these tribals. . In Andhra Pradesh, non-tribals have also unlawfully intruded on several of hectares of land owned by tribal people groups by enticing and marrying tribal women. Global Human freedoms regulation has perceived the option to protect or satisfactory house for individuals to reside some place in 'security, harmony and dignity' and any such constrained ousting or land estrangement to non-tribals is violative of such fundamental common liberties.

2. Insufficient adherence to current statutes, ordinances, and the Constitution

   Amidst the India's constitutional recourse for S.T.s, the government can buy land in the 5th and 6th Schedule zones that is involved or vacant for 'public purpose' initiatives. Because tribal peoples have no real title to the land that they have been living on and producing for generations, non-tribals have found it relatively easy to gain territory that was once known for tribal peoples, especially to the increasing role of private enterprise and the rise of modern country states. Regardless of the fact that the 'National Forest Policy of 1988' envisions a healthy association and relation between tribal peoples and the forests in which they reside, the Forest Act of 1927 essentially duped the tribal community. The Indian government enacted 'the Scheduled Tribes and Other Traditional Forest Dwellers Act in 2006', however it was never enforced. Until recently, the Indian government has failed to adequately educate the 'Forest Rights Act of 2006 Rules' of Procedures.

3. Threat of Eviction and Displacement

   HRLN has recorded that over '11.3 million individuals in India live under the danger of constrained expulsion and relocation'. The record incorporates an enormous level of native/ancestral people groups. The 2019 request by Supreme Court connected with the expulsion of tenants of the forest across India was because of the 9.5 million individuals live in outrageous frailty and apprehension about approaching dislodging, and removal of these people would not just cause deficiency of their homes and environments, but also affect their vocations, societies, customs, and way of life that they have been living in association with nature. Clashes in the upper east coming about because of land estrangement, convergence of untouchables, and the battle for normal assets, have likewise brought about broad dislodging of native/ancestral networks.

4. Continuing Rights Violations

   Basic liberties or basic human rights are the inheritances of each individual and they structure a necessary piece of the socio-social texture of mankind everywhere. In any case, they are powerless against misuse and infringement. Concurring with the 'United Nations Declaration', The Indian Constitution also stipulates that 'the state will not discriminate against citizens based on their place of birth, race, religion, or social standing, and that the government shall prioritise the advancement and protection of all these fundamental rights' which include the access to healthcare, accommodation, nourishment, and state pension; the capacity to work; the access to literacy; as well as the ability to be concerned about the social existence of one's general public. In any case, there is a massive disparity between ideal of basic liberty and the reality of gross breaches of common liberties of tribal peoples in India.





5. Economic deterioration and Cultural and Language rights of the Tribes

   The ancestral individuals are financially one of the most in reverse networks in the country. These individuals are frequently taken advantage of on account of pariahs, property managers and cash loan specialists because of their blamelessness and lack of education. Because of the absence of assets and uneconomical land possessions, this training has ended up being pointless for them. The tribal people are not being able to secure and promote their culture and linguistics despite the fact that Article 19 clause 5 expresses that a etymologist minority has the privilege to preserve and protect its culture and linguistics. However, in light of absence of command over human, authoritative and monetary assets, the Tribal people group have not had the option to go to compelling lengths toward this path.

6. Health and Sanitation Problems

   The essential common freedoms incorporate 'Access to safe, affordable and reliable drinking water and sanitation services are basic human rights. They are indispensable to sustaining healthy livelihoods and maintaining people's dignity.' Wellbeing and disinfection is turning into an enormous issue for individuals of the tribe due to lack of education and obliviousness and they are not prepared to invite the cutting edge ideas of wellbeing and sterilization. Liquor addiction is also a serious issue alongside blood borne sicknesses like Hepatitis B infection contamination is probably going to be high in the ancestral populace as a result of the regular act of inking. The adjustments in the climate and the natural parts of the environment increment the gamble of transmittable illnesses. The absence of information and appropriate sterilization has made the people of tribes vulnerable against these illnesses. Additionally the shortage of clinical offices and the hesitance of the specialists to work in rustic regions has increased the circumstance. There is a need to open up clinical units in the such tribal living areas. The clans ought to be furnished with monetary and social help to battle the transferable and non-transmittable infections.

**Judicial Contribution In Upholding Rights Of The Tribes In India**

Indian courts, through their decisions, have maintained the freedoms of native/ancestral or tribal groups to their properties and homes, and to quote a few, the milestone decision in 'Samatha v. Province of Andhra Pradesh' , the S.C. of India restricted the exchange of ancestral land to non-ancestral and noted that 'the agriculture was their only way of earning revenue other than the produces from the forest, also the land for them was a sanctuary and a way of getting economic benefits and therefore these tribe possess emotional connect with their lands.'

In Maala Pentamma v. Nizamaabad Municipality a case on house demolition of Scheduled Tribe members, the Hon'ble High Court of Hyderabad declared that it

is critical for the state or its local councils to protect the interests of S.C.s, STs, and other Relatively weak Sections.

'A passing reference can be needed to Article 46 of the Constitution of India, which orders that the State will advance with extraordinary consideration the instructive and monetary interests of the more vulnerable Sections of individuals, ... what's more, specifically, of the Scheduled Castes and Scheduled Tribes, and will shield them from social treachery and all types of abuse.'

In Sudama Singh v. Administration of Delhi (2010) , A huge number of the attorneys had a place with the minimized migrant and S.T. people group in a crucial dispute on the humanitarian rights and liberation to adequate dwelling in India. The Delhi High Court recognised

'the right to housing for all and held that constrained removal deprives everyone of a bundle of rights, including the privileges of working, shelter, well-being, literacy or education, access to metro conveniences, public transportation, and the right to survive with dignity across all circumstances.'

Indira V. State Of Kerala , The court for this situation have referred to Articles of the Constitution such as Article 15(4), 16 (4), 341 & 342 for state to make arrangements for S.T.s and S.C.s who are socially and economically backward, reservations in jobs, recognition of various tribes and castes respectively in order provide them the due privileges. Etc. Such standings, races, and ancestral tribes have been remembered for the warning gave under the Constitution and the regulations made by the Parliament. The judiciary has to be sure guaranteed through its judgment that the freedoms of it residents are upheld and they are not subjected to any sort of biasness based on their tribes or castes they have a place with.

## Impact Of Initiatives Regarding Tribals

The analysis of the above data depicts that tribals in India, irrespective of being recognised under the Constitution and through other legislative provisions they still are not treated in parlance with the treatment given to non tribals and their regular problems have turned into factors contributing to rights violations. We can analyse the situation critically, keeping in mind the three research questions :

- First being the adequacy of national and International legal Regime on the Protection and Promotion of Rights of Tribals. It has been seen that the laws though framed perfectly but remain loose on implementation. For e.g. Schedule 5th and 6th give the right to secure land by the government in the interest of public which can cause displacement, forest policies, instead of benefitting victimise the tribals, the authorities under the PESA act have been neglectful towards their duty. Kani tribals have been subjected to the threat of displacement from forest, not being allowed to continuous access to forest resources which they depend upon for their livelihood constituting





basic human rights violation. The international laws make a slight distinction between the indigenous and tribe and therefore for these tribes the ILO alone ensures the rights of the tribal people but again only the parties to it are subjected to ratify their laws, bringing in the uncertainty in ensuring rights of tribals across the globe.

- Second the identified threats to Kani Tribe and similar Indian tribals are leading to deprivation of their basic Human Rights. The greater part of the ancestral regions are sloping, blocked off undulating level grounds in the woods region of the nation, bringing about the bypassing of Advancement projects for these places. Because of this issue, facilities pertaining to growth and advancement in ancestral regions for skilled and educational training, streets, medical services, correspondence, drinking water, sterilization and so on are not guaranteed and these tribal people' s rights are not protected and promoted rather they are subjected to the human right violation in form of threat to livelihood, inability to live with dignity, inadequate to clean water and sanitation facilities etc.
- Third the judiciary has definitely contributed in the protecting and promoting the rights of the Tribal people in India. They have upheld the following points:
  - They have restricted the exchange of ancestral land to non-ancestral as these lands hold of emotional value to these tribal people
  - It is the duty of Government or its Local Bodies to safeguard the interests of the S.C.s, STs, and other similar weaker Sections.
  - Human rights are a bundle of rights, including the privileges to work, shelter, wellbeing, literacy or education, admittance to metro conveniences, and public vehicle and to live with dignity in all circumstances.

So from the above analysis, we can infer that rights of Tribal people should be ensured at all costs and it's the duty of the executive, judiciary and legislature to uphold the same.

## Conclusion & Recommendation

Infringement of basic human rights common liberties makes numerous financial and psychological issues as should be visible in the event of Kanikaran Tribe who face the dangers of dislodging, deficient remuneration in the event of Inventing the therapeutic medication 'Jeevani', threats of displacement, inadequate compensation in case of Inventing the medicinal drug 'Jeevani', disappearing language and traditions, poor economic conditions, inability to gather forest produce who are subjected to government authorities etc. and so on It influences the nature and government assistance of individuals, and makes many problems. It is feasible to envision the existence chances of Tribal people group working on through the execution of pragmatic measures alongside

considering the freedoms agreed. Be that as it may, quiet on freedoms will constantly convey with it the risk of a re-visitation of paternalism and the treatment of a recognizable gathering as an issue 'deserving of good cause, not collectively of people to whom society has liabilities and obligations. The established assurance, which administers and safeguards the freedoms and power of Tribal people group, need a prompt execution. Any other way, this would prompt a vanishing of the different Tribal people groups from the human picture.

Along these lines it is suggested that as the Tribal people group's sway is in question by the intercession of Non-Tribals in their space. In this way, there is a prompt need to comprise Tribal independence committees with the goal that the Tribal people group themselves can take care of the guidelines, execution and advancement of the regions.

After site visits of affected regions have been conducted, a full assessment of the repercussions for the climate must be requested as part of the 'Forest clearance' procedure and a 'social effect evaluation' on the Indigenous population group should be requested, including Free and Prior And informed of the Indigenous community with full compliance with 'the Forest Rights Act, 2006' which provide for restoration, resettlement, and adequate remuneration whenever the impacted town consents.

Given the broad infringement of the right of housing and land privileges of native/ancestral people groups and networks, measures ought to be taken to: carry out Constitutional arrangements, regulations, and moderate court decisions connected with their assurance; execute the 'United Nations Declaration on the Rights of Indigenous Peoples', which additionally perceives their freedoms to land and satisfactory house facilities;

Guarantee making successful systems to authorizing Tribals or ancestral land regulations, including re-establishing procured grounds to the first landholders.

There is a need to authorize existing lawful preclusions on biases and consider ordering thorough fair legislations, along with the preparation and responsibility of protection measures to act aimlessly.

**Bibliography**


- Subhash Meena and Nitesh Pal Singh Meena, 'Historical Perspectives of Different Tribal Groups in India' (2014) Vol 1, No.10 International Journal Of Interdisciplinary And Multidisciplinary Studies pp 48-57, 49
- Government of India Act 1935
- Acharya, Deepak And Shrivastava Anshu, Indigenous Herbal Medicines: Tribal Formulations And Traditional Herbal Practices, (Avishkar Publishers Distributor, Jaipur- India 2008) pp 440
- The Constitution of India, 1950







- Robert Harrison Barnes, Andrew Gray And Benedict Kingsbury, Indigenous Peoples Of Asia, (Association For Asian Studies 1995), 'The Concept of the Adivāsi: According to the political activists who coined the word in the 1930s, the "adivāsis" are the original inhabitants of the Indian subcontinent ...'
- Tribal People In India Facts and Details, available at https://factsanddetails.com/india/Minorities_Castes_and_Regions_in_India/sub7_4h/entry-4216.html (Accessed on 27 February 2022)
- Constitution of India, Article 366 (25), "Scheduled Tribes means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution."
- Constitution of India, Article 244 (2)
- Constitution of India, Article 244 (1)
- The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006. https://ncsk.nic.in/sites/default/files/PoA%20Act%20as%20amended-Nov2017.pdf (Accessed 01 March 2022)
- The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013.
- The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, s 41.
- ibid
- OHCHR Indigenous and Tribal Peoples Convention 1989, available at https://www.ohchr.org/en/professionalinterest/pages/indigenous.aspx (accessed 02 March 2022)
- United Nations Declaration on the Rights of Indigenous Peoples available at https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (accessed on 02 March 2022)
- See, e.g., Corntassel, J., 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33(1), Alternatives, 105–132. https://doi.org/10.1177/030437540803300106 (accessed 12 March 2022)
- Kristoffer P. Kiefer, 'Exercising Their Rights: Native American Nations of the United States Enhancing Political Sovereignty Through Ratification of the Rome Statute' (2005) 32 SYRACUSE J. INT'L L. & COM. 345, 357
- Anuradha, R. V., 'Sharing With Kanis: A case study from Kerala. India', New Delhi: Kalpvriksha Mimeo, 1998, and personal field work https://www.cbd.int/financial/bensharing/india-kanis.pdf (accessed 03 March 2022)

- K. Nambiar, Ethnographic Notes on Scheduled Tribe, PART V-B- (1) , (MUDUVARS, KADARS, KANIS, MALA MALASARS, PANIYANS, PALLIYANS & MULLU KURUMBARS) Census of India, 1961, Volume IX Madras pp 87-88 available at http://lsi.gov.in:8081/jspui/bitstream/123456789/6549/1/28122_1961_ETH.pdf
- 'Census Of India : Office Of The Registrar General & Census Commissioner, India' https://www.censusindia.gov.in/2011census/PCA/ST.html (accessed 03 March, 2022)
- Renuka C, 'Traditional Remedies of Kani Tribes of Kottor reserve forest, Agasthyavayanam, Thriuvanthaouram, Kerala,' (2007) 6(4) Indian Journal Of Traditional Knowledge pp 589-594, 590
- Krishna Halavath, 'Human Rights and Realities of Tribals' Lives in India: A Perfect Storm' (2014) 19(4), Ver. II IOSR Journal Of Humanities And Social Science 43-46, 44
- Office of the United Nations High Commissioner for Human Rights available at https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf (accessed 04 March 2022)
- Forced Evictions in India in 2018: An Unabating National Crisis, Housing and Land Rights Network, New Delhi, 2019. https://www.hlrn.org.in/documents/Forced_Evictions_2018.pdf (accessed 04 March, 2022)
- ibid
- 'Report of the High Level Committee on Socio-economic, Health and Educational Status of Tribal Communities of India,' Ministry of Tribal Affairs, Government of India, May 2014. http://www.indiaenvironmentportal.org.in/files/file/Tribal%20Committee%20Report,%20May-June%202014.pdf (accessed on 04 March, 2022)
- Poulter,S., Ethnicity, Law And Human Rights. (The English Experience, Oxford Clarendon Press 1998)
- The Constitution of India, 1950
- Human right to water and sanitation International Decade for action' Water for Life' 2005- 2015 https://www.un.org/waterforlifedecade/human_right_to_water.shtml (accessed on 04 March 2022)
- AIR 1997 SC 3297
- 2005 (6) ALD 488.
- 168 (2010) DLT 218







- AIR 2006 Ker 1, 2006 (2) JCR 276, 2005 (4) KLT 119
- Observations of the state indigenous Human rights in India available at https://www.culturalsurvival.org/sites/default/files/INDIAUPR2016final.pdf (accessed on 05 March 2022)

# Political Participation and Representation of Women in India: A Historical Overview

*Rayees Ahmad Parray*, Dr. Md. Khurshid Alam***

**Abstract**

Democracy without the participation of women is incomplete. Women play an important role in the reconstruction of society and to bring social justice in society, the recognition of women's equal rights is a must. Society cannot develop socially, culturally, economically, and politically unless its women are given equal opportunities for political participation. This paper presents a historical overview of women's political participation at the International level vis-à-vis the women's political participation in India. The study reveals that socio-economic, psychological and attitudes of political parties are the main factors that hinder the political participation of women in India. The study suggests improving the socio- economic and educational conditions of women, spreading political awareness, and the reservation of women in politics which can engage more and more women in politics.

**Key words: -** *Political Participation, Democracy, Representation, Freedom, Obstacles, Marginalization, Society, etc.*

## Introduction

Political participation refers to an individual's involvement in the political system, which may start from non-involvement at the initial stage to holding of political office at the final stage (Rush, 1992). Participation in politics empowers the people to, directly and indirectly, influence the decisions of the government (Verba et al. 1995), so that democratic values are enriched. Democracy will sustain not only by the political structures and institutions of the state but also by the participation of diverse social groups existing in those institutions (Moghadam, 2008). These social groups also include the women section of the

* *Ph.D. Research Scholar, Maulana Azad National Urdu University*
*Email: rayeesparray6@gmail.com*
** *Assistant Professor, Political Science, Maulana Azad National Urdu University*
*Email: khurshidjmi@gmail.com*





society, without their participation society is not going to progress.

"Woman is equal to man. She is the nobler of the two sexes. She has an equal right of freedom as that man. If any legislation does not have an equal share of Women members, I am going to boycott that legislation"

-Mahatma Gandhi

## Methodology

This paper is based on secondary data. Analysis has been done by collecting secondary data from various books, journals, magazines, research articles, Government reports, and websites. Besides, various online national and international newspapers were used to collect the data relevant to this research article.

## Objectives of the study

The present study will consist of the following two objectives-

- To study the political position of women in India
- To study the factors that impact women's political representation in India

A brief overview of the historical background of women's political participation and representation at the global level as well as at the national level will be given for a better understanding of the purpose of the study.

## Representation of women in the politics:-An overview

Women have a prominent place in world affairs and to empower them politically, the world leaders from most of the countries started to give voting rights to them. However, despite providing voting rights to them in the early 19th century, it was only in the late 19th century that countries officially started granting women political rights. New Zealand in 1893 granted women the voting rights in elections followed by Australia in 1902.Women in Nigeria were granted suffrage under the constitution of the Federal Republic of Nigeria, it has the lowest women's political participation. The average female representation in its Legislature is 5.6 % (Dim and Asomah., 2019). In Bangladesh, the first Parliamentary election, which was held in 1973, immediately after its independence in 1971, 0.3% of the total women candidates participated in this election and among all those, none of them won the election (Parvin.2016). In Indonesia, women got voting rights in 1941 (Blackburn and Susan., 1999). Srilanka has a history of having the world's first women prime minister "Srimavo Bandaranaike". It was the first Asian country that granted the right to vote to Women in 1931 at the age of 21 years without any restriction ( Nilson.T.2020).

Women in India from ancient times till date have been fighting for their rights,

and most of the times during that period, they were regarded as inferior to men. During the Mughal rule in India, the position of women was not satisfactory because of the prevalence of various traditional customs like, purdah, child marriage etc., but still, some women had a very strong political base during that time, and mention can be made of Raziya, who was a torch bearer for the empowerment of women in her times (Gabbay,2011). Nur Jahan was such a figure that no grant of land was made to any women except under her seal (Findly,1993) Jahanara, Gulbadan Begum and many more who were active during their times both culturally and politically. During the social reform movements, the issues of women were raised by the reformers like Raja Ram Mohan Roy and others. The British era started during this time, and women got the opportunity to participate in various government affairs and assisted the government to pass legislation that could ban such evils which were already raised by social reformers ( Begum., 2015). These legislations, with the help of women's involvement, led to the passing of the historic resolution of 1829, which banned Sati (Goha.2012) and the Hindu Widow Remarriage Act 1856 (Chary.2012). There was the establishment of the Indian National Congress in 1885, which was a platform for political participation and political involvement of the people, especially the women. In its 1889 session, only ten women took part, and with the passage of time, women started taking part in large numbers because the membership was open to all (Das., 2010). The Swadeshi Movement in 1905 marked the commencement of Indian women's participation in nationalist activities while simultaneously bringing the issue of suffrage and voting rights to the forefront (Prawin., 2011). In 1917 Annie Besant was the first woman who expedited the process of women's involvement in the national independence struggle movement when she was elected the President of the Indian National Congress. But Gandhiji's call to women for participation in the freedom struggle movement was a turning point when he termed women with men equal mentally, spiritually, and intellectually (Kamat., 1998). The Civil Disobedience Movement was the only movement that saw the highest number of women participants. The leading women were Sarojini Naidu, Durgabai Deshmukh, Hansa Mehta, etc. (Radha, 1993).

The Congress session of 1942 in Bombay passed the Quit India Resolution, which was a historic event for mass mobilization. This Non-violent movement paralyzed the administration as it was like a parallel government (Chandra,1989). The women who participated in the Quit India movement were Maya Thomas, Padmaja Naidu, Sister Subbalakshmi, etc. The role of Usha Mehta and Asif Ali is said to be the most important motivational factor for other women to join the movement. Sarojini Naidu was such a personality that she not only participated like a common woman but also presided over the 1925 Indian National Congress Session held in Kanpur. In 1929, she chaired the "East African Indian Congress" in South Africa (C, Shirpurkar,2021).

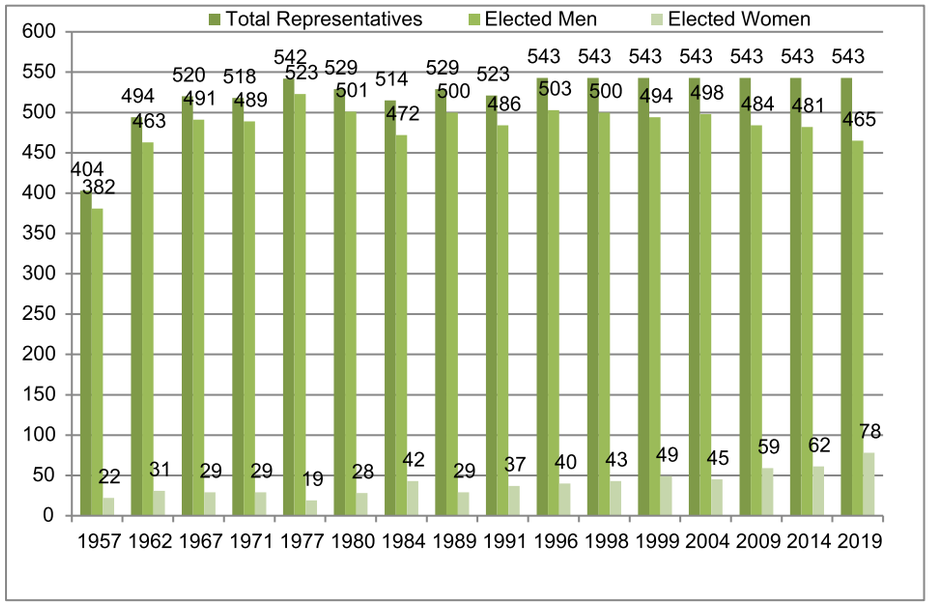




## Political representation of women after independence

The issues related to women's equality in political and economic affairs caught the attention of the founding fathers of the Constitution. The constituent assembly was assigned the responsibility to frame a Constitution for independent India (Laxmikanth, 2013). The constituent assembly had a representation of both men and women. Among women, there were Hansa Mehta, Sucheta Kriplani, Begum Aizaz Rasul, Sarojini Naidu, Kamala Chaudhari, Durgabai Deshmukh and many more (Desk,2020). So women were not left behind during the formulation of the full-fledged Constitution. Finally, the Constitution came into effect after deliberations on 26 January 1950. In this body of rules and laws (Hedling, 2017), women were now granted equality in every field formally.

**Table 1. Women representation in Lok Sabha from 1957 to 2019 General Elections**




**Source: - Election Commission of India**

Representation of Women in Lok Sabha from 1957 general election to 2019 recent general election shows how there are fluctuations in their representation. In the 1957 general election, there were 404 seats in Lok Sabha, out of which 382 seats were won by men, and only 22 seats were won by a woman, which makes it 5.5% of the total representation in the Lok Sabha. Since the conduct of elections between 1957 to 1984, it was only in the 1984 general election when women representation crossed 8%. In the election of 1977, there was a drastic reduction in the representation of women. Although the electorate percentage of women in every election was around 50% and in some elections, it was more than 50%. Still, women representation is not up to that mark as far as their voter

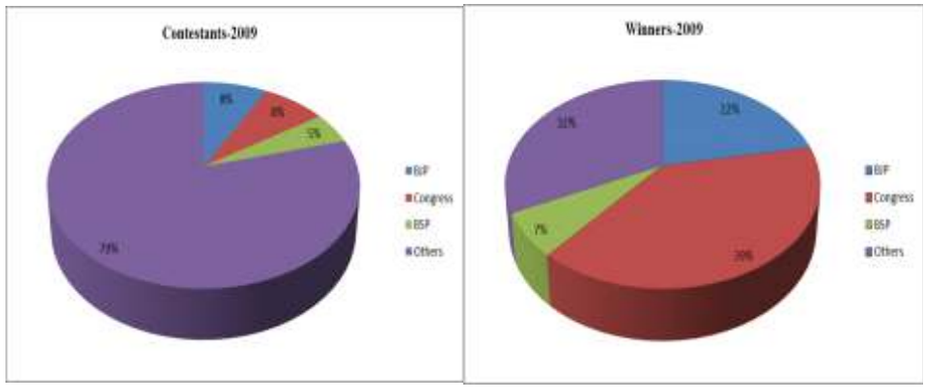
turnout is concerned. From 1989 to 1999 general election, there was an increasing trend of women candidates in Lok Sabha, but in the 2004 election, a slight decline can be seen in which 355 candidates were contestants, and among those 355, only 45 women could make it to the Lok Sabha. After the 2004 general elections, there was a continuous increase in the representation of women in Lok Sabha. The current Lok Sabha of 2019 saw for the first time 14% of women in total representatives, which is the highest till date but not satisfactory. In the current Lok sabha (17th), the total electorate was 911950734 in which women comprised 438537911 which became 48.9% of the total electorate (ECI, 2019)

**Table:-2 Tickets allotted to women in recent General elections of 2009,2014,2019**

| National Parties | 2009 | 2014 | 2019 | | | |
|---|---|---|---|---|---|---|
| | Contestants | Won | Contestants | Won | Contestants | Won |
| All India | 556 | 59 | 668 | 62 | 726 | 78 |
| BJP | 44 | 13 | 38 | 30 | 55 | 41 |
| Congress | 43 | 23 | 60 | 04 | 54 | 06 |
| BSP | 28 | 04 | 27 | 0 | 24 | 01 |
| Others | 441 | 19 | 543 | 28 | 593 | 30 |

**Source: - Election commission of India**

**Comparison Between Women Contestants And Winners in Lok Sabha 2009**



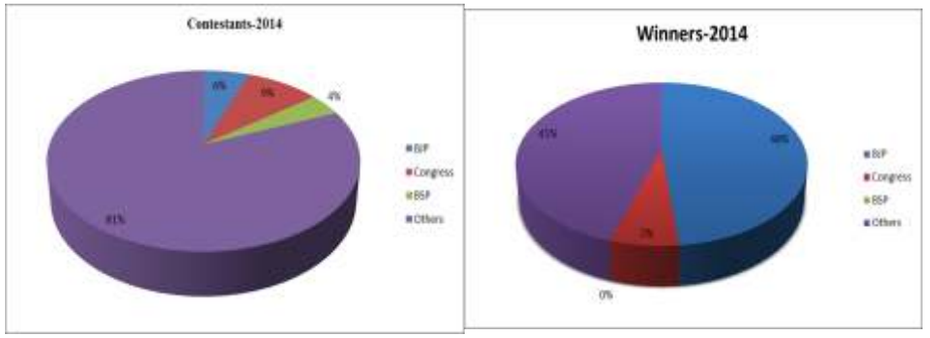

**Source: - ECI.New Delhi 2018**





556 seats were allotted to women in India in the 2009 general Election by Political parties. Among these contestants, 59 won the election taking the winning percentage to (10.6%) and men contestants were 7514 from which 484 won the election with a 6.4 winning percentage. BJP allotted 44 seats to women contestants and among them, 13 won the election having (30%) win ability factor. Congress in the same year gave 43 tickets to women candidates of which 23 won the election making it (53%) of winning potential. Bahujan Samaj party allotted 28 tickets to women and among them, 4 won the election which makes it (14%) win factor. 8% of seats were allotted to women by BJP and Congress each in India among which BJP won (22%) among those seats and Congress won (39%) of seats.

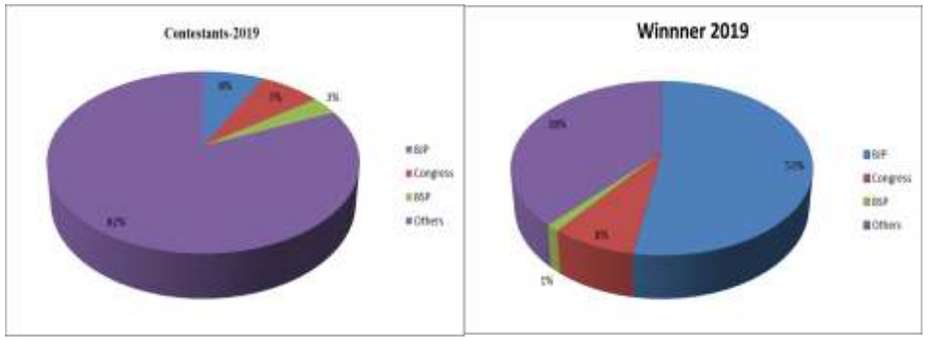
**Comparison Between Women Contestants And Winners in Lok Sabha 2014**




**Source: - ECI.New Delhi 2018.**

In 2014 BJP allotted 38 tickets to women candidates and among those 30 won the election raising the winning percentage to (79%). But congress had a low winning percentage of (7%).In this election, BJP mobilized the public through social media with the help of which more and more women came forward after looking at the powerful manifesto made by the party (Hasan,Johri,2017).

**Comparison Between Women Contestants And Winners in LokSabha 2019**




**Source: - ECI.New Delhi.**

In 2019, there was an upsurge of both the female electorate as well as voters in this election. The overall number of female contestants in India was 726 of which 78 (Kawoosa,2019) women won the election which is highest for the first time since 1952.BJP again was the leading seat provider to women. It gave 55 seats to women of which 41 won the election. This trend shows that women always have more winning potential than men according to data by the election commission of India.(8%) of the total women, candidates were from BJP, and among those they have (53%) win ability factor.

**Factors leading to low political participation of women in India**

The Constitution of India gives equal rights to both men and women in every field. Both sexes have been provided equal opportunities in electoral participation, but despite that, low participation and representation of women have been a crucial challenge. Low political participation of women at the initial stages post-independence and followed by the negligible representation in the Lok Sabha till the 17th Lok Sabha have many factors which can be explained one by one.

**Socio-economic factor:**

The first and the most important factor has been the socio-economic obstacle that prevents women from joining the political process. A girl child in the family is brought up with the belief that she has to be the caretaker of household work. She is imposed with the responsibilities of children, her husband, and also the agricultural work ( Burns et al.,2001). If a woman wants to take part in electoral processes in India, want to expand her political contacts, for that purpose she needs time, but she is not able to balance household responsibilities and political affairs, and for holding political meetings and demonstrations, she needs money (Lister,2003) for which she is mostly dependent on man, with the result of which women become less inclined towards politics (Coffe and Bolzendahl,2010). Women who spend most of their time outside the household tend to be more involved in politics than the women who are housewives. The income factor for women plays an important role in political participation, the more income inequality the less electoral participation. When a woman is economically independent, she takes part in political affairs like electoral politics or decision-making: the less income inequality, the more the percentage of electoral participation and representation (Anderson, 2008).

**Political factors:**

Masculine model of politics hinders women's political participation and representation because in this model men dominate all the political spaces. This is the model where there is no mutual respect and consensus and women tend to work as aliens (Sindhuja and Murugan, 2017). Discriminatory role of National





political parties in giving tickets to women candidates. According to (Basu 1992), the political parties have always played a discriminatory role and have followed the gender exclusionist policy in giving tickets to women. Both National, as well as regional political parties, have been excluding women from politics by not providing them party tickets with the perception that women have the least winning chances and hence lack the win ability factor (Kuldeep Fadia,2014).

**Psychological factors:**

Psychological factors cannot be denied when talking about Indian societal norms. Women in India have been and are still being socialized in such a way that she is made to believe that politics is the job of men and they should not be concerned about it (Goel, 1974). Due to this patriarchal setup in Indian society, women vote for the candidate, whomever their husband or any other male member tells them to vote for. She does not exercise the independence of the right to vote on her own choice (Mishra, 2010). A girl child is brought up and socialized through the gender lens, which is passive and rule-abiding, while men are considered to be perfect in leadership and autonomy, the result of such abiding nature is that women are not able to forward their personal opinions (Fox and lawless,2004).

**Lack of education and political awareness:**

Lack of education and political awareness hampers the political participation of women. Literacy and political education may be called the best tools for voter turnout. Studies have shown that literate and educated women are more bold and active while taking part in political activities than illiterate and uneducated (Norris,2002). Education helps in political awareness among the masses (Sahu,Yadu,2018).

**Discussion and Conclusion**

From the data analyzed above, it is observed that women form half of the percentage of total electors in every election but their representation has been low. The share of women's representation in the current Lok Sabha is only 14%, while that of men, is 86%. The total number of women contestants in the 16th Lok Sabha was 668, and the number of winning candidates was 62. The total number of women contestants in the 17th Lok Sabha was 726, and among them, the number of winning candidates was 78, which means there is an increase of 3% in the representation of women. From the last 15 years, women's representation has been relatively good in numbers, but when it is measured in percentage, it is extremely the cause of concern. From 1957 till the 2019 general election, the total representation of men in Lok Sabha has been 7733 among the total of 8374, which is 92%, and the number of women MPs has been 641,

which is just 7.6% of the total Lok Sabha representation. It has been found that men join political parties as members and are always eager to expand political contacts, but women lack such opportunities because of their engagement in non-political affairs such as household responsibilities, involvement in families, and other agricultural activities. Unawareness of politics and lack of political education is one of the obstacles which can be resolved by political awareness programs. Political awareness can also be achieved through different means and media, particularly the mass media which plays an important role in the awareness of the masses about political affairs (Gerber et al. 2009).Women folk can also get benefits from the media which will help them in political consciousness, and will also come to know political skills and the ways through which they mobilize other voters and electors (Mansuri and Gine, 2018). The above data shows that political parties are hesitant in giving tickets to women because they think women are less likely to win the election, but it has been found through the data that women have more winning probability than men, so the attitude of political parties need to be changed and made accommodative.

Electoral participation of women is satisfactory based on the data but the voter turnout and representation of women are low. Data shows that factors like male-dominated politics, socio-economic, psychological, lack of education, and political awareness are responsible for low political participation and representation of women.All these factors which become obstacles in the way of political participation of women need to be redressed on a priority basis for a vivid democracy. True democracy will flourish only when 'Representation of opinion' is converted to 'Representation of persons. 'Further research is needed to look at the effects of gender inequalities. It is also imperative to mention that the women themselves need to organize and mobilize their own networks to increase their political participation and representation.

**References**


1. Anderson, C.J.&Beramendi, P. (2008).Income inequality, and electoral participation. Democracy, inequality, and representation: A comparative perspective, 302-303.
2. Arora, Banarsi (1999): "Women in Politics: Governance in Patriarchal and Non-participatory Culture", Guru Nanak Journal of Sociology, 20(1-2): 111.
3. Atkeson, L. R. (2003). Not all cues are created equal: the conditional impact of female candidates on political engagement. The Journal of Politics, 65, 1040–1061.
4. Bagum, S. (2015). Political Participation of Women: Some Issues and Challenges. International Journal of Applied Research, 1(11), 480–481.
5. Baseline Report (1998): "Women and Political Participation in India" prepared by NIAS et al and coordinated by IWRAW Asia Pacific, advanced un edited version.







6. Basu, Amrita (1992): Two Faces of Protest: Contrasting Modes of Women's Activism in India (Berkeley: University of California Press).
7. Blackburn, Susan,(1999) 'Winning the Vote for Women in Indonesia' Australian Feminist Studies, Volume 14, Number 29, pp. 207–18.
8. Burns, Nancy, Kay Lehman Scholzman and Sidney Verba (2001): The Private Roots of Public Action: Gender, Equality, and Political Participation (Cambridge: Harvard University Pres).
9. C. Shirpurkar, S. (2021). Analytical Study Of The Political Status And Role Of Women During The Indian Independence Movement. EPRA International Journal of Multidisciplinary Research (IJMR), 7(3), 168–172, https://doi.org/10.36713/epra1529.
10. Chandra, B.(1989). India's Struggle For Independence. Page 462-478.
11. Chary, M. R. (2012). Women And Political Participation In India: A Historical Perspective. Indian Journal Of Political Science, LXX1II, No. 1, 3–4.
12. Coffé, H., &Bolzendahl, C. (2010).Same Game, Different Rules?Gender Differences in Political Participation. Sex Roles, 62(5–6), 318–333, https://doi.org/10.1007/s11199-009-9729-y.
13. Desk, I. T. W. (2020, November 26). 15 women who contributed in making the Indian Constitution.India Today.https://www.indiatoday.in/education-today/gk-current-affairs/story/women-s-day-the-only-15-women-who-contributed-to-making-the-indian-constitution-1653496-2020-03-07.
14. Dim,E.E and Asomah,J.Y.(2019).Socio-demographic Predictors of Political participation among women in Nigeria: Insights from Afrobarometer 2015 Data. (2019). Journal of International Womens Studies. Published.
15. Fadia, K. (2014). Women's Empowerment Through Political Participation in India. Indian Journal of Public Administration, 60(3), 537–548. https://doi.org/10.1177/0019556120140313.
16. Findly, E. B. (1993).NurJahan: Empress of Mughal India (1st ed.). Oxford University Press,p,123.
17. Gabbay, A. (2011). In Reality a Man: Sultan Iltutmish, His Daughter, Raziya, and Gender Ambiguity in Thirteenth Century Northern India. Journal of Persianate Studies, 4(1), 45–63. https://doi.org/10.1163/187471611x568285.
18. Giné, X., &Mansuri, G. (2018). Together We Will: Experimental Evidence on Female Voting Behavior in Pakistan. American Economic Journal: Applied Economics, 10(1), 207–235. https://doi.org/10.1257/app.20130480.
19. Goel, M. (1974). Political Participation in A Developing Nation-India. Asia Publishing House Bombay,pp 89-98.
20. Guha, R. 2012. Makers of Modern India.New Delhi, Penguin Books.

21. Gerber, A. S., Karlan, D., & Bergan, D. (2009). Does the Media Matter? A Field Experiment Measuring the Effect of Newspapers on Voting Behavior and Political Opinions. American Economic Journal: Applied Economics, 1(2), 35–52. https://doi.org/10.1257/app.1.2.35.
22. Hasan, Johri, K. S. (2017). A Study on the Role of New Media in the 2014 LokSabha Elections in India.Journal of Business and Management, 19(9), 42–43. https://doi.org/10.9790/487X-1909074246.
23. Hedling, N. (2017). The Fundamentals of a Constitution. International IDEA, 01–03. https://www.idea.int/sites/default/files/publications/the-fundamentals-of-a-constitution.pdf, https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures#_ednref19.
24. Inter-Parliamentary Union, Women's suffrage: A World Chronology of the Recognition of Women's Rights to Vote and to Stand for Election. https://www.ipu.org/women-in-politics-2021.
25. Jean Uhlaner, C. (2015). ' Politics and participation' in International Encyclopedia of the Social & Behavioral Sciences (2nd ed.). University of California Irvine, Irvine, CA, USA.
26. Kamat, J. (1998). Gandhi and status of Women.Excerpts from a Lecture given at the Gandhi Peace Foundation in December 1998).
27. Kawoosa, V. M. (2019, May 17). Lok Sabha elections 2019: In 2019 polls, women look to bridge historic turnout gap. Hindustan Times.https://www.hindustantimes.com/lok-sabha-elections/lok-sabha-elections-2019-in-2019-polls-women-look-to-bridge-historic-turnout-gap/story-5dnpEBLWW9bAY4ugzr6XNN.html.Accessed on 11 February 2022.
28. Kumar, R. (1993). History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800–1990 (2nd ed.). Kali for Women.
29. Laxmikanth, M. (2013). Indian Polity 4th Edition (Old Edition) (4th ed.). Tata McGraw-Hill Education India
30. Lister, R.(2003).Citizenship: Feminist perspectives. New York:Palgrave Macmillan.
31. Menon, L. N. (1968). From Constitutional Recognition to Public Office. The Analysis of the American Academy of Political and Social Science, 375(1), 34–43. https://doi.org/10.1177/000271626837500105.
32. Mishra, V. (2010,).The day before, paler, bitter Lalu.Indian Express.Retrieved on 10 February 2022 from http://archive.indianexpress.com/news/the-day-before-paler-bitter-lalu/715163/3.
33. Moghadam, V. M. (2008). The gender of democracy: The link between women's rights and democratization in the Middle East. Arab reform bulletin, 2(7), 2-3.
34. Nilson. T.(2020) Education, Gender Inequality, Global Poverty, Srilanka, Women's Rights. Here you find https://borgenproject.org/tag/promoting-womens-political-participation-in-sri-lanka/ 23 sep.2021.
35. Parvin, A. (2016). Women's Political Participation In Bangladesh (1971–2015). Indian History Congress, 77, 815–827.
36. Prawin, R. (2011). Electoral Participation of Women in India Key Determinants and Barriers.Economic and Political Weekly, Vol. 46(3), 48–49. https://www.jstor.org/stable/27918039.
37. Rush, Michael (1992). Politics and Society: An Introduction to Political Sociology. New York: Prentice Hall.
38. SindhujaAndMurugan, P. K. R. (2017). Factors impeding women's political participation - A literature review. International Journal of Applied Research, 3(4), 563–565. https://www.allresearchjournal.com.
39. Verba, S., Schlozman, K. L., & Brady, H. (1995). Voice and equality: civic voluntarism in American politics. Cambridge, MA: Harvard University Press.

# Minorities in The Indian Parliament: The Question of Fair Representation

*Mohd Rameez Raza**

**Abstract**

India, is a country that embodies the most complex democracy, with unparalleled religious, ethnic, and linguistic diversity. Fair representation in politics becomes the key goal when we are looking at democracy with diversity, but looking at representation only as a goal is not fair, because representation also provides every community with an identity in the political sphere and ensures that no voice is ignored. But with this paper, the authors want to bring to everyone's attention that with the rise of politics of communal polarization, either these voices don't find a seat in the legislature, and if they reach there, they are not heard and are slowly silenced. In parliamentary elections, the biggest national party won two consecutive terms, without a single Muslim MP, and major ethnic minorities have also seen a massive decline in terms of representation. An analytical report by the Mint suggests that India has a better representation of minorities than other big democracies, but do we need to be proud of it because the conclusion of the same report suggests "India has a long way to go when it comes to Fairer Minority Representation". When looking at representation, we are not just looking at the number of seating people in the legislature, but we are also looking at them being the voices of the communities, the authors have noticed a common trend, that the minority members of the legislature are just "trophies" to showcase representation, but their presence is either negligible or just trifling. We need to review the existing parliamentary system and suggest measures for the effective representation of minorities in the system. A.G. Noorani once suggested that such review is not only a responsibility of the bodies, but scholars and academicians must also undertake a study to assess the existing limitation and to recommend alterations, that will ensure better representation, and through this paper, the authors aim to do the

* *Lawyer, Senior Research Analyst, Centre for New Economics Studies, O.P. Jindal Global University*





something on the same lines.

**Key words: -** *Minority, Representation, Schedule Caste, Muslim, FPTP.*

## 1. Introduction: What is "Representation"?

The right to representation in the parliamentary system is a critical tool for participation since it allows the voices of minority communities heard in the government. This helps in drawing legislatures' attention to the minority communities and their issue effectively, which might go unnoticed without representation.

There are more than 30 nations on the globe that reserve seats in their national legislatures for members of minority groups (Krook, 2010). The inclusion of representatives of all politically significant groups into the legislature might be regarded as a normatively desirable objective that representative democracies should strive to fulfill in their own right (Norris, 2006). Members of minority groups are often given seats in legislatures with the further expectation that these representatives would not only speak for minorities but also act on behalf of those members of society who identify with a particular group.

The importance of representation to a minority, on the other hand, is dependent on variables and not just numbers. Given enough votes and seats minority communities may use their position to put forward their demands, as well as forge long-term strategic partnerships. The purpose of this paper is to explain the link between reserved seats, party membership, and minority representation.

## 2. Understanding Indian Election System

India has 543 seats, each of which elects one representative, and the candidate who receives the most votes in that constituency is proclaimed the winner of that constituency. We must emphasize that under this system, whoever receives the greatest number of votes above all other candidates is deemed the winner. It is not necessary for the winning candidate to receive a majority of votes. This procedure is referred to as the First Past the Post ("FPTP" hereinafter) system. During the election process, the candidate who finishes first, or crosses the finish line first, is declared the winner. This approach is referred to as the Plurality System in certain circles. The Constitution specifies that this is the manner of a fair election.

In the FPTP election system, the candidate who receives the greatest number of votes in a certain constituency is proclaimed elected. Smaller social groupings are often disadvantaged as a result of this phenomenon. When considered in the Indian social context, this is much more important. We have a long history of discrimination based on caste. So, in the FPTP election system, the dominant social groups and castes may be able to win across the board, while the oppressed social groups may continue to be underrepresented in politics. These difficulties were recognized by our founding fathers, who recognized that they

needed to devise a method of ensuring fair and reasonable representation for repressed socio-economic groups. This was a topic of discussion even before independence when the British administration created the concept of "separate electorates". This method ensured that only those voters who belonged to a certain community were entitled to vote for a representative from that community while that community was being represented in the legislature. Many members of the Constituent Assembly voiced concern that this would not be appropriate for our aims.

As a result, we decided to implement the system of reserved constituencies. In this system, all eligible voters in a constituency are able to vote, but the candidates must be members of a certain group or social sector for whom the seat has been designated. It is possible that some social groupings will be dispersed around the nation. When it comes to a single constituency, their numbers may not be sufficient to have an impact on the outcome of a certain candidate's campaign. However, when considered as a whole, they constitute a significant proportion of the population. A system of reservations becomes essential in order to guarantee that they are properly represented. Those from Scheduled Caste(s) and Scheduled Tribe(s) are guaranteed seats in the states and central legislative bodies under the provisions of the Constitution of India. This clause was originally intended to last for a period of ten years, but it has since been extended as a consequence of repeated constitutional modifications.

Other disadvantaged groups are not afforded the same level of protection under the Constitution. Recently, there has been a significant increase in demand for the allocation of seats for women candidates. Looking at the representation of women in elected positions, the call for reserving one-third of all seats in representative bodies is becoming more vocal. In both rural and urban local governments, women have been given priority in terms of seat allocation. Amendment to the Constitution would be required to provide a comparable provision for the Lok Sabha and Vidhan Sabha. Despite the fact that such an amendment has been suggested multiple times in Parliament, it has yet to be adopted. As a result, questions such as, "Who chooses which constituency is to be reserved?" and "On what basis does this choice for reservation have to be made?" emerge. In response to these questions, the "Delimitation Commission" is established. The Delimitation Commission, which is an independent agency, makes the decision on whether or not to reserve land. This commission is appointed by the President of India and works in partnership with the Election Commission of India to draw boundaries for the country's states and territories.

## 3. Minority Representation in the Indian Electorate

On the subject of their representation, two radically different methods have been presented. First is to "Ensure that minorities are represented by members of the minority, ideally in proportion to their number of the population, either via a national electoral system that facilitates this or, if required, through a system of special representation, according to the needs of the minority. The alternative





approach is less concerned with direct minority representation and more focused with the incorporation of minorities into the political system" (Silva, 1998) The line between direct minority representation and integration is frequently muddled since certain systems of direct minority representation, such as proportional representation, are consistent with their integration. A wider contrast exists between systems that offer separate minority representation and those that do not allow for such representation.

Congress, which played an instrumental in the independence movement, was against the election based on ethnicity, that the British had instituted in 1909, according to historians. Austin in his writing states that:

*"Members of the Constituent Assembly had one predominant aim when framing the legislative provisions of the Constitution: to create a basis for the social and political unity of the country." (Austin, 1997).*

Austin comments on the situation at the time of independence:

*"Not only did the provinces lack even a semblance of popular government, but the small electorate that existed was itself thoroughly fragmented, split into no less than thirteen communal and functional compartments for whose representatives' seats were reserved in the various parliamentary bodies."*

### 3.1. Scheduled Caste(s) & Scheduled Tribe(s) Representation in India

One kind of special representation, for Scheduled Caste(s) and Tribe(s), was approved by the Constituent Assembly, through Articles 330 and 332, respectively (Galanter, 1984). This provision was initially intended to endure for ten years, but it has been extended on an annual basis since then, as Scheduled Caste(s) and Scheduled Tribe(s) account for 15 and 7 percent of the population, respectively, ensuring that they get considerable guaranteed representation. Candidates belonging to Scheduled Caste(s) and Scheduled Tribe(s) are also obliged to make lower deposits under the provisions of the legislation.

"Separate electorates for the national and state legislatures are outlawed under the Constitution, and the Supreme Court has construed the Constitution to prohibit separate electoral registers at the municipal and county levels" (Nain, 1953). In constituencies where seats are reserved for Scheduled Caste(s) or Scheduled Tribe(s), all registered voters are eligible to vote, with the exception of those in which seats are allocated for Scheduled Tribe(s). The Delimitation Commission is in charge of determining which constituencies would have seats allocated to them. A single factor is used to determine which constituencies will be represented by the Scheduled Tribe(s) that is the concentration of the tribe's population, due to the fact that the Scheduled Tribe(s) still reside in specific areas. The Scheduled Caste(s), who are more scattered, must have reservation areas that are distributed across the nation and that are situated, to the greatest extent practicable, in constituencies where the percentage of their population to the total is comparably substantial. As a result, constituencies with reserved

seats for Scheduled Caste(s) include a proportionally smaller number of them than constituencies with reserved seats for Scheduled Tribe(s). The biggest include around 30% of the total (Galanter, 1984). Scheduled Tribe seats are more remote and less urban than normal constituencies, with fewer people living in them.

It is the consequence of the "reservation" that these two populations, who are otherwise disenfranchised in terms of politics and economics, are represented in the political process. This is especially essential for the Scheduled Caste(s), who do not constitute a majority in any section of the country. Due to the fact that members of these groups hold more than 20% of the seats in Parliament, all political parties support candidates belonging to these communities (Mendelsohn, 1994). It is reasonable to conclude that the reservations have provided the two groups with a significant amount of political power, it has eased for them to raise their voices and take affirmative action, which are the key factors of reservations (Ghai, 2001).

### 3.2. Muslim Representation in India

Muslims are a minority in 97 percent of constituencies, of the country (Farooqui, 2020), and among that, approximately 40 percent of Muslims are urban inhabitants, as per the 2011 Census (Verma, 2015), and they are the most urbanized community in the country (Gayer, 2012). In contrast, the vast majority of India's parliamentary seats are largely rural, while a significant percentage of Muslims live in the 38 percent of parliamentary constituencies that are semi-urban or urban in nature. This cluster has just seven seats where Muslims constitute a significant proportion of the population (Farooqui, 2020).

The geographical distribution of the community, combined with the FPTP system, has had a negative impact on Muslim participation in Indian politics. Because of their geographic dispersion, Muslims are a minority everywhere and, as a result, are far more reliant on the support of other communities in order to gain political representation. However, "in situations where the political system tends toward ethnic majoritarianism, the FPTP system is often detrimental to minority interests, as ethnic consolidation would prevent political parties from nominating candidates from ethnic minorities for fear of alienating voters from the majority community" (Shidharan, 2002) As a result, candidates from ethnic minorities are more likely to be elected in seats where there is a high number of members of the aforementioned group.

The geographical dispersal of Muslims is a major impediment to the creation of Muslim-led parties as well as the community's continued preference for other parties at both the national and regional levels. "FPTP makes it difficult for a dispersed group to form a political platform that exclusively represents their interests, because the exclusive pursuit of community interest may alienate others and prevent their preferred party from achieving a majority at the constituency level under the system's rules" (Ghai, 2001) This is particularly





true in a political climate marked by social and political mobilization along ethnic lines, which has the potential to negatively affect the electability of their favored candidate's chances of winning the election (Ghai, 2001). As a result, Muslim-led political parties have either failed to achieve success even in areas with a high Muslim population.

Muslim representation in Lok Sabha has been approximately 5 percent in the past few years, which is much lower than the Muslim demographic proportion in the country (Farooqui, 2020). Only in 1980 and 1984, representation has been in proportion with the population. During this period of democratic transition and outreach, the Muslim community gained from a political standpoint. This happened because of the political marginalization of the right-wing parties, which was first led by the Bhartiya Jana Sangh and then by the Bhartiya Janta Party ("BJP" hereinafter) (Mujibur Rehman, 2010).

At present, on its alone or as part of a coalition, the BJP is in power, in a significant number of states throughout the country. After the 2014 Lok Sabha election, the BJP has continued its upward trajectory, which took a toll on Muslim representation in state legislatures. Only 3 Muslim parliamentarians represent the BJP out of a total of 1282 party legislators representing the party in the 28 assemblies (Verniers, 2019). Before the 16th Lok Sabha, Muslim MLAs accounted for only 8% of the total number of MLAs in different state legislatures throughout the country. After, the 2018 State Assembly Elections, the percentage of community members represented in state legislatures has decreased to 7 percent. A rise can be observed in the 2019 Lok Sabha Elections but over one-fourth contested as an independent, and another 63 percent on the ticket of local parties that had little or no representation on the ground in their home districts. Also, India has a history of independent candidates having low chances of victory (Abbas, 2019), and it is still true for Muslims today. Because of this, an overwhelming 88 percent of Muslim candidates were not genuine contenders in the first place. Political parties with some presence on the ground, either individually or as part of an alliance, nominated just 12 percent of the candidates nominated by them in 2019. According to the latest available data, the number of candidates nominated by such parties has decreased by 168 candidates as compared to the 2014 parliamentary election (Farooqui, 2020).

Adnan Farooqui, in one of his works, mentioned that "equitable representation is a desirable aim in and of itself and that it is a required condition, though not a sufficient requirement, for ensuring that varied perspectives are not neglected in a democracy". The persistent underrepresentation of Muslims in the political arena is a result of a mix of historical, institutional, and geographic circumstances. Inequality in political representation has been exacerbated by factors such as the historical legacy of partition, the choice of an election system, and the geographical distribution of Muslims over history. Political parties' inability to address issues of political underrepresentation has not prevented them from articulating and representing the concerns of the Muslim community in political arenas, or even from attempting to address issues of

political underrepresentation through informal mechanisms, as has happened in the past. To the extent that only Muslim politicians may be elected from seats with a majority of Muslims as voters, this represents an indication of the Muslim community's political ghettoization in the United States. Farooqui also mentioned that "a new style of leadership that is aggressive and expressive has emerged in response to the unwillingness of conventional political parties to offer an outlet for political articulation in the community. They may not have voted for this leadership yet, but they nevertheless pay attention to them because of their willingness to speak up on behalf of the community's problems" (Farooqui, 2020).

## 4. Faulty Representation: Tracing the Causes and Suggesting Solution

The Indian Parliament has never been a true reflection of society; lawmakers are disproportionately male, rich, and belong to the country's native majority, and they are not elected by the people. However, although women and certain ethnic and racial minorities have made significant gains in politics in recent decades albeit at a rate that is far from proportionate to their numbers, their representation in politics is still far from equal. Diverse researchers have proven in recent years why political choices are skewed in favor of the wealthy and the causes that contribute to this bias, as well as the consequences of this prejudice.

### 4.1. The FPTP System

The Indian Constitution uses the FPTP electoral method, often known as the simple majority system, in which the candidate who receives the most votes in any constituency wins the election. Some people think that this method is undemocratic and unrepresentative of people of different ethnic backgrounds (Nasir, 2018). The opponents of this system have argued for reexamination and have advocated in favor of the adoption of a proportional representation system.

There are various tales to be told about the 2019 Lok Sabha election. In India, the majority constitute most of the MPs, over 50 percent belonging to the higher castes. So, where have all of India's many voices gone? In terms of policy considerations, first and foremost, the literacy rate, according to the most recent 2011 Census, is 74 percent, in comparison to 18 percent in 1951 (Bureau, 2019). It just serves to demonstrate that we have the most literate electorate in the country's history. Furthermore, the FPTP has not always resulted in stable majority administrations. Rather than being an anomaly, the creation of coalition administrations at the national level has been the rule rather than the case since 2000. Finally, although the Constitution provides for reservations for members of the Scheduled Caste(s) and Scheduled Tribe(s), other oppressed people are not provided with any such protection under the Constitution.

During the debates in the Constituent Assembly, Kazi Syed Karimuddin delivered the most forceful criticism of FPTP and made the strongest argument





for the adoption of proportional representation. While attempting to introduce a change that would replace FPTP with a "system of proportional representation with multi-member districts by way of cumulative vote." The "tyranny of the majority", he maintained, was generated by first-past-the-post voting and could be addressed by using proportional representation. Mahboob Ali Baig Sahib Bahadur was another member who spoke out in favor of proportional representation. He introduced a motion to propose that members of the Lok Sabha be chosen "in line with the system of proportional representation by way of a single transferable vote," as opposed to the current system of plurality voting.

### 4.2. Inappropriate or Unequal Representation

Article 82 of the Constitution of India mandates that seats be reallocated following every census on the basis of the most recent population numbers available. But in 1976, during the National Emergency, the 42nd Amendment was passed, delaying the adjustment of seats until after the 2001 Census.

Reallocation was further postponed in 2002 when the Parliament passed the Eighty-Fourth Amendment, which extended it until the next census, which would take place after 2026. Redistricting within states was permitted by the Eighty-Seventh Amendment, but only in accordance with population statistics from 2001, and the seats allotted to states remained the same, under this Amendment.

The result of this unwavering postponement is a system of representation that is very unequally distributed. In 2001, when legislators postponed the seat adjustments, the problem of unequal representation among states had already become significant. Alistair McMillan detailed precisely how extreme over and underrepresentation had grown (McMillan, 2021). When analyzing the Census of 2001, Alistair McMillan determined that "Tamil Nadu should have had 7 fewer Lok Sabha seats and Uttar Pradesh should have gained 7 seats". Even more significant inequalities are seen when McMillan's findings are updated to take into account the 2011 Census data (McMillan, 2021).

McMillan also mentioned that "the revised figures are likely to have resulted in significant movements in political power. Consequently, four northern Indian states (Bihar, Madhya Pradesh, Rajasthan, and Uttar Pradesh) would have gained a total of 22 seats, but four southern Indian states (Andhra Pradesh, Kerala, Telangana, and Tamil Nadu) would have suffered a total of 17 seat losses. According to demographic predictions, these tendencies will only become more pronounced as time progresses. When it comes to representation in the House of Representatives in 2026, Bihar and Uttar Pradesh alone stand to gain 21 seats, while Kerala and Tamil Nadu stand to lose up to 16".

The shift in the number of seats legally allotted for candidates from Scheduled Castes (SC) and Scheduled Tribes (ST) is one of the unintended consequences of reapportionment, which has been overlooked. The number of SC and ST

reserved seats is set on a state-by-state basis; the proportion of each state's seats designated for SC and ST candidates must be proportional to the proportion of those communities' population in the total state population. There are two ways in which reapportionment impacts SC and ST reserved seats: first, by updating the population proportions of SC and ST communities in each state, which was last done in 2008, and second, by updating the overall number of seats for each state, which has been constant since 1971. Both of these numbers would be increased by one if they were revised to correspond to the 2011 Census statistics; however, the total number of reserved seats would be increased by two if they were revised to correspond to the 2011 Census values. Despite the little adjustment, there has been an obvious shift in the distribution of reserved seats: slower-growing southern states would lose their reserved seats, while faster-growing northern states would gain them. Taking everything into consideration, the reservation status of 18 seats would change (Vaishnav, 2019).

It comes as no surprise that reapportionment has significant repercussions for political parties. Macmillan also mentioned that "parties with strong roots in fast-growing northern states such as the present governing BJP would gain power at the cost of regional giants from the southern states and regions. The BJPs majority would have increased from 282 to 299 seats on the basis of the 2011 Census and the 2014 Lok Sabha election results, assuming that the proportion of seats won by each party in each state does not change."

This would have occurred primarily at the expense of regional parties in the southern states. Unless there is another Constitutional Amendment, no new parliamentary seats will be granted until after the 2031 Census has been completed. Although this is the case, it should not be used as an excuse to postpone a complete federal debate on the different facets of interstate inequity, including the difficult question of representation. What solutions could policymakers be able to come up with?

The first method is as simple as committing to a reallocation after 2031 and avoiding the temptation to push the can down the road even another time after that. If India had reallocated seats following each decennial census, the Lok Sabha's composition would have gradually altered over time, as opposed to the current tactic of "pulling off the Band-Aid." The longer the process drags on, however, the more pain would ultimately be felt. After decades of self-imposed lethargy, any future reapportionment will inevitability result in significant shifts in the balance of political power in the country.

The increase in the number of seats in the Lok Sabha, which has also been recommended by McMillan, is still another possible answer (McMillan, 2021). There are two distinct benefits to doing so. First and foremost, increasing the number of MPs would address the problems and issues of constituents while also enhancing the responsiveness of MPs to the demands of residents. "Indian parliamentarians currently answer to vastly larger numbers of citizens than their counterparts in virtually every other democracy: Indian members of parliament represent an average of 2.5 million citizens, which is more than three times the





number of citizens represented by members of the United States Congress, which is ranked second in terms of population."

A third option is to modify the composition of the Rajya Sabha, also known as the Council of States. "The Rajya Sabha is India's upper chamber of Parliament and, as its name indicates, serves as a forum for states to fight for their interests in the country. While Rajya Sabha members theoretically advocate for their home states, a 2003 amendment severed the link between a representative and his or her home state by repealing an earlier "domicile requirement," which required members of Parliament to be residents of the state they represented at the time of their election (Nayar, 2016). Fixing the domicile problem can only get you so far; nevertheless, there is another adjustment that should be considered: abolishing the indirect election procedure for Rajya Sabha members and introducing a process of direct election instead (Vaishnav, 2019).

## 5. Conclusion: The Immediate need for "Fair Representation"

Indian democratic federalism has been praised for keeping the nation together over the course of seven decades, despite the country's unprecedented ethnic, linguistic, and religious diversity. The Constitution of India vests extensive authority in its subnational governments over a wide range of issues relating to daily administration. When India's states were rebuilt on linguistic principles in the mid-1950s, it was a foresighted political choice that prevented many potential confrontations over linguistic identity from breaking out. Given the political class's persistent reluctance to reorganize the parliamentary seats as per the shifting demographics, serious and entrenched malapportionment has resulted in India's parliamentary representation. As long as Indian leaders put off making difficult choices about how many parliamentary seats each state should get, the country's current problem of representation will only get worsen.

Indians outperform Americans when it comes to the representation of the greatest demographic minority, according to the United Nations Development Programme (UNDP). As per the 2001 Census, at present Muslims are 13.4 percent of India's total population, making them the country's biggest demographic minority. However, they only constitute 4.24 percent of the Lok Sabha, resulting in a representation score of -9.16 percentage points in the House of Commons. Religious minorities other than Muslims are better represented in the Lok Sabha than Muslims themselves. Christians, Buddhists, and Jains each have a representation score of -1 percentage points or less, but Sikhs have a representation score of 0.3 percentage points or less. In terms of more equitable minority representation, India, like other democracies, has a long way to go. Regardless of the path taken, the discussion on fair representation should not be postponed any further.

## References


1. Abbas, G. (2019, March 4). Since the 1st Elections, Only 0.49% of Independent Candidates Have Managed to Enter Lok Sabha. News 18. Retrieved from https://www.news18.com/news/politics/since-the-1st-elections-only-0-49-of-independent-candidates-have%02managed-to-enter-lok-sabha-2047541.html.
2. Austin, G. (1972). The Indian Constitution: Cornerstone of a Nation. Bombay: Oxford University Press, 144.
3. Bureau, ET (2019, May 25). 17th Lok Sabha: In Many Ways, the New Lower House Will Break Old Patterns. The Economic Times. Retrieved from https://economictimes.indiatimes.com/news/elections/lok-sabha/india/17th-lok-sabha-in-many-ways-the-new-lower-house-will-break-old-patterns/articleshow/69499650.cms.
4. Farooqui, A. (2020) 'Political Representation of a Minority: Muslim Representation in Contemporary India' India Review, 19(2), 2.
5. Galanter, M. (1984). Competing Equalities. Delhi: Oxford University Press, 45.
6. Gayer, L & Jaffrelot. C. (Ed.) (2012). Muslims in Indian Cities: Trajectories of Marginalization. New Delhi: Harper Collins, 1–22.
7. Ghai, Y. (2001). Public Participation and Minorities. Minority Rights Group International.
8. Krook, M.L., & O'Brien, D.Z. (2010) The Politics of Group Representation: Quotas for Women and Minorities Worldwide. Comparative Politics, 42(3), 253.
9. McMillan, A. (2021). Population Change and the Democratic Structure. India-Seminar. Retrieved from https://india-seminar.com/2001/506/506%20alistair%20mcmillan.htm.
10. Mendelsohn, O., & Vicziany, M. (1994). 'The Untouchables'. In O. Mendlesohn and U. Baxi (Ed.), The Rights of Subordinated Peoples. Delhi: Oxford University Press.
11. Mujibur Rehman, M. (2010) Muslim Politics in India and the 15th General Elections. In Ajay K Mehra (Ed.), Emerging Trends in Indian Politics: The 15th General Election. New Delhi: Routledge, 141.
12. Nain Sukh Das v State of UP AIR 1953 SC 384.
13. Nasir, A., & Anuragini, P. (2018, May 14). Debate: First Past the Post Means India Is Only a Namesake Democracy. The Wire. Retrieved from https://thewire.in/politics/debate-first-past-the-post-means-india-is-only-a-namesake-democracy.
14. Nayar, K. (2016, May 18). Who Belongs to the House, Who Doesn't. The Indian Express. Retrieved from https://indianexpress.com/article/opinion/columns/rajya-sabha-membership-supreme-court-who-belongs-to-the-house-who-doesnt-2807591/.
15. Norris, P. (2006). The Impact of Electoral Reform on Women's Representation. Acta Politica, 41, 197.
16. Pitkin, H.F. (1967). The Concept of Representation. University of California Press, 80.
17. Reilly, B. & Reynolds, A. (1999). Electoral Systems and Conflict in Divided Societies. Washington DC: National Academy.
18. Silva, K.M. (1998) Electoral Systems. In C. Young (Ed.), Ethnic Diversity and Public Policy: A Comparative Policy London, Macmillan.
19. Sridharan, E. (2002). The Origins of Electoral System: Rules, Representation, and Power Sharing in India's Democracy. In Zoya Hasan, E. Sridharan & R. Sudarshan (Ed.), India's Living Constitution: Ideas, Practices, Controversies. Ranikhet: Permanent Black, 348–50.
20. Vaishnav, M. & Hintson, J. (2019, March 14). India's Emerging Crisis of Representation. Carnegie Endowment for International Peace. Retrieved from https://carnegieendowment.org/2019/03/14/india-s-emerging-crisis-of-representation-pub-78588.
21. Verma, S. (2015, August 26). More religious minorities live in urban areas than rural. Times of India, Retrieved from https://timesofindia.indiatimes.com/india/More-religiousminorities-live-in-urban-areas-than-rural/articleshow/48680765.cms.
22. Verniers, G. (2019, June 2). Verdict 2019 in Charts and Maps: Nearly Half of India's Muslim MPs Came from Only Two States. Scroll. Retrieved from https://scroll.in/article/925440/.

# An Analysis of Human Rights of Mother and Child in Prison

*Dr. Archana Vashishth*, Ms. Manju Kundu***

## INTRODUCTION

India is a welfare state, and as such, it is the responsibility of the government to safeguard and advance the civic, economic, and social well-being of every individual. For all individuals who are unable to care for themselves, the government has a duty to provide fair wealth distribution, access to healthcare, and equal opportunity. The government is responsible for implementing health policy and ensuring that everyone has access to healthcare because it is a foundational component of the welfare state. However, it is impractical to expect these services to reach the prison because these regulations and government programmes are rarely accessible to the general people. This nation's treatment of female convicts is abhorrent, and not just the women suffer. The children of the ladies who were arrested were also taken into custody. Despite the fact that they haven't done anything wrong, such children inevitably face some type of arrest. Additionally, the atmosphere in prison does not support the healthy upbringing of such youngsters.

"According to a five-year review of jail data in India, the proportion of female inmates is rising. 3.3%, 3.9%, 4.1%, 4.3%, and 4.3% of all inmates in 2000, 2005, 2010, and 2015, respectively In 15 Indian states and Union Territories, out of about 1,300 prisons, there are only 31 women's jails, while in 21 states and UTs, there are no separate women's jails".

"According to NCRB data, 9% of all female detainees are mothers, and three out of every four of these moms are still awaiting trial. In 2019, 1,543 female inmates and 1,779 kids were incarcerated together".

* *Associate Professor School of Legal studies, Apeejay Stya University, Gurugram*
** *Assistant Professor, School of Education, K.R. Mangalam University Gurugram*





## CHILDREN OF FEMALE PRISONERS AND THEIR ISSUES

The Indian Constitution's Parts III and IV provide specific provisions for the upbringing, welfare, and development of children. The Constitution states that the child's best interests shall come first in all decisions. According to Article 45 of the Constitution, the state must make every effort to provide all children with early care and education up until the age of six. Due to improper schooling arrangements inside the prisons, the state has grossly infringed this right of the children. It is impossible to consider the mother's imprisonment in isolation because their infants and young children are also detained with them. Given that they have not been exposed to the outside world, socialisation of these kids is primarily limited to female convicts. The kids' access to learning is constrained as a result of their restrictive living circumstances.

It is highly incongruous for the state to uphold the Roe v. Wade ruling, which acknowledges the state's interests in protecting the life of the foetus, while also failing to provide a better environment or place for the children in jail who are raised by their mother who is either on trial or found guilty.

According to the Indian Jail Manual, A youngster can spend up to six years in prison with her mother. However, it differs between states. Children are permitted to reside with their mothers till the age of five, for instance, in Andaman and NicobarIn Assam, up to the age of six. When there is no alternative carer for the child, it is in Bihar for children up to the age of two and up to the age of five in extraordinary circumstances. Chhattisgarh permits children up to age six.

When the time for separation finally comes, though, the situation becomes tense. Both the mother and the child suffered negative effects from the separation. Visiting a prison can be unsettling and terrifying for adults. Children of incarcerated women, especially those raised by the state, have a much higher risk of becoming criminals.

Every element of their children's life was touched by their mothers' incarceration. Compared to bereavement, it carries more social shame. Such kids have very little social support, which leads to aggressive and antisocial conduct in kids. Even while all recently released inmates struggle with reintegration, women often have a harder time making amends with their kids who may have developed while they were away.

Inmates' children do not experience a typical childhood. With the exception of a select handful that offer health examinations, immunisations, and nurturing facilities for both mothers and children, there is no formal structure or educational system in the jail. Due to their extended stay in a closed environment, their socialisation is frequently impaired child may be at jeopardy due to the poor conditions of jails and the absence of essential facilities.

## PREGNANCY, CHILDBIRTH AND POSTPARTUM CARE LEGAL FRAMEWORK, JUDICIAL PRECEDENTS, AND INTERNATIONAL OBLIGATIONS

Ten guilty people going free is preferable than one innocent person suffering. Why should the child suffer as a result of the mother’s crime is the question at hand. The state violates fundamental rights, doesn't it? While it may seem that all the facilities and regulations are in one location for the protection of these children, the reality on the ground is what matters. The child spends their building and learning time in jail. Women are entitled to special attention when it comes to arrest and bail, according to the 1973 Code of Criminal Procedure. A proviso to Section 416, which provides that the High Court may defer the execution if a woman sentenced to death is found to be pregnant, reflects the CrPc's concern for women.

In RD Upadhyay vs. State of AP, in a historic judgement, the Indian Supreme Court held that the government had a constitutional duty to protect children from all forms of exploitation and to ensure their wellbeing.

Articles 21, 23, 39 (e), 39 (f), 21 A, 14, 42, 45, and 47 of the Indian Constitution, as well as current child-related laws, international laws and conventions, scientific reports of institutions and committees, and affidavits of state governments and union territories, were all taken into consideration by the court while taking note of the plight of children living in jails as a result of their mothers' incarceration. The court determined that food, clothing, shelter, education, medical. To guarantee the health and safety of infants, expectant mothers, and women giving birth in prison, the court also issued comprehensive rules.

The jail handbook and other rules must be modified within three months to comply with the court's further orders.

Following the ruling, several state governments started giving money to kids of detained parents. Children of prisoners serving at least a two-year sentence are given a monthly stipend by the State of Kerala. In West Bengal, the state government will assist in paying tuition costs for dependent children who are enrolled in school or college.

In Safoora Zargar vs. State, The Delhi High Court used the maxim of "personhood of the unborn" established in the American case of Roe vs. Wade when giving bail to Safoora Zargar.

In Nasrin vs State of H.P, Due to the woman's need to breastfeed her infant, the Himachal Pradesh High Court granted her bail.

The Model Prison Manual, which placed a focus on particular considerations for female convicts, was released by the Home Ministry in 2016. The manual's suggestions made reference to the United Nations' Bangkok Rules Protocol from 2011.





## KEY FEATURES OF MANUAL

To arrange for a pregnant inmate's temporary release to give birth in a hospital outside of the jail, the National Model Prison Manual must be properly adhered to. Sentence suspension for safe delivery may be taken into consideration for repeat offenders. In order for the court that ordered the detention to grant bail or change the detention order as needed, the court needs also be informed of the woman's pregnancy status. Pregnant and nursing women should follow a special diet. There is no reason to discourage nursing. Prison should never be included as the child's place of birth on the birth certificate in order to shield the youngster from social shame. Women in the postpartum stage should be provided with separate housing for at least a year in order to maintain hygiene and safeguard themselves and their unborn child from potential infections.

Women who are pregnant or nursing shouldn't ever be kept in a small space. Programs for healing and nutrition should include women prisoners who have undergone abortions or miscarriages.

The handbook states that mothers in jail should be given as many opportunities as possible to spend time with their kids. If there is no one to look after the child and he or she cannot go to prison with the mother, a child care facility should look after them. Children of the same female prisoner should reside in alternative care facilities together. The mother and child must be reunited at least once per week, according to the jail administration.

A creche facility should be made available to women convicts who have kids so that the kids can get educational and vocational training. Recreational facilities must be made available to these children. But most prisons don't even have a functioning creche.

Women in jail experience various issues because there are few policies in place to ensure their welfare, according to the 2018 Women in Prisons Report. Following an analysis of the situation, the report recommended that the children of women prisoners not be made to feel guilty. The Model Prison Manual, the United Nations Bangkok Rules protocol, the 2018 report, and the RD Upadhyay decision all establish processes for the well-being of children and their jailed children, but there is still a gap between policy and practice.

## INTERNATIONAL BODIES

### The UN's Minimum Standards for the Care of Pregnant Women in Prison

All necessary prenatal and postnatal care and treatment will be offered in women's institutes. There will be preparations for children to be born at medical facilities. This Act is not to be noted on the birth certificate of a child who was born in a prison.

### International Human Rights Standards

“The International Covenant on Economic, Social, and Cultural Rights' Article

10(2) states that mothers should receive special protection both before and after giving birth.

The current covenant acknowledges that everyone has a right to the best possible physical and mental health, according to Article 12 of the Covenant". Every human being has the intrinsic right to life, according to Article 6 of the International Covenant on Civil and Political Rights, and no one shall be arbitrarily deprived of that right.

"The right to nationality, the requirement that a child be registered as soon as possible after birth, and, to the greatest degree possible, the right to know and be cared for by one's parents are all stated in Article 7 of the United Nations Convention on the Rights of the Child." India has ratified all of these international agreements and made a commitment to respect its commitments under them in order to safeguard the rights of women prisoners and their offspring. However, these policies are not being implemented at all.

## CONCLUSION

One of every person's fundamental right is access to healthcare, regardless of whether that person is a law-abiding citizen or a criminal. Therefore, it is the duty of every government to promote and support public health, as well as to put health policies into place and guarantee that everyone has access to medical treatment. All fundamental rights, such as wholesome food, a quality education, and leisure time, must be supplied in order to ensure the children's holistic development while they are housed in prison alongside their mother. Their physical, mental, moral, intellectual, and emotional fortitude will benefit from this.

The judiciary occasionally expresses worry about how women and their children are treated in jail and sets forth specific rules to ameliorate things. All of the current regulations and rules, however, are merely written down. Implementation of the rules is largely influenced by the jail administration. The needs of women and children in jail must also be contextualized in light of the relevant state-level factors since incarceration is a state-related issue. Additionally, a specialized agency must be established to look into their needs. Without a doubt, in the present period, every youngster on the earth has a right to a safe, unrestricted, and honorable environment. Article 21 of the Indian Constitution states that every citizen has a right to the best things in life, and it would be fantastic to see this idea extended to children incarcerated.

**References:**


1. National Crime Records Bureau, Prison Statistics India–2019, available at https://ncrb.gov.in/sites/default/files/Executive- Summary-2019.pdf, last seen 05/08/2021
2. Shreehari Paliath & Preety Acharya, Children of women prisoners in India struggle to get proper food and education despite guidelines, Scroll.in, available at https://scroll.in/article/975186/in-india-children-of-women-prisoners-struggle-to-get-proper-food-and-education-despite-guidelines, 09/10/ 2020.
3. INDIA COST. Art. 45.
4. MANU/USSC/0177/1972.
5. "Ministry of Home Affairs, Government of India, Model Prison Manual For The Superintendence And Management Of Prisons In India, available at https://bprd.nic.in/WriteReadData/userfiles/file/5230647148-Model%20Prison%20Manual.pdf, last seen on 05/08/2022".
6. CrPc 1973, Section 416.
7. MANU/SC/2061/2006.
8. MANU/DE/1445/2020
9. Supra 4, at 2.
10. MANU/HP/0236/2021.
11. "Ministry of Home Affairs, Government of India, Model Prison Manual 2016, available at https://www.mha.gov.in/sites/default/files/PrisonManual2016.pdf, last seen 05/08/2022"
12. Ibid.
13. Supra 8, at 4.
14. "United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) 2010".
15. International Covenant on Economic, Social, and Cultural Rights, Arts. 10(2), 12.
16. "International Covenant on Civil and Political Rights, Art. 6".
17. United Nations Convention on the Rights of the Child, Art. 7.

# United Nations High Commissioner for Refugees: The Case of The Syrian Refugees

*Preeti Singh**

**Abstract**

Birth of the United Nations High Commissioner for Refugees (UNHCR) is seen as significant step in the direction of protecting refugee rights. The paper seeks to assess the role of UNHCR in protecting the refugee rights by specifically focusing on the case of Syrian refugees. The central argument that the paper focuses upon is that the working of UNHCR in the case of Syrian conflict is hampered due to the delay and refusal in granting of asylum to Syrian refugees by most of the countries of Global North. The paper put across the point that the countries which have handful of resources and less capacity in terms of infrastructure have by far supported most to UNHCR while dealing with rights of Syrian refugees. Syrian refugees have also been facing the brunt of COVID-19 on a large scale as the infrastructure of the host countries is not capable of protecting both the citizens and Syrian refugees residing in the country. UNHCR did assist Syrian refugees amidst COVID-19 but the lack of facilities such as funding and infrastructure in the host countries makes them incapable of protecting Syrian refugee rights. It is along these lines the paper sought to analyse the extent to which UNHCR has succeeded in protecting the rights of Syrian refugees.

**Key words:** - *COVID 19, Rights, Syrian refugees, UNHCR.*

## Introduction

The turmoil that began in Syria in 2011 has made it the highest refugee-generating country. Three countries – South Sudan, Afghanistan and Syria - constitute the majority of refugees i.e. 55 percent. As per the statistics, 6.3

* *Research Scholar, Centre for International Politics, Organization and Disarmament, School of International Studies, Jawaharlal Nehru University, New Delhi,*
*Email: preeti21593@gmail.com*





million refugees are coming from Syria alone. Given the scenario, the role of the United Nations High Commissioner for Refugees (UNHCR) as the guardian of refugee rights becomes valuable. In the light of this, the paper assesses the response of UNHCR towards Syrian refugees from 2011 till 2021. The paper seeks to assess the role of UNHCR by specifically taking the case of Syrian refugees. UNHCR since its very inception has claimed itself as the guardian of refugee rights but too what extent it has succeeded in protecting the rights of refugees is a matter of enquiry.

Having said this, the paper is divided into following sections. First section traces the evolution of UNHCR to understand the ways in which it has operated to protect the refugee rights. Second section focuses on Syrian case specifically. It elaborates the cooperation of UNHCR with different actors (regional and extra-regional countries) and pattern of responses to cater to the need of Syrian refugees. In third section, the paper deals with the impact of COVID-19 on Syrian refugees and the way UNHCR responded to current crisis. The conclusion section put forth the challenges that UNHCR faces while protecting the refugee rights in general and Syrian refugee rights in particular.

## EVOLUTION OF UNHCR

UNHCR headquarter is located in Geneva, Switzerland, currently consists of 128 members. It was created as a temporary organization which was to work for three years but it acquired the status of the permanent organization in 2003 and is now one of the most prominent humanitarian organization working for the welfare of refugee rights. At the time of its formation, the core mandate of UNHCR was to protect "refugees" but now due to complexity of the situation it encompasses various groups or people such as internally displaced persons (IDPs), stateless persons, returnees, asylum seekers or migrants often referred to as persons of concern. A study of evolution of the UNHCR is important in order to understand the ways in which its evolution has shaped its responses in the conflict situation where rights of refugees are at stake.

### Historical Background

The United Nations General Assembly by resolution 319(IV), on 3rd December 1949, establish the office of UNHCR which following the adoption of its statute by resolution 428(V) on 14th December 1950 came into existence. The birth of UNHCR was not the product of altruistic nature of western powers rather it was the result of the context that compelled them to establish an organization for the welfare of refugees. The first set of organizations that came into effect - office of the High Commissioner for Russian Refugees, the Nansen International Office for Refugees, United Nations Relief and Rehabilitation Administration (UNRRA) in 1943, International Refugee Organization (IRO) – due to events such as World War I (1914-1918), Bolshevik Revolution, Russian famine (1921), World War II (1939-1945) failed to manage large scale exodus and

provide rehabilitation in the event of crisis in Europe.

Further, the organizations created by League of Nations did not adopt any kind of universal definition of refugees. In addition to this, budget constraints and great depression of 1920s and 1930s together led to a situation wherein management of refugees became a huge issue for western powers. All these reasons taken together were responsible for the emergence of UNHCR. The United States at this particular time was not in favour of a new organization as it was already engulfed with the Marshall Plan to contain communism. Therefore, it only wanted an organization providing legal protection to refugees rather than any kind of relief role to the new organization. Analysing from this perspective, it is clear that UNHCR was created to foster the interest of western powers. The Euro-centric nature of UNHCR was reflected through its statute and convention of 1951 relating to the Status of Refugees which not only offered a narrow definition of a refugee but also limited the mandate of UNHCR to legal protection.

## Normative framework of UNHCR

The paragraph 1 of the statute of the office of the UNHCR begins with articulating that: "UNHCR should provide international protection to refugees under the ambit of United Nations and seek a permanent solution for their problem by assisting governments, private organizations and further facilitating repatriation and assimilation". The statute of UNHCR has always been a matter of concern as the word protection is not clearly defined due to which it is interpreted sometimes as a legal protection or other time as a political protection or as a assistance in form of shelter, food, and clothing. UNHCR's statute is recommendatory in nature and hence only enjoys a moral authority and not the legal one.

The 1951 Convention was amended once only by which the Protocol relating to the Status of Refugees was adopted on 31st January and entered into force on 4th October 1967. Through 1967 Protocol the geographical and temporal limitation relating to refugee status was removed. Previous to this amendment, in the 1951 Convention, only people who fled their country due to events occurring in Europe prior to 1st January 1951 or events occurring in Europe or elsewhere before 1951 were recognized as refugees. Being a rights-based instrument, it highlights three principles which are: non-discrimination (Article 3), non-penalization and non-refoulement (Article 33). Currently, the total number of State of Parties to 1951 Convention are 149 member countries. What is intriguing is the fact there are still many countries who have still not ratified 1951 Convention relating to refugee rights and this insight poses a challenge for UNHCR which since it very beginning was set up with the objective of providing protection to refugee rights.





## UNHCR in the Post-War Europe

In terms of institutional expanse, the evolution of UNHCR can be inferred from the fact that it started with 34 staff members but it grew in the year 1953 to have 99 staff with 11 regional offices. In the year 2000, UNHCR had 6,500 staff in 116 countries with an annual budget of US$1 billion to cater its mandate. At present, it consists of more than 10,966 members of staff working in 130 countries. In the words of Gordenkar: "UNHCR began working as part of the UN Secretariat in 1951 primarily to protect the rights of refugees under the Convention of 1951, which provided legal safeguards for European refugees" but over the years "UNHCR transformed not only in scale but also in substance". However, it has not crossed the limits set up by western powers as the power of governance to UNHCR is legitimized by the powerful states in the international scenario. Therefore, UNHCR's evolution is not antagonistic to the interest of western powers rather it is sensitive to the concerns of those who have created it.

The leadership given by High Commissioners and initiatives in the early years have significantly shaped the organizational boundaries and hence, led to the expansion of the office. High Commissioner Goedhart (1951-56) began the work of expansion by raising funds for the first time from Ford Foundation so that NGOs could help in integration of refugees in Western Europe and further the funding helped in tackling the refugee crisis in the West Berlin. Further, the invasion of Hungary by the Soviet Union in 1956 resulted in a huge influx of refugees to countries like Austria and Yugoslavia for which a request was made by these countries to UNHCR for assistance. In response to this, UNHCR was appointed as the central agency to solve the Hungarian refugee issue.

The Hungarian issue was a landmark event in the sense that the 1951 Convention recognized refugees only on the basis of geography and time and going by this guideline the assistance could not be provided to them. However, assistance was still provided under UNHCR. This was a remarkable expansion of its power. The success achieved by UNHCR in case of Hungarian refugees steadily won the confidence of United States and thus led to an increase in its funding capacity which helped it to encroach on the operational work (providing material assistance) from strictly non-operational working. With this, the phase where UNHCR strictly dealt with European countries came to an end and this marked the beginning of a new phase wherein UNHCR started engaging with post-colonial states.

It is in this backdrop that a change in approach towards refugees was adopted during the 1990s. High Commissioner Sadako Ogata (1990-2000) dubbed the 1990s as the decade of "voluntary repatriation". The repatriation fervor of UNHCR can be seen from the number of refugees it repatriated between 1991-1996 that accounted for 9 million refugees as against 1.2 million refugees repatriated from 1985 to 1990. Repatriation is seen as a solution by developed countries who now see refugee as a liability whether in terms of resources or in terms of providing them with asylum facility and thus, it has become one of the

leading cause of North-South rivalry. By this time, UNHCR started describing itself as a humanitarian organization which is active in the field of protecting rights of refugees. UNHCR was no longer a lead agency in the humanitarian operations as UN adopted a system of cluster approach.

## UNHCR AND SYRIAN REFUGEES

Before examining the response of the UNHCR towards Syrian refugees, it is useful to trace the background of Syrian conflict that caused the great deal of humanitarian suffering.

### Syrian conflict and the resultant humanitarian crisis

The root cause of the Syrian crisis lies in the Arab Spring that erupted in Tunisia on 10th December 2010 and spilled over to Syria. Scholars have argued that the turmoil in Syria is result of history which is characterised by sectarianism, class warfare and social inequalities. The political system run for decades by al-Assad family alienated marginalized sections. Bashar al-Assad, who succeeded his father in 2000 was considered a liberal minded person as he carried out some reforms in the country but he was constrained by Ba'ath party political leaders. There was absolute monopoly of Ba'ath party in the political arena that created a democratic deficit in Syria. The root cause associated for Syrian conflict is the sectarian nature of the society of Syria. Syrian society is composed of Sunni Arabs (almost 60 percent of population), Christian population (10-12 percent of population), Alawites (about 10-12 percent), Druze (about 6 percent), Kurds and Armenians. Therefore, majority of the population in Syria belongs to Sunni sect but the President Assad came from Alawite which is a sub sect of Shias. President enjoyed the support of Sunni community and it was only after the eruption of crisis that the sectarianism became a dominant reason for growth of the conflict.

The other reason for Syrian conflict was the hostility of several countries such as Saudi Arabia, Israel, and western countries to ruling regime, and they saw Arab spring as an opportune moment to topple Assad regime and set up friendly government in the country. Syria has always taken a pro-Palestine stance, has close relations with Russia, Iran and Hezbollah which is definitely not liked by West and countries like Saudi Arabia and Israel specifically. The United States deepened the sectarian divide by persuading the Gulf States that they are encircled by Shia arc ranging from Iran to Lebanon. Therefore, the conclusion was targeting of Syrian regime with an aim to destabilize it and remove President Assad. The humanitarian crisis is of unprecedented scale which is reflected through the reports which claim that 11.5 percent of the Syrian population have been killed or are injured. Those living inside as well as outside the country suffered from lack of basic amenities (shelter, food, water), violation of rights, delay in asylum grants etc. Apart from this, there have been instances of use of chemical weapons and attacks on civilian population from both





opposition groups and the government forces.

The official figures of Syrian refugees in different countries are not captured wholly as "UN statistics do not include individuals and families who settled in these countries without being registered as refugees or asylum seekers, because they were either able to take care by themselves of their establishment, or accommodated by relatives or friends". The conflict compelled Syrians to take refuge in the neighbouring countries (95 percent of refugees in Egypt, Lebanon, Turkey, Jordan and Iraq) and many have taken perilous path by taking recourse to Mediterranean sea to avail refuge in Europe countries.

**Table 1 provides relevant data for the number of Syrian refugees**

| Year | Total number of Syrian refugees |
|---|---|
| 2012 | 476,506 |
| 2013 | 2.47 million |
| 2014 | 3.88 million |
| 2015 | 4.9 million |
| 2016 | 5.5 million |
| 2017 | 6.3 million |
| 2018 | 6.7 million |
| 2019 | 6.6 million |
| 2020 till June 2021 | 6.7 million |

**Source: UNHCR Global Report**

### UNHCR's response to Syrian refugees in the regional countries

Syrian conflict created the need for various humanitarian agencies to step in to manage the large scale humanitarian distress. The UNHCR was the most prominent one. In order to respond effectively, the office of UNHCR prepared the Syrian Regional Response Plan which is a framework document to cater to the needs of Syrian refugees fleeing from Syria to Jordan, Lebanon, Turkey and Iraq. The Plan is an outcome of 100 local and international partners, including NGOs and UN partners putting forward the demand for funds. The Syria Regional Response Plan had following objectives: ensuring that refugees fleeing from Syria have access to the neighbouring countries, asylum facility, receiving

protection (also protection from refoulement); basic needs are to be met and special focus on vulnerable people; plans for mass influx.

UNHCR launched the Regional Refugee and Resilience Plan in 2015-2016 (3RP). The 3RP plan is described as: "nationally-led, regionally coherent strategy which is built on the national response plans of the countries in the region". Under the 3RP, UNHCR undertook refugee response part whereas UNDP oversees resilience part. The support of the host countries continued as they continued to host significant number of Syrian refugees. The Regional Refugee and Resilience Plan directives were: "strong national leadership, regional protection framework (ensuring safety and dignity of refugees through coordination), building on the dead sea resilience agenda, enhancing economic opportunities (access to jobs and livelihood opportunities for refugees), no lost generation (focussing on education of children and youth), continued outreach and partnership (240 partners working together which includes governments, NGOs and UN agencies), enhanced accountability mechanism". Despite such interventions by UNHCR, there were weaknesses with respect to shelter component as refugees could not get proper accommodation. Two reasons may be attributed to this condition: majority of refugees lived outside camps (only 18 percent of refugees lived in camps in Jordan) therefore, have difficulty in receiving aid, access to employment and education and further there was unfair accruing of rent from refugees as the formal agreement was not made given the vulnerability of refugees in these host countries.

UNHCR in the five regional host countries is working under different circumstances. The response of UNHCR in the regional countries is restricted by the fact that the three countries namely Iraq, Jordan and Lebanon who are providing refuge to Syrian refugees are not signatory to the 1951 Convention relating to the refugees and its 1967 Protocol and therefore, Syrians are not given the status of refugees but of a guest. Though UNHCR has received permission from Lebanon government to register Syrian refugees to provide protection but the kind of protection offered remains limited as they do not get right to avail asylum or the right to legally stay in Lebanon. Turkey which hosts majority of the Syrian refugee has ratified only the 1951 Convention which gives the status of refugee to only those who became refugees due to the events that occurred before 1st January 1951 occurring in Europe.

For Syrian refugees to avail services provided by UNHCR they need to get UNHCR registration card but such status cannot be maintained if refugees move around the country. Further, there are also Syrian refugees who do not register with UNHCR due to lack of awareness regarding assistance or to prevent their identity for security reasons. In Lebanon around 60 percent of the Syrian refugee children are not receiving education and some are also into child labour. Syrian refugees in the regional host countries are engaged in unskilled jobs with very low wage and are facing high competition from citizens of the host country.

These aspects are an attack on the UNHCR's role as the protector of refugee right. UNHCR's response to Syrian refugees in these regional host countries is





constrained by these factors. UNHCR and its partners have been facing criticism on the ground that there plans do not take into account the views of refugees and are formed in isolation to their needs. Despite the shortfall, the response of UNHCR in the region of Syria remains satisfying as the basic principle of refugee right such as non-refoulment, access to asylum have been provided by regional host countries.

**UNHCR and Syrian refugees in Europe**

Before illustrating the response of UNHCR in European countries, it is important to understand the policy of European Union (EU) with respect to refugees. EU operates through the Common European Asylum System (CEAS) that put forth standards, procedure for application to avail asylum. EU follows Dublin system wherein EU members send an asylum-seeker that has travelled through multiple EU countries back to the EU state where the asylum-seeker reached first on coming from home country. However, there is no uniform application of CEAS as many EU members have not followed it till now and thereby there is variation in the giving asylum grants.

Syrian refugees fled to European countries through various routes - land route to Greece or Bulgaria, air route and through Mediterranean route. They initially arrived in countries like Italy, Greece and Hungary. The problems they faced in these countries were numerous: congested spaces in Italy (overcrowding), Greece itself was debt ridden, basic facilities were not provided in Greece. Given this situation, Syrian refugees wanted to take refuge in another European country but due to application of Dublin system they could not do so. It is in this context, it is argued that UNHCR's role could only be of facilitator as it cannot govern or give orders to countries to change their border policies. Countries such as Hungary "constructed a fence and closed its borders with Croatia and Serbia in order to deter the flow of refugees". What is notable is that despite consistent effort by UNHCR, the EU countries registered much lower number of Syrian refugees in their respective countries than hosted by regional countries like Egypt, Lebanon, Iraq, Jordan etc.

The asylum grant is around ten percent of the received application. There also lies another trend wherein Syrians do not apply for asylum in Southern Europe countries in large number (only 3 percent of the Syrian who have applied for asylum in Europe apply for Southern Europe countries). Germany and Sweden received maximum application that is 300,000 and 100,000 respectively. Germany has the highest rate of granting asylum to Syrian refugees. UNHCR has been facing criticism that it has not been able to mobilize western countries (in this context, European countries) to share the refugees burden in an equitable manner. Analyzing on the basis of figures of Syrian refugees in regional countries and in the European countries, it is pointed out that European countries have been largely reluctant to provide asylum to Syrian refugees. However, the other side of the argument is that EU contributes largest share of aid for the Syrian humanitarian crisis. But UNHCR has often cited problems with respect

to lag in the funding as there has been shortfall of 70 percent of funds from EU side.

Also there is no separate regional plan prepared by UNHCR for European countries in order to deal with Syrian refugees. Though, in the initial years of the Syrian conflict, EU discussed the possibility of putting forth a Regional Protection Plan for European Union specifically in coordination with UNHCR but the plan did not receive further consideration. Therefore, there remains a great degree of variation in the quality of protection and rights being granted to Syrian refugees in different European countries. For instance, Germany grants subsidiary protection to Syrians who apply for asylum whereas Sweden automatically grants temporary residence permit to Syrians as soon as they apply for asylum to ensure safety and security of Syrian refugees. But there are European countries such as Greece and Eastern European countries which have rejected the claims of Syrians applying for asylum. Further, there is no will on the part of the Baltic states, Poland, Czech Republic and Slovakia to accommodate Syrian refugees. The reasons cited are Xenophobia, religious reasons. It is because of these variations, UNHCR and other aid giving agencies have constantly made an attempt to persuade EU to follow the guidelines of EU's Common European Asylum System.

While it is true that UNHCR's efforts to provide an effective response in EU towards Syrian refugees remain limited but the organization has not shied away from criticizing European countries for their reluctant attitude towards Syrian refugees. Former High Commissioner for Refugees Antonio Guterres stated in 2014 that given the vast geography of Europe and

its economic capacity it has done very little for Syrian refugees. The High Commissioner for Refugees Filippo Grandi argued that the displacement of Syrian people outside Syria border is restricted due to the border management policies not only of Syrian border but of strong border management policies followed by European countries. Such arguments reflect the fact that UNHCR is faced with hurdles while working in Europe to provide an effective response to the Syrian refugees.

UNHCR has proved itself as an instrumental organization in the area of refugee protection. But what cannot be ignored is that Syrians might have fled to different parts of the world but the majority of the Syrian refugees are located in the region itself specifically in one country which is Turkey. This has definitely put a mark on the working of UNHCR as the countries who are not part of the 1951 Convention have accommodated much larger number of Syrian refugees than countries who are part of 1951 Convention and its 1967 Protocol. Seen from this perspective, regional countries have cooperated with UNHCR in a much better manner when it comes to providing refuge to Syrian refugees in their territories than the European countries.





## IMPACT OF COVID-19 ON SYRIAN REFUGEES: RESPONSE OF UNHCR

COVID-19 has impacted the lives of people in many ways in terms of health and economic downturn. But even within this category, people who are hardest hit by the pandemic are migrants and refugees residing outside their national borders. The spread of COVID-19 becomes vigorous in a condition wherein people are living in a close contact. In this context, Syrian refugees who live in camps and households among close spaces with inadequate water supply and sanitation are most susceptible to corona virus. The refugee camps are most vulnerable to the epidemic. By the end of 2020, the number of Syrian refugees infected with the COVID in five countries i.e. Turkey, Lebanon, Iraq, Egypt and Jordan were one lakh thirty three thousand nine hundred and eighty five. The data related to the number of people infected with COVID among Syrian refugees is not accurate as the enumeration with respect to it was a difficult task. It is argued that Syrian refugees have experienced number of challenges to health care such as high cost of health care, low priority given to them on the account of being refugee and stigma attached to the refugee. Syrian refugees are or have been vulnerable to corona infections because of various reasons: "lack of knowledge with regards to infection and symptoms; lack of access to tests, which are already limited and insufficient for the needs of the hosting communities, and fear of stigma which might lead to increasing restrictions and crackdown on the refugees". These concerns are not trivial as hosting countries have deported refugees even before the full scale start of pandemic.

In case of Lebanon, Syrian refugees did not had primary care and did not had access to secondary healthcare. This further deteriorated the situation and led to the spread of virus in the community. Also, there was a weak surveillance system with limited testing facilities in Lebanon. The tests that were done by the end of first lockdown were not among the Syrian refugees as the targets were citizens of country and the former were treated as the second class of citizens. This lack of testing among the Syrian refugees contributed to the increase in cases of COVID and thereby leading to increase in death rates. UNHCR did respond by implementing a strategy integrated with the national response which includes work like setting up isolation facilities, expanding hospital bed facility, paying for treatment of Syrian refugees. The Regional Refugee and Resilience Plan (3RP) countries-Turkey, Lebanon, Iraq, Jordan, Egypt-developed specific response to COVID-19 by reprogramming or reallocating more resources than the earlier programme. The total budget requirements to implement the COVID-19 plans were US$ 774 million in total (US$ 644 million in additional funding on top of existing 3RP plans).

The 3RP plan in Iraq focussed on raising awareness regarding hand washing, reviewing medical facilities in health camps for refugees. The national distance learning programme for children of Syrian refugees in Turkey has been launched as a new way to respond amidst COVID crisis. Turkey is one of the largest Syrian refugee receiving country. Post the outbreak of COVID, the situation has

become more precarious. In Turkey, Syrian refugees are losing their income source due to COVID impact on the economy of the country. Turkish government does not have separate information on the number of Syrian refugees infected with COVID as the majority of them were living in populated areas which made it difficult for authorities to keep a data check. Turkey cooperated with the partners including UNHCR to help refugees to contain the spread of corona virus.

For pandemic to slowdown, the approaches that were followed included social distancing; hygienic atmosphere; wearing masks and gloves and rapid testing. However, these approaches are difficult to adhere and more challenging in the refugee camps. The refugee population lives in make shifts tents with little spaces and poor quality of hygiene maintenance. Although UNHCR and other NGOs have endeavour to provide significant support to Syrian refugees but the funding shortage remains one of the biggest challenge. UNHCR in five host countries have cooperated to provide assistance to Syrian refugees in order to mitigate the impact of COVID-19 but the organization is facing challenge in terms of funding, priority given to nationals of the country when it comes to treatment and even vaccination.

UNHCR as an organization can assist the host countries but it cannot dictate these countries whose morality is guided by the border. The rights of Syrian refugees are protected as long as the rights are not coming in conflict with the rights of the citizens of country. COVID-19 has made the situation worse as the national infrastructure of these host countries were already under strained and the pandemic has further contributed in that. UNHCR as an organization for refugee rights can put forth a moral obligation on the host countries but cannot pressurize them to meet the demands of Syrian refugees as these countries themselves suffer from resource crunch. Global North countries have become more strict interms of border policy upon the arrival of pandemic, so whatever little is done for Syrian refugees during pandemic situation was provided by these five host countries-Turkey, Jordan, Lebanon, Egypt, Iraq- alongwith the cooperation of UNHCR.

## CONCLUSION

It is notable that the Syrian conflict has produced largest number of Syrian refugees since the conflict started in 2011 due to which the response on such a large scale became a challenge for humanitarian actors in general and for UNHCR specifically. The challenge which UNHCR faces while working for any conflict in general and the Syrian conflict specifically is the reluctance of host countries to accommodate refugees inside their own borders due to mounting pressure on their infrastructure. UNHCR opines that the conflict in Syria is impacting host countries in many ways: socio- economic impact, creating competition for employment, hampering trade and commerce, increase pressure on already scarce resources. Further, there is backlash from the citizens of the host country in which the Syrian refugees arrive. In the Germany not everyone





is open to the idea of diluting borders due to which there have been attacks on place where Syrian migrants are living. These instances have challenged the stature of UNHCR as the protector of refugee rights. COVID-19 has aggravated the situation and made worse for Syrian refugees residing in these countries.

The most challenging part for the UNHCR is shortage of funds for Syrian refugees as the plans launched by UNHCR remain underfunded. The UNHCR has from time to time taken initiatives to mobilize fund by organizing conferences such as London (2016), Brussels (2018) etc. but the pledges have not completely resulted into the actual grant. The UNHCR often struggled to provide basic services to Syrian refugees- such as health, nutrition, shelter, education- due to reasons of funding shortage. For any organization to survive and work effectively, the requirement demands that it takes lessons from its past work to improve upon its working. For UNCHR, the Syrian case is an opportunity hidden behind challenges that can help the organization to expand beyond its limit and become a guardian of refugee rights in its true letter and spirit.

## References:

1. UNHCR (2014), Protecting Refugee Rights
2. Lewis, Corinne (2012). UNHCR and International Refugee Law: From treaties to innovation. Milton Park, Abingdon, Oxon: Routledge.
3. Loescher, Gil et al. (2008). The United Nations High Commissioner for Refugees (UNHCR): The politics and practice of refugee protection into the 21st century. New York: Routledge.
4. United Nations General Assembly Resolution 428(V) of 14 December 1950.p.6.
5. Goodwin-Gil, Guy S. (2006), International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform, Paper presented on 24th April at the Refugee Studies Centre Workshop, Oxford: England.
6. United Nations General Assembly Resolution 2198(XXI),p. 2.
7. Giri, Tharkeshwar Nath (1998), office of United Nations High Commissioner for Refugees and its Role in the Third World Refugee Problems, Ph.D. Thesis, New Delhi: Jawaharlal Nehru University,p.25.
8. Gordenker, Leon (1981), “Organizational Expansion and Limits in International Services for Refugees” International Migration Review, 15(1/2): 74-87.
9. Krever, Tor (2011), “Mopping-up”: UNHCR, Neutrality and Non-Refoulement since the Cold War, Chinese Journal of International Law, 10(3): 587-608.

10. Loescher, Gil et al. (2008), The United Nations High Commissioner for Refugees (UNHCR): The politics and practice of refugee protection into the 21st century, New York: Routledge,p.48
11. Chimni, B.S. (2000), From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems, Refugee Survey Quarterly, 23(3): 55-73.
12. Coleman, Michael (2013), The Rising Tide of Syria, Global Security Studies, 4(3): 15-42.
13. Haran, V.P. (2016), Roots of the Syrian crisis, New Delhi: Institute of Peace and Conflict Studies, [Online: web] Accessed 15th February 2018, URL: https://reliefweb.int/report/syrian-arab-republic/roots-syrian-crisis-ipcs-special-report-181-march-2016.p.2.
14. Carpenter, Ted Galen (2013), Tangled Web: The Syrian Civil War and Its Implications, Mediterranean Quarterly, 24(1): 1-11
15. Akbarzadeh, Shahram and Dara Conduit (2016), The Syrian refugee crisis, Ethos, 24(2): 8-10.
16. Fargues, Philippe and Christine Fandrich (2012), The European Response to the Syrian Refugee Crisis: What Next?, Florence: Migration Policy Centre in European University Institute, [Online: web] Accessed 15th February 2018, URL: http://www.migrationpolicycentre.eu/docs/MPC%202012%2014.pdf.p.4.
17. Huynh, Justin (2016), Tales of the boat people: Comparing refugee resettlement in the Vietnamese and Syrian refugee crisis, Columbia Human Rights Law Review, 48: 198-241.
18. Syrian Regional Response Plan (2012).p.4.
19. Regional Refugee and Resilience Plan (2015-2016).p.6.
20. Regional Refugee and Resilience Plan 2017-2018
21. Akbarzadeh, Shahram and Dara Conduit (2016), The Syrian refugee crisis, Ethos, 24(2): 8-10
22. Regional Refugee and Resilience Plan 2016-2017.p. 40.
23. Aranki, Dalia and Olivia Kalis (2014), Limited legal status for refugees from Syria in Lebanon, Forced Migration Review, 47: 17-18.
24. Zetter and Ruaudel (2014).p.8.
25. Akbarzadeh, Shahram and Dara Conduit (2016), The Syrian refugee crisis, Ethos, 24(2): 8-10.
26. Smallwood, Frances Topham (2014), Refugee activists' involvement in relief effort in Lebanon, Forced Migration Review, 47: 21-22.
27. Huynh, Justin (2016), Tales of the boat people: Comparing refugee resettlement in the Vietnamese and Syrian refugee crisis, Columbia Human Rights Law Review, 48: 198-241.
28. Syrians in Southern Europe UNHCR Regional Update May (2015).p.1.
29. Fargues, Philippe and Christine Fandrich (2012), The European Response to the Syrian Refugee Crisis: What Next?, Florence: Migration Policy Centre in European University Institute, [Online: web] Accessed 15th February 2018, URL: http://www.migrationpolicycentre.eu/docs/MPC%202012%2014.pdf.p.13.
30. Heisbourg, Francois (2015), The strategic implications of the Syrian refugee crisis, Survival Global Politics and Strategy, 57(6): 7-20.
31. Fouad et al. (2021) Conflict and Health.p.4.
32. Refugees besieged: The lurking threat of COVID-19 in Syrian war refugee camps (2020)
33. 3RP (2020), UNHCR.
34. Wahtum. L. J.A & Sugito (2022),Refugee and Asylum Seekrs in Turkey During the COVID-19 Pandemic, Vol. 7, No. 2 Syntax Literate: Jurnal Ilmiah Indonesia.

# Endeavors of Legislature and Judiciary in Preservation of Human Rights of Indian Women: An appraisal

***Shelja Singh*, Razia Chauhan*****

*"Women's rights are the edifice on which human rights stand".*

- Dr. A. P. J. Abdul Kala"

**Introduction**

The revered thought of human rights coveys the idea of righteousness and morality. The legendary Indian jurist, Justice VR Krishna Iyer rightly stated that "the human Rights date back to the very dawn of human civilization and often appear clearly enshrined in the great religions of the world." John Stuart Mills, the renowned political philosopher of 19th century argued for women's human Rights stating that, "women should be given the opportunity of suffrage, education and employment. The development of women is necessary not only for women's sake but for humankind itself." Being a member of English Parliament, he demanded rights of custody, property, and inheritance for women. Following Wollstonecraft and Margaret Fuller, He argued that, "women should be considered as free rational beings that shall choose their own style of life without following dictations of others." Hence, John Stuart Mills proposed equal rights in favor of women to partake in political process, education and employment, especially the right to be considered as a human being equal to men. 19th century witnessed various movements demanding women's rights including equal opportunities and status in social, economic and political sphere and providing legal safeguards against discriminations etc. These are significant steps that aided to integrate the overall concept of women's rights. Despite of all these socio-political movements and philosophical text, the status of women in all over the world didn't raised much until the middle of the 20th century. This was mainly due to the insufficient legal safeguards provided to them.

* *Research Scholar, Department of Law, Aligarh Muslim University, Aligarh, Email: sheljasingh2607@gmail.com*
** *Research Scholar, Department of Law, Aligarh Muslim University, Aligarh, Email: sharp.razia@gmail.com*





It has been rightly pointed out by Sir Hersch Lauterpacht, the eminent lawyer of International law that, "Since Human Rights are not created by any legislation, they bear a resemblance to the natural rights and each civilised state must recognise and respect them." Gender justice is the abolition of the disparities among genders that turn out in various spheres of life. It entails actively measures by the influential institution such as law and socio economic policies to check the prejudice, which is responsible for vulnerability of women. It is duly stated by a renowned author that, "As the women in the world have struggled for their rights, various hurdles have blocked their path to find out the manner to aver the rights equivalent to their counterpart and at the same time delineate the rights specially designed for them, at the same time not forfeiting their interests and power as women." It is duly said by Joanne Scott, in her classic study of women in the French revolution that "the rights of man had only paradoxes to offer to women". The notions about women worldwide show that women were perceived as a subordinate being by communities. Katherine T Barlett has rightly stated that "The world subordinated women in mutually reinforcing ways perhaps the most enduring conceptual basis for women's subordinate legal and social status is the assumption that while men represent norm of the fully human being, women represent a deviation sometimes superior usually inferior but always different." United Nations conducted a study which states, "Women comprise half of the world populace, carry out nearly two thirds of work hours, obtain one tenth of the world's proceeds and own less than one-hundredth per cent of the world's property."

Establishing equality between both genders and to wipe out all sorts of inequality faced by women are among the most basic principles and objective of United Nations. It is rightly stated in a report prepared by "United Nations Women" that "Women around the globe nevertheless regularly endure violations of their human rights all through their lives, and realizing women's human rights has not always been a main concern. An assortment of prejudice is being faced by women in different parts of world on different grounds." All such factors should necessarily be taken into consideration while formulating policies and enacting statutes to preserve and protect rights of women." As the women in the world have struggled for their rights since ages, they had to cross numerous hurdles blocking their path to find out the manner to have equal rights to their counterpart and at the same time having the rights specially designed for them not forfeiting their interests and power as women. The world always subordinated women to men in terms of legal and social status. Despite of being half of the world force, women do not own property as compared to men and if they own some property, mostly they own it as a proxy owner on behalf of their husbands or other family members which is quite devastating. Gender justice is the elimination of the inequality among genders in various spheres of life. It necessitates vigorous measures by the prominent institutions such as state, law and socio economic policies to curb the bigotry, which is responsible for vulnerability of women. A very significant role has been played by Law in transforming the socio-legal status of women and protecting their rights.

Law: the most prominent tool preserving and protecting Women's Human Rights: Rights of women became a matter of worldwide concern and programme of action as an outcome of a range of declarations by the Unite Nations. The United Nations acknowledged the requisite to construct certain provisions specially crafted for women and to further suggesting other nations to pursue the ushering principles laid down by it for eliminating gender disparity to ascertain "Gender Justice". Law has played most significant role in this. The journey was started in form of "International Instruments" concerning rights of women. Some of the significant International commitments ensuring Human Rights of women are as follows:

**International Instruments:**

**"The Charter of United Nations, 1945":** Preamble of the Charter unequivocally speaks for Human Rights of women. It depicts the notion of "Gender Equality". The "Preamble" of "Charter" states, "We the People of The United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The very rationale of United Nations is to promote international collaboration to resolve international conflicts relating to economy, society, ethnicity and humanity and to promote and raise concern about respect for Human rights devoid of all sorts of prejudice.

**"Universal Declaration of Human Rights (UDHR), 1948":** The Declaration states that "All human beings are born free and equal in dignity and rights." Another significant facet of Human Rights is prohibition against bigotry. The Declaration, under Article 7 provides, "All persons are equal before the law and are entitled without any prejudice to equal protection of the law. Everyone is entitled to equal protection against any discrimination in contravention of this Declaration and against any incitement to such discrimination." Debra Bergoffen rightly states about the gender justice, "As the abstract principles of the eighteenth-century declarations exposed the injustices of kings and provided grounds for concrete political action, the United Nations' affirmation of the equal rights of men and women in its twentieth-century declaration exposed the injustices women suffer because they are women. It provided grounds for demanding that specific laws and concrete practices that support these injustices be challenged and changed."

**"Convention on Elimination of all forms of Discrimination against Women (CEDAW), 1979":** CEDAW is profoundly known as the Magna Carta of rights of women all over the world. It guides the State Parties to embark on to "embody the principle of equality of men and women in their State constitutions or other suitable legislations to ensure, through law and other proper means, the realistic realization of this principle." It is the only human right instrument preserving the women's right relating to reproduction and focusing on ethnicity and custom as a potent tool to figure the role of men and women in society. It provides for right of women to nationality. The countries ratifying the





Convention are under the obligation to bring its provisions into exercise and are bound to provide report on fourth yearly basis about the measures adopted by them to attain the objectives of the convention. India signed it on July 30, 1980 and on July 09, 1993, it made two declarations while ratified the Convention and kept one reservation. This reservation concerning "Article 29(1)" is not related to the fundamental provisions of CEDAW; hence, it is not so much important. "India's declarations, however, seek to curtail its core obligations under Articles 5(a), 16(1) and 16(2). The two declarations read as follows: With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Discrimination against Women, the Government of the Republic of India declares that it shall follow and ensure these provisions in compliance with its policy of non-interference in the personal affairs of any Community without its initiative and consent. With regard to Article 16(2) of the CEDAW, the Government of the Republic of India declares that though in principle it fully supports the principle of mandatory registration of marriages, it is not realistic in a vast state like India with its variety of customs, religions and level of literacy."

**"Declaration on Elimination of violence against Women, 1993":** This is the earliest global mechanism unequivocally dealing with hostility to women, endowing with a legal mechanism for countrywide and worldwide action. It describes violence against women "as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including intimidation of such acts, coercion or arbitrary denial of liberty, whether happening in public or in private life."

**Indian Legal regime for Preservation of Human Rights of women**

Indian legal system has a very strong legislative framework that establishes and preserves the Human Rights of women in social sphere of the Country. The most significant legislations are analyzed and evaluated herein below.

**Constitutional framework:**

Our Constitution lays the first stone in the foundation of gender justice jurisprudence in our country. It establishes the notion of equality among male and female. The founding fathers of our Constitution were well aware with the plight of Indian women hence they made special provisions for them. Our Constitution, the suprema lex mandates equality between men and women through its various articles. It also provides for positive discrimination for women to compensate their age old backwardness and give them equal status in society. The significant Constitutional provisions in this regard are as follows:

**Preamble:** The preamble sets out the objectives of the Constitution. Equality of women starts right from the preamble of our Constitution. The framers of our Constitution manifested the solemn resolve of the people of India to secure justice, liberty, equality and dignity of all persons including men and women both. Thus it quests to found what Mahatma Gandhi envisaged as "The India of My Dreams", "an India in which the poorest shall feel that it is their country in

whose making they have an effective voice; an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of Intoxicating drinks and drugs. Woman will enjoy as the same rights as man."

**Fundamental Rights:** The Constitution assures certain fundamental rights and freedoms to attain the objectives as enshrined in the Preamble. The Constitution in its Part III contains these fundamental rights. These rights are both positive and negative i.e. enabling and prohibitory. The Constitution imposes a duty upon the State to preserve and protect these inalienable rights. Indian women are equally entitled to enjoy these just like their counterparts. In India, the highest law of the land is our Constitution. It not only entitles women with right of equality but also sanctions the State with the power to take on special measures for them to neutralise the collective social, political, economic and educational difficulties faced by them. These provisions are enshrined in Preamble, Part Third, Part Fourth and other constitutional provisions. The preamble provides for "securing to all its citizens justice- social, economic and political and equality of status and of opportunity." Part III contains the inalienable fundamental rights. Some of the notable fundamental rights ensuring gender justice are- "right to equality, prohibition of discrimination against any citizen on the grounds of religion, race, caste, sex or place of birth, special provision in favour of women and children, Equality in employment opportunities etc." "Article 21" of our Constitution states that "no person shall be deprived of his life or personal liberty except according to procedures established by law." This right is a genus which and various species of rights flow from it. This is one of the most liberally construed Articles of the Constitution. Various new dimensions has been added to it by the Apex Court by its the purposive interpretation. The term 'life' as used in the Article has been interpreted from so many perspectives by the Supreme Court that it creates a plethora of other rights. The term 'life' as stated by the Supreme Court in Francis Coralie "is not restricted to mere animal existence. It includes right to live with human dignity and all those interests essential to constitute this right." In a very appreciable verdict given in the case of Madhukar Narain, the Supreme held that "even a woman of easy virtue is entitled to right to privacy and that no one can invade her privacy as and when he likes. Even a prostitute has a right to privacy and no person can rape her without her will just because she is a woman of easy virtue." Article 23 and 24 are kept together with title "Right against Exploitation." The Constitution under its Preamble and Directives refers to exploitation by one person of another for his own interests as a violation of individual dignity. Constitution under "Article 23" absolutely forbids "traffic in human being, beggar and other similar forms of forced labor and provides that any contravention to the provisions of the Article shall be punishable as an offence according to the law." Women constitute one of the major groups that are most susceptible to human trafficking. They have been the victims of exploitations since ages despite of their class, caste or status. They are trapped, kidnapped, coerced and sold almost everywhere in world for commercial or sexual





exploitation. The major causes of women traffic in, in India include prostitution, bonded labour and forced marriage. The framers of our Constitution were well aware with the irony of women. Hence they kept Article 23 to safeguard the dignity of women and protect them from exploitation.

**"Directive Principles of State Policy" (Article 36-51):** The "Directive Principles of State Policy"(DPSPs) as enshrined in Constitution under "Part IV" outlines the goals for the States to consider while setting out the plans and policies for governing the nation. The innovative characteristic of DPSP has been adopted from Irish Constitution, in which, it was adopted from the Constitution of Spain. Collectively, they delineate the social, cultural, economic, educational and political objects for the nation. The architects of our Constitution, at the time of framing these DPSPs aspired to sketch out the fundamental "aims and objectives" which have been longed for by the citizens of India, subsequent to grand "Renaissance" as observed in nineteenth century (later period). It also motivated the people of India to join a serene political upheaval in the country with an object of "social reconstruction and economic upliftment" as launched by Mahatma Gandhi and many another political personalities in early part of 19th century. These Directive Principles of State Policies are non-justiciable but are guiding principles to states in their administration and formation of legislations and policies. The Directing Principles protecting the human rights of women are- "the right to adequate means of livelihood, equal pay for equal work for both men and women, provisions for just and human conditions for work and maternity relief."

**Other Constitutional Provisions:** Part IVA provides for fundamental duty to renounce practices derogatory to women. The 73rdand 74th Constitutional Amendment Acts have added new dimensions in the advancement of gender justice in India. It secures the "reservation of seats for women in panchayat election by rotation, reservation of not less than one- third of the total number of offices of Chairpersons in the Panchayats at each level, reservations of not less than one third seats for women in municipality elections& reservation of offices of Chairpersons in Municipalities." Apart from these provisions, the constitution of India bestows upon the Parliament power to "make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

Statutory Provisions: Inspiring from these national and International measures, the parliament of India has enacted numerous legislations to protect and preserve the Human Rights of women. Some of the significant statutes and provisions are as follows: "the Factories Act 1948, Immoral Traffic (Prevention) Act, 1956, Maternity Benefit Act 1961, The Dowry Prohibition Act, 1961, the Equal Remuneration Act of 1976, the Child Marriage Restraint Act of 1976, the Medical Termination of Pregnancy Act of 1971, the National Commission for Women Act, 1990 , The Protection of Human Rights Act, 1993, Protection of Women from Domestic Violence Act, 2005, Sexual Harassment of Women at

Workplace (Prevention, Prohibition and Redressal) Act 2013, The Criminal Law (Amendment) Act, 2013 & the Criminal Law (Amendment) Act, 2018."

**Judicial Endeavours**

Our Constitution has opened the way for women in our country to achieve equal status and number of legislations has been enacted to preserve and protect their rights. The positive outcome is evident in all spheres of life. In our country, women's status has been raised upto a great extent which though not perfect yet satisfying. The credit of the current status acquired by women goes not merely to our legislative framework but also to our dynamic judiciary that effectively raised women's status to the current level in our country. The independent and impartial "Judiciary" has fulfilled the responsibility of "a true Guardian of justice." Time and again, the Judiciary has efficiently performed a pro-active role in interpreting and amplifying scope of legislative provisions to preserve the right to equality of destituted half of our society, i.e., the women of our nation. Judiciary has fulfilled the fissure left by legislators by exercising its decretory powers.

Judiciary plays the role of sentinel of the human rights of the people. It, apart from safeguarding the rights explicitly provided in the Constitution, has also perceived numerous undefined rights by creative interpretation and construction of fundamental rights and expended their scope to their utmost extent. With the passage of time after independence, the Judiciary has immersed as the real saviour of the human rights of women and has done a commendable job in securing gender justice. "It would not be erroneous to say that instead of occasional aberrations of the judicial process our judiciary has been a good sentinel on the qui vive in the protection of the fundamental rights of our people. Despite frustration with the legal and judicial system because of costs and inordinate delays there is yet public confidence in the judiciary and justice is rooted in confidence." "When the respect of womanhood in a country declines, unfortunately, the moral standards of the country also degrades . In our country, standard of decency and morality in public life is now the same as in other countries of the world, so the decency and morality in public life can be promoted and protected if only the courts deal strictly with those who violate the societal norms." This observation of the Supreme Court shows the judicial trend towards the safeguarding of women's right in India.

Higher Judiciary of India has revolutionized the whole notion of constitutional proceedings absolutely by removing the procedural manacles to preserve rights of women. It has persuaded the broadest feasible exercise of legislations by liberally interpretating them in their widest possible terms. It has quietly shifted its approach towards a pragmatic one which is favourable to the women's interests in social sphere. The judiciary has really exhibited appreciable interest in conceding Constitutional provisions to all women equally to men. It has filled the slit between law and social wants as ignored by our legislature through its landmark judgments. It has preserved the rights of women to assist them in





achieving equal status when denied by the legislature in the country as well as facilitating their economic, social, educational and political reinforcement. Here in below a detailed analysis of the approach of judiciary has been attempted through diverse a brief overview of diverse landmark judgments, through which, the Judiciary has done a commendable task to empower Indian women and safeguard their Human Rights. In the landmark Judgment of Air Hostess Case, the Supreme Court quashed the regulations regarding the retirement and termination of services of air hostesses serving Air India on marriage and pregnancy as unconstitutional and violative of their "right of equality" as enshrined under "Article 14" of our Constitution. In the well-known "equal pay for equal work case," Hon'ble Apex Court established the "principle of equal pay for equal work" for employees of both genders. The Court derived this principle from Articles 14, 16 & 39(d). Recently in Charu Khurana, the Apex Court invalidated the provision putting restriction on women to be a makeup artist in the film industry. The Apex Court stated that the restriction on women to work as a makeup artist is by the makeup artist association is totally arbitrary and against the right to equality guaranteed under Article 14. In Suchitra Srivastav and another v. Chandigarh Administration, the Hon'ble Supreme Court added a very progressive dimension to the "right of personal liberty" as guaranteed under "Article 21" and added reproductive choice as an extension to it. In Nilima Priadarshini case, the Apex Court exercised the writ jurisdiction of habeas corpus exercising its powers as provided in "Article 32" of "the Constitution" when a women was alleged to be detained by a private person. Equality of women will be elusive and vague untill they are being accepted as entitled to certain essential human rights including "right to live with dignity, privacy, reproductive freedom and safety at workplace" etc. Unless these rights are ensured for women, they cannot achieve equality. The jurisprudence of women's rights has evolved as a result of their struggle for the recognition of these rights as fundamental rights. Judiciary has extensively used "Article 21" to mainstream "women's rights" into the paradigm of "Fundamental Rights". In a very appreciable verdict given in the famous judgment of Apex Court in Madhukar Narain, the Supreme held that "even a woman of easy virtue is entitled to right to privacy and that no one can invade her privacy as and when he likes. Even a prostitute has a right to privacy and no person can rape her without her will just because she is a woman of easy virtue."

Paternity or DNA test is the biggest question mark on the dignity of a woman and the grave violation of her "right to privacy" as provided under the umbrella of "Article 21." Preserving the dignity of women, in the leading case of Gautam Kundu the Apex Court discarded a request for the blood test of a child to disprove paternity of him in a suit for maintenance. The highest court stated that "a child born of a married woman is deemed to be legitimate unless the contrary is proved." Considering such a demand, a serious violation of "right to personal liberty" of a woman the court observed that: "Permitting blood tests to prove or disprove paternity unless there is a strong case and access was ruled out would be slanderous, embarrassing and humiliating for the woman."

Rape victims have to undergone a series of traumatic procedural requirements that scratches her soul again and again. Two finger test during medical examination is one of such heart shaking practice. Adopting a humanistic approach, The Gujrat High Court in Rameshchandra Ramabhai Panchal stated that the age old "archaic and outdated" practice of "two-finger test" during medical examination of the rape victim, conducted to determine her 'virginity or consent' is unconstitutional and violation of her "right to privacy, physical and mental integrity and dignity." It is interested to mention here that the Lahore High Court has given the same judgment citing the Indian Precedent of Gujrat High Court.

Interpreting Article 21 in a different perspective, the Supreme Court in In Bodhisattwa Gautam v. Subhra Chakraborty has for the first time stated that "absence of bodily injury and the fact of submission do not imply consent." Here the observation of Justice Saghir Ahmed speaking on behalf of Court is important to note, he stated, "Unfortunately, a woman, in our Country, belongs to a class or group of society who is in disadvantageous position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status." It progressive approach was followed by a number of cases such as in Delhi Domestic Working Woman's Forum, Compensation was awarded to the rape victim. In Chandrima Das, the Apex Court awarded compensation to a Bangladeshi rape victim.

Here, the observation made by the Court is important to mention, it stated that "the word 'life' as used in the Universal Declaration must get the same meaning as in Article 21. Its meaning cannot be narrowed down. The term 'life' in the International Conventions relating to human rights and Article 21 must be interpreted to mean life worth living, meaningful and dignified."

In the landmark Vishakha Judgment, exhaustive directives were issued by the Apex Court concerning "sexual harassment of women at workplace" and directed the State to make a robust law on the subject. In the present case a women named Bhanwari Devi was gang raped mercilessly for stopping a child marriage. A public interest petition was filed by Vishakha and other organizations against the Union of India and State of Rajasthan to shield the fundamental rights of women employees and to seek the proper guidelines for their protection from sexual harassment at workplace. For the very first time in this judgment, the Court has given a clear definition of sexual harassment and issued strict directives to be followed till an appropriate legislation is not framed by the State. Thus this judgment has laid the foundation of enactment of the most awaited Act for working women. The Apex Court applied the same guidelines first time in Apparel India case. In Cehat, a PIL under "Article 32" of the Constitution was presented in the Apex court against the Union of for critical decline in sex ratio in census 2001 by the voluntary organisations for effective execution of concerned Act to reduce the increasing incidents of pre-natal sex diagnosis and female foeticide. The Supreme Court of India directed the States





and Union territories to take the immediate measures for effective implementation of Act and also directed for the implementation of National Monitoring and Implementation Committee. Shakti Vahini v. Union of India, is the landmark judgment wherein the Highest Court stated that the "right to choose a spouse is a fundamental right" and two adults do not need the consent of their family, clan or community for it. The Court issued guidelines to State for adopting the preventive, punitive and remedial measures for the prevention of honour killings.

In Laxmi, the apex court delivered a landmark judgment on acid attacks and directed the State for: "the enactment of suitable provisions for efficient regulation of sale of acid in the Country, measures for the appropriate treatment, post care and rehabilitation of the acid attack victims and granting compensation to acid attack victims by the State." It also issued extensive guidelines on the sale of acid in the country. It is quite miserable that instead of the guidelines issued by the Supreme Court, the incidents of acid attack have not been stopped. The easy availability of cheap acid helps the perpetrators to use it like an ideal weapon for this heinous crime.

In the landmark Sabrimala Judgment, the five judges constitutional bench of Supreme Court by a majority of 4:1, allowed ingress of women belonging to any age in the famous "Sabarimala temple," stating that "devotion cannot be subjected to gender discrimination." The Apex court took a very progressive step adding a dimension to the equality rights of women. The judgment was delivered in response to a "Public Interest Litigation" presented by "Indian Young Lawyers Association" questioning the age old orthodox custom of "Sabrimala Temple" prohibiting entrance of women of menstruating age within the precincts of the temple. Chief Justice Deepak Mishra wrote the judgment for himself and Justice Khanwilkar. It was stated by him that "Women is not inferior to man. Religious patriarchy cannot be allowed to trump over faith. Biological reasons cannot be permitted in curtailing freedom for faith. It was also held that the devotees of Lord Ayyappa will not create a separate religious denomination." The Apex court also struck down the alleged Rule which prohibited entry of women in temple as unconstitutional. Justice Nariman held in his concurring but separate judgment, "Anything destructive of individuality is anachronistic of Constitutionality. To treat women as lesser people blinks at the Constitution itself." It was also held that "the followers of lord Ayyappa do not constitute a separate religious denomination." Justice D Y Chandrachud, in a separate and concurring opinion, held that "the exclusion of women belonging to a certain age group was contrary to constitutional morality and it undermined the principles of autonomy, liberty, and dignity. He further emphasised that physiological characteristics of women such as menstruation, have no significance on the entitlements assured to them under the Constitution. He also stated that the exclusion of women on such basis was a form of untouchability which is prohibited under Article 17 of the Constitution." Justice Indu Malhotra, the only female judge of the bench delivered a dissenting opinion. She stated that, "in a secular polity, such as India, constitutional morality requires a

'harmonisation' of diverse competing claims to fundamental rights. She said that Ayyapas comprises a separate denomination and the Court must respect a religious denomination's right to manage its internal affairs, irrespective of whether their practices are rational or logical." In Joseph Shine v. Union of India, Section 497 of IPC, 1860 which makes the adultery a crime is struck down by the five judges constitutional bench as unconstitutional being violative of Article 14, 15 and 21 of the Constitution. The court stated that the section is arbitrary as it treats the women as chattel of husband.

In Charu Khurana, a makeup artist Charu khurana challenged a bye law of "Cine Costume Make-up Artists and Hair Dressers Association" which entitled the association to prohibit women from practicing as make-up artists in cine industry and only permitting them to work as hair dresser as violative of fundamental right of equality as enshrined in the Constitution as well as statutory provisions. The Apex Court held that such rule prohibiting women from working as make-up artists violated the fundamental right of equality guaranteed under Constitution of India. It quashed the impugned bye-laws and also directed the police administration of Maharashtra to ensure that the female artists do not face any harassment by the Association.

In a significant step towards ensuring substantive equality to women in India, a divisional bench of the Supreme Court in the landmark judgment of Babita Puniya held that, "women should be granted Permanent Commission in all the ten streams in army where the Union Government have decided to grant Short Service Commission to them. The Apex Court also held that complete exclusion of women from command assignments is unjustified and violative of Article 14 of the Constitution." Therefore, the policy of Indian Army of giving only "staff appointments" to women was declared unconstitutional by the Court. It stated that, "An absolute bar on women seeking criteria or command appointments would not comport with the guarantee of equality under Article 14. Implicit in the guarantee of equality is that where the action of the State does differentiate between two classes of persons, it does not differentiate them in an unreasonable or irrational manner. An absolute prohibition of women SSC officers to obtain anything but staff appointments evidently does not fulfill the purpose of granting PCs as a means of career advancement in the Army." The court held that "the blanket non consideration of women for command appointments by the Army without any individuated justification is not sustainable in the eye of law." The Court observed that, "It is an insult to women as well as the army when aspersions are cast on women, their ability and their achievements in the army". The Hon'ble Supreme Court dismissed the appeal filed by the Union Government and upheld the decision of Delhi High Court given in 2010 which held that "those women Short Service Commissioned officers of the Air Force and the Army, who had submitted the application for Permanent Commission but were given extension of SSC only, are entitled to Permanent Commission at par with their male Short Service Commissioned officers with all resulting benefits."





The same divisional bench of Supreme Court again in the case of Annie Nagaraja established the concept of gender equality. The Apex court held "that serving women Short Service Commission Officers of Indian Navy were eligible to Permanent Commission equally with their male counterparts. While considering the appeals filed by the Union Government against a Delhi High Court judgment delivered in 2015 which allowed the claim of women officers for permanent commission, the Supreme Court rejected the appeals of the Union Government and upheld the Delhi HC judgment. It was held by the Supreme Court that "officers of both sexes are to be treated equally while granting permanent commission in Indian Navy, once the statutory bar for inducting women in Navy was removed. The Court discarded the Centre's objection on the ground of physiological features of women as gender stereotypes." While reading out the operative part of the judgment, Justice Chandrachud, stated that, "Performance at work and dedication to the cause of the nation are the surest answers to prevailing gender stereotypes. To deprive serving women officers of the opportunity to work as equals with men on PCs in the Indian Navy is plainly discriminatory. Furthermore, to contend that women officers are illsuited to certain avocations which involve them being aboard ships is contrary to the equal worth of the women officers who dedicate their lives to serving in the cause of the nation."

Taking a suo moto notice of lack of access to education and menstrual hygiene for women in the Union Territories, a two judges Bench of Jammu & Kashmir High Court, showing a modern and progressive approach, held that Inadequate Menstrual Hygiene Management (MHM) options would be a major obstacle to education, even in the Union Territories of Jammu & Kashmir and Ladakh, eventually leading towards dropping out of many adolescent girls from schools due to lack of access to appropriate sanitation facilities, menstrual products and the stigma linked with menstruation. The difficulties faced by these adolescent girls are increased by the fact that there are several educational institutions and facilities without having even basic toilet facilities. The Court stated that it is the accountability of the states to aware children about menstrual health and hygiene and to ensure the accessibility of sanitary products to all adolescents, specially those who cannot afford them due to financial constraints. The Court also said that the concept of menstrual health should be read along with the Right to Education as enshrined under Article 21A of the Constitution of India. It has instructed the Government of India and the Union Territories of Jammu and Kashmir and Ladakh to report on the situation of menstrual hygiene in the two UTs.

## Summation & Suggestions

It is unquestionably true that The Constitution of India does not discriminate among men and women and it is the biggest force to accomplish the equality of women but due to the aged old social structure and ideology, it was felt that there must be some statutory safeguards to assist women in achieving equal

status in society. Therefore various legislations are enacted by the State to help women in achieving equality in different spheres of life. Despite the enactment of various laws to improve the social condition of women, the rate of their progress is very slow. We need the more effective implementation of laws rather than the enactments of more and more laws. The State has made various laws to protect the interests of women from every perspective. Law is a dynamic concept and with the change of time, the law also needs to be changed. From independence to now, the position of women has seen extreme changes and so the law. The legislature has made all possible efforts to make the law suitable to the contemporary social condition of women in order to assure them equality in all spheres of life.

However, it is really unfortunate that despite of a growing net of legal framework, atrocities against women are growing continuously and the law has been ineffective to check them. There are various social evils still prevalent in the society such as female infanticide; dowry, low political participation of women, domestic violence and crime against women etc. are some of the examples of the sufferings faced by women even in the 21st Century. Even today, the lifeline of woman is controlled by patriarchal society. The conflict between the Constitutional values and the realities of existing social order is still existing pertaining to the rights of women. Though a plethora of instruments and policies have been formulated both at national and international level concerning women, they are still facing all types of violence, hostility and exploitation. Increasing number of sexual offences against women across the country, including the horrible instances of Mujjarfarpur and Kathua rape cases depict the actual position in this regard.

The Government amended criminal laws and framed new principle assuring justice to sexual assault survivors still women in our country have to face hurdles while reporting heinous crimes, including shame at police stations, hospitals and other institutions, fear of further attack, humiliating "two-finger" tests during medical examination the social stigma of becoming impure forever etc. There is also a want of ample support services and institutional care together with health care, proper legal assistance, and recompense for their irreparable loss of dignity. Women prisoners have their own plight. The "National Commission for Women (NCW)" recently stated in its report on increase on domestic violence against women that, "domestic violence against women had increased manifold during the lockdown. Only between March 25 and May 31, the NCW received 1,477 complaints of domestic violence from women. This short span of 68 days recorded more complaints than those received between March and May in the previous ten years. In the entire year of 2020, when some level of restriction on movements was imposed in various parts of the country even after the lockdown, the women's commission received 5,297 complaints of domestic violence. This was almost a 79% jump from 2019 when the NCW received 2,960 such complaints. A large number of these were homegrown in nature, related to bigamy, polygamy, dowry-related issues, substance abuse, and marital disharmony. It is also important to understand that not all forms of





domestic abuse are physical violence: restriction of rights, mobility, autonomy, and sexual harassment are also equally traumatic. Mental and money-related maltreatment may be ongoing and subtle but eventually normalized, although having a more prominent effect over the long haul. Furthermore, controlling behaviors, gender-based stereotypes, gender discrimination, misogynistic attitudes, and jealousy can increase during a disaster crisis that reinforces domestic violence."

Gender justice will be achieved in its true meaning only if conventional practices of female foeticide, dowry murders, murder in the name of fake honour, domestic violence and all sort of abuses whether mental, physical, sexual or economic is eliminated from our country and for that the effective implementation of legal mechanism accompanied with the behavioural change of people is the need of the hour. Now the legislators and the administrators need to consider a comprehensive approach for assisting women in achieving equality and law and social sensitisation must go hand in hand for that.

**Bibliography "**


- Sibaram Tripathi, Revolutionary Spirit of Article-21: Promoting Human Rights in India, A Conceptual Analysis 41 B L.J 121, 128 (2012).
- John Stuart Mill, The Subjection of Women (1869), quoted in Subrata Mukherjee and Sushila Ramaswamy, A History of Political Thought – Plato to Marx 330 (Prentice Hall of India Private Limited 1999).
- Ramona Vijeyarasa (ed.), International Women's Rights Law and Gender Equality Making the Law Work for Women 126 (Routledge, 2021).
- Patricia Grimshaw, Katie Holmes, et.al,(eds.). Women's Rights and Human Rights- International Historical Perspectives 1 (Palgrave Publishers Ltd. 2001).
- Katiyani Juneja, Gender Equality is a Human Right: An Assessment of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 4 SJIF 135, 136 (2016).
- Katharine T Barlett, Angela, P. Harris, et.al. (eds.) Gender And Law: Theory, Doctrine, Commentary 2 (Aspen Law & Business 2002)
- Dr. Malabika Talukdar, The Status Of Women In India: A Human Rights Perspectives, 4 IJMART 124,127 (2015).
- Gender Justice: Key to Achieving the Millennium Development Goals, http://www.ungei.org/MDGBrief-English.pdf
- Debra Bergoffen, Paula Ruth Gilbert, et.al (eds.) Confronting Global Gender Justice: Women's Lives, Human Rights 2 (Routledge, New York 2011).
- Tripathi S. (2012). Revolutionary Spirit of Article-21: Promoting Human Rights in India, A Conceptual Analysis. Banaras Law Journal 41(1),121-

128.

- Mukherjee, S. & Ramaswamy, S. (1999). A History of Political Thought – Plato to Marx. Prentice Hall of India.
- Vijeyarasa R. (Ed.). (2021). International Women's Rights Law and Gender Equality Making the Law Work for Women. Routledge.
- Kapoor, S.K. (2003) International Law and Human Rights: A Nutshell. Central Law Agency.
- U.N. Women. (2012).Gender Justice: Key to Achieving the Millennium Development Goals. http://www.ungei.org/MDGBrief-English.pdf. Retrieved on April 24, 2022).
- Grimshaw, P. & Holmes K. (Eds.). (2001). Women's Rights and Human Rights- International Historical Perspectives. Palgrave Publishers.
- Juneja K. (2016). Gender Equality is a Human Right: An Assessment of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). South Asian Journal of Multidisciplinary Studies, 4(1), 135-139.
- Barlett, K.T. & Harris, A.P. (Eds.). (2002). Gender And Law: Theory, Doctrine, Commentary. Aspen Law & Business.
- Office of the High Commissioner for Human Rights. (2014). Women Rights are Human Rights. https://www.ohchr.org/Documents /Events/WHRD /WomenRightsAreHR.pdf. Retrieved on April 25, 2022. Retrieved on April 24, 2022).
- Bergoffen, D. & Gilbert, P.R. (Eds.), (2011). Confronting Global Gender Justice: Women's Lives, Human Rights. Routledge.
- C.E.D.A.W., 1979, Art. 2.
- The reservation exempts referral of disputes (raised by States Parties) relating to interpretation or application of the Convention by India to arbitration.
- Helum, A. & Aasen, H.S. (Eds.), (2013). Women's Human Rights: CEDAW in International, Regional and National Law. Cambridge University Press.
- U.N. Women. (2020). Global norms and standards: Ending violence against women. http://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards. Retrieved on April 25, 2022).
- Gandhi, M.K.,(1947). India of My Dreams. Navajivan Mudranalaya. https://www.mkgandhi.org/ebks/India-Dreams.pdf. Retrieved on April 28, 2021.
- Basu, D.D., (1955). Commentary on The Constitution Of India. S. C. Sarkar & Sons.
- Kumar, V.V. (2016). Violation of Women Human Rights In India – A Review, International Research Journal of Commerce and Law, 3(1), 25-30.





- Saryal, S. (2014) Women's Rights in India: Problems and Prospects. International Journal of Research in Social Science and Humanities,3(1), 51-55.
- Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) SCC 688.
- State of Maharashtra v. Madhukar Narain (1992) 1 SCC 392.
- Seervai, H.M. (2015). Constitutional Law of India. Universal Law Publishing.
- Nagindrappa, M. & Radhika M.K., (2013) Women Exploitation in Indian modern society. International Journal of Scientific and Research Publications, 3(1) 1-9. http://www.ijsrp.org/research-paper-0213/ijsrp-p14145.pdf. Retreived on January 22, 2021.
- Iyer, S.R. & Radha, N., (2016). Women Trafficking In India - A Critical Analysis, Shanlax International Journal of Arts, Science and Humanities, 4(1), 105-108. http://www.shanlax journals.in/pdf/ ASH/V4N2/Ash_V4_N2_017.pdf. Retrieved on January 22 2021."
- Talukdar, M., (2015). The Status of Women in India: A Human Rights Perspectives. International Journal of Multidisciplinary Advanced Research Trends, 4(2),124-129.
- Kagzi, M.C.J.(2001). The Constitution of India. India Law House, 2001.
- Sorabjee, S.J.,(2018) Creative Role of Judiciary in Enlarging and Protecting Human Rights , Journal of the National Human Rights Commission, 17(1),26-29.
- Chandra Prakash Kewal Chand Jain v. State of Maharashtra, AIR 1990 SC 658.
- Air India v. Nargesh meerza, AIR 1981 SC 1829.
- Randhir Singh v. Union of India, AIR 1982 SC 879.
- Charu Khurana v. Union of India 2015 1 SCC 192.
- Nilima Priyadarshini v. State of Bihar 1987 SCC 732."
- State of Maharashtra v. Madhukar Narain (1992) 1 SCC 392.
- Gautam Kundu v. State of West Bengal (1993) 3 SCC 418.
- State Of Gujarat v. Rameshchandra Ramabhai Panchal , Crl. Appl. No. 122/1996. https://www.livelaw.in/news-updates/two-finger-test-unconstitutional-as-violative-of-womans-right-to-privacy-dignity-gujarat-hc-152107. Retrieved on April 29, 2022.
- Sadaf Aziz etc v. Federation of Pakistan etc WP No.13537 of 2020. https://www.livelaw.in/foreign-international/two-finger-test-virginity-rape-victim-personal-dignity-of-womanlahore-high-court-167921. Retrieved on April 26, 2022).

- Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490.
- Delhi Domestic Forum v. Union of India (1995)1 SCC 14.
- Chairman Railway Board v. Chandrima Das (2000) 2 SCC 465.
- Vishakha v. State of Rajasthan, AIR 1999 SC 625.
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (Ind.).
- Apparel Export Promotion Council v. A.K. Chopra (2003) 8 SCC 412.
- Cehat & Ors. v. Union of India (2003) 8 SCC 412.
- The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (Ind.).
- Laxmi v. Union of India, 2014 4 SCC 427.
- Mrs. Arundhuti Das & Dr. Subhamoy Banik, (2018). A Study on Acid Attack in India And Its Impact, Journal of Emerging Technologies and Innovative Research, 6(1), 165-200(2019).
- Indian Young Lawyers Assn. v. State of Kerala (2018) SCC OnLine SC 1690.
- Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965. Rule 3, cl. b.
- Charu Khurana v. Union of India (2014) SCC Online SC 900.
- Secretary, Ministry of Defence v. Babita Puniya & Ors (2020) SCC OnLine 200.
- Union of India v. Lt. Cdr. Annie Nagaraja (2020) SCC OnLine SC 326.
- Court on its own motion v. Government of India & Ors., W.P. (C) PIL No.36/2020, J&K H.C. https://www.livelaw.in/pdf_upload/pdf_upload-385975.pdf. Retrieved on May 1, 2022.
- Rao, L.(1998) Crime, Atrocities and Violence against Women and related Laws and Justice. Amol Publications.
- U.N. Women,Women in Prison- India. (2014). http://www.unwomen.org/en/docs/2014/5/special-rapporteur-on-violence-against-women-a-hrc-26-38. Retrieved on May 02, 2022). https://wcd.nic.in/ sites/default/files/Prison%20Report%20Compiled_0.pdf. Retrieved on May 05, 2022).• https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7945968/#:~:text=Women%20were%20fighting%20a%20shadow,increase%20in%20domestic%20violence%20complaints. Retrieved on May 08, 2022).




# Mob Lynching in The Form of Mob Justice: Lynching of The Rule of Law

***Prof. (Dr.) Iqbal Ali Khan*, Wasim Ahmad*****

**Abstract**

Although the idea of mob lynching is not new, during the past few years, India has seen an extraordinary rise in crime involving mob violence. In this scenario, the "rule of law" and the suspect are both lynched by a crowd that takes the law into its own hands. The law is the most powerful authority in a country, and people should be aware of this. The integrity of justice cannot be compromised only because some people believe that they have the power to enforce the laws on their own, become a law unto themselves, and punish the suspects in accordance with their presumptions and moral standards. The threat of mob violence in the state has grown to such terrifying proportions that the government, decision-makers, human rights organisations, and intellectuals must consider the catastrophic effects of mob violence. There are many factors contributing to its proliferation, thus it is imperative that we acknowledge it as a serious issue and take action to stop it in order to protect humanity's future. Mob violence has tainted our legal system. In its ruling in the Tahseen S. Poonawala case, the Supreme Court outlined numerous preventative, remedial, and corrective procedures to deal with lynching and mob abuse, but aside from a few states, none of them actually bother to make the necessary laws. This article will go through the potential causes of such mob lynchings as well as their history and impacts. It will also go over pertinent laws that already exist as well as those that are necessary to prevent such mob violence. The current tendencies make it abundantly evident that, in terms of mob justice, we are all in danger. Mob justice must be seen as an affront to the rule of law and human rights, and it is never justifiable.

**Key words:** - *Intolerance, Mob, Lynching, Violence, Justice, Rule of Law, Global Issue.*

* *Former Dean and Chairman, Department of Law, A.M.U*
** *Research Scholar, Department of Law, A.M.Uw Delhi.*
*Email: aswin_grace@yahoo.com.*

## Introduction

"No one has the right to become the guardian of law claiming that he has to protect the law by any means. It is the duty of the States to strive, incessantly and consistently, to promote fraternity amongst all citizens so that the dignity of every citizen is protected, nourished and promoted. It is the responsibility of the States to prevent untoward incidents and to prevent crime."1

Every year, we observe Independence Day, but when we consider the current situation, we are forced to ask ourselves: "Are we really living in an independent state?" Are we each experiencing freedom in our ideas, feelings, or behaviour? The rule of law is the foundation of democracy in every democratic nation, and it can only exist when both individuals and institutions respect and uphold the law. Every individual is explicitly protected by our constitution's guarantees of life and liberty, and these rights cannot be taken away from someone without following a legal process. Its main goal is to unite the Indian people in a spirit of brotherhood and harmony. Every innocent person must be safeguarded against offenders, and wrongdoers must be punished according to the legal process rather than on their own.

India has seen an exceptional rise in crime involving mob violence over the last few years. The mob has the propensity to enact law without any due process and to muddy the concept of "justice." A mob lynching is an act of group violence that ends in the death or physical harm of one or more people who are accused or suspected of committing a crime. Lynching is an extrajudicial punishment administered by a crowd or unofficial organisation without any sort of formal authority to the accused or suspected person. It appears that those who practice hate and blood have turned our streets and roadways into "sanctuaries of immunity." In such a setting, when every person has the right to enjoy the interests and rights granted to him by constitutional or statutory law, he is also obliged to remain obeisant to the command of the law.

In the case of Cardamom Mktg. Corp. v. State of Kerala2, the Hon. Justice of the Supreme Court, A.K. Sikri, made the following observation:

"It is the constitutional responsibility of the government to provide governance and maintain law and order, and the responsibility lies on the state to protect the life and property of the citizens. In this regard, the police have the predominant role to play."

When a lynching episode occurs in a civilised culture, it essentially amounts to the destruction of the entire system of law and order in society. Lynching is typically seen as a kind of swift, righteous retaliation against a crime by the crowd, even when such a mob lacks the legal right to do so or is not governed by the law. Mob lynching has no place in any civilised society.

In the case of National Human Rights Commission v. State of Gujarat and others3, Hon'ble Supreme Court observed:

"Communal harmony is the hallmark of a democracy. No religion teaches





hatred. If in the name of religion, people are killed, that is essentially a slur and blot on the society governed by the rule of law. The Constitution of India, in its Preamble, refers to secularism. Religious fanatics really do not belong to any religion, they are no better than terrorists who kill innocent people for no rhyme or reason in a society which as noted above is governed by the rule of law."

Our nation is experiencing a massive increase in these crimes right now, which amounts to the lynching of our core value of the "Rule of Law". In order to ensure the future of humanity, it is urgently necessary to learn from previous mistakes and implement those lessons in the present.

This article will discuss the concept including the history of mob lynching in India. It will also discuss some recent instances of mob lynching and possible reasons for its growth. However, it is important for the application and implementation of laws related to anti-lynching in India as soon as possible because mob lynching offense is increased by day to day in different forms. So, this article will also discuss the existing and required laws to curb the heinous offence of mob lynching. The Indian Constitution's noble goals are to be achieved and shall be kept in mind when applying any policies that are directly or indirectly related to the safety, security, and dignity of India's citizens, as stated in Article 21, which guarantees the right to life and personal liberty. A law must be strict and effective because no one should be granted a special right to change the law or take it into their own hands.

## 1. Meaning And Concept of Mob-Lynching

A mob lynching is when a group of aggressive people kills someone else without permission or a court order. It equates to an extrajudicial punishment, such as a public hanging, to exact retribution or serve as a deterrent to a convicted criminal. It can also be described as vigilantism, where a group of self-appointed individuals enforces the law despite having no formal power to do so. In the past, these kinds of activities typically involved stoning someone to death. The term "lynch" was initially used during the American Revolution and was used to describe a law whereby punishment was meted out without a trial or other due process. Collins Dictionary defines lynching as a group of people who punish and condemn someone without a fair trial.4 The legal definition of lynching is when three or more people, who together make up a mob, execute a person extrajudicially, without a court order or other legal protection, and they do it in the name of tradition or whatever justice system they subscribe to.

## 2. Historical Retrospect of Mob-Lynching in India

Mob Lynching is not only "mobocracy" but a collective hate crime against human beings. In America, it started in the middle of the eighteenth century when lynching was used to refer to vigilante justice being given to people of dark colour. India is now keeping an eye on a spate of lynching instances. Since

2014, there have been a number of lynchings in India related to dairy cows' vigilante violence, with Hindu mobs mostly "lynching Indian Muslims and Dalits".5 The 2015 Dadri crowd lynching6, the 2016 Jharkhand horde lynching, the 2017 Alwar crowd lynching when a group of dairy animals' vigilantes murdered a 65-year-old Muslim man named Rakbar Khan, Baksi and Nagarajan 2017, and most recently the Palghar lynching case and Singhu border lynching case are some notable examples of such assaults.

### 2.1. Lynching In Ancient India

Sati-Pratha

Sati is portrayed as a Hindu tradition in India where the widow was burned to remain on the pyre of her deceased husband. In essence, the practise of Sati was recognised as a conscious Hindu act in which the woman consciously elects to take her life with her better half after his departure. However, there were a number of situations where the ladies were required to submit to Sati, sometimes even hauling her in front of a lighted fire against her will. Several Indian leaders made an effort to boycott this practise. The British outlawed this practise in 1829 as a result of Raja Ram Mohan Roy and other Hindu reformers' efforts. Today it can be said that Sati pratha was a kind of mob-lynching, where a woman was used to be killed by so-called society customs- saver in front of people.

Religious Violence

Due of their high level of emotion, people frequently act violently. Religious violence can occasionally result from political, social, and intellectual conflicts. Religious violence results from a study of the scriptures and human frailties. The Roman conquests and the Spanish invasions of Asia, Europe, Africa, and Latin America are only a few examples of the numerous conflicts that have been fought in the past to propagate one religion or eradicate rival ones. Millions of people in mediaeval India perished as a result of the brutality, abuse, and cruelty committed by the Muslim tyrants. In previous religious wars, women and children proved to be the worst victims. Rape, adultery, kidnapping, enslavement, and forced marriages were all practiced on them. Religious violence was caused by a variety of ideologies, scriptures, politics, economic interests, etc.

### 2.2. Before Independence

The use of Enfield guns at Meerut was the immediate cause of the revolt. It eventually led to the 1857 Revolt. Indian soldiers working for the British East India Company started it in Meerut, and it quickly spread to Delhi, Agra, Kanpur, and Lucknow. In India, it is frequently referred to as the First Independence War and other names that are similar. The then-British rulers massacred thousands of Indians at this event. In order to seize control of the





Hindu princely states that were affiliated with the British through what were known as subsidiary alliances, the British increasingly adopted a range of strategies. In every place, British bureaucrats were taking the place of the previous Indian aristocracy.

Similarly, slaughter is an aimless and ruthless butcher of numerous individuals. It suggests that the killings were irregular and without cautious judgment. It could be opposed to followers of a certain religion or ideology in general. The most disgraceful massacre in our country's history occurred at Jallianwala Bagh on April 13, 1919, when General Dayer gave the order to open fire on a crowd of unarmed civilians who had gathered to celebrate Baisakhi. In this genocide, thousands of people were brutally murdered. This incident was not committed by a mob against a single person, but rather, a single person became the reason for mass killing, even though it occurred before the country gained its independence, and the guilty parties were British officers. Even after the period of Independence, there is not much difference, only the perpetrators were replaced, but the killings persisted.

### 2.3. Violence During Independence

In 1947, during the time of the episode, people's bodies turned into sites of lynching and general brutality, with women and children suffering the worst unpleasant outcomes. It is estimated that between 10 and 12 million people crossed the border between India and Pakistan during the time of partition.7 Between 1.5 and 2 million people died in the subsequent bloodshed between Muslims and Hindus and Muslims and Sikhs.8

### 2.4. After Independence

Since freedom, several strict mobs have been recorded in India.

Gujarat Riots (1969)

The riots in Gujarat in 1969 were a result of widespread hostility between Hindus and Muslims. The first large mob in Gujarat was savage, engaging in massive pillage, butchery, and crimes involving fire. According to the official statistics, 660 people were put to death, 1074 people were injured, and more than 4800 people lost their property.9

Moradabad Riots (1980)

The atrocity occurred after a group of Muslims attacked the local police with rocks for failing to remove a pig from the neighborhood. Over a hundred people passed as a result of the police's arbitrary reactions.10

Sikh Massacre (1984)

The 1984 anti-Sikh massacre refers to a string of coordinated crimes committed by anti-Sikh mobs against members of the Sikh community all throughout India in retaliation for the killing of the then-prime minister Indira Gandhi by her Sikh

bodyguards at her home. Anti-Sikh riots broke out in several areas after the death of Indira Gandhi on October 31, 1984, killing more than 3,000 Sikhs in New Delhi and an estimated 8,000 people throughout India.11

Kashmiri Pandits

The local residents of Kashmir i.e., Kashmiri Pandits were thrown out by the majority of Muslims with the help of greedy politicians. The remaining "Kashmiri Pandits" sought refuge in various locations around the nation without a house, a job, money, or any chance of returning to their original land after the deaths of thousands of them.

Godhra Riots, Gujarat (2002)

59 passengers riding in Coach S6 of the Sabarmati Express perished after it was set on fire in the early morning hours of February 27, 2002. At that moment, the train had just arrived in Gujarat's Godhra station. Within hours, the train burning tragedy had set off deadly rioting across the state. The riots started on February 27th evening and lasted for two to three months throughout the state. Later, the Nanavati-Shah Commission, which the Supreme Court established, characterised the train burning as a conspiracy.

## 2.5. Current Scenario

Lynching is an old idea in terms of crime. It was prevalent in ancient and mediaeval India, although we can argue that people there were less educated and aware of their obligations to one another as individuals. However, we cannot use the same defence now. People in today's society are well aware of their rights and obligations, but they do not fear punishment for breaking the law. Below are a few recent examples that have been discussed:

Lynching Of Khairlanji

In India, the lynching of Khairlanji in September 2006 is the most well-documented instance of mob violence. Four Dalit family members were lynched by the mob in Maharashtra. The dominant Kunbi rank was this mob violence, and the lone survivor had to fight for equity for ten years.12

Lynching Of Dimapur

On May 15, 2015, a crowd of about 7500 people stormed the Central Jail of Dimapur and dragged the unfortunate victim; it pulled out a prisoner suspected of rape who was violently beaten up by the mob before being killed by stripping.

Lynching Of Mohammed Akhlaq

Mohammed Akhlaq was lynched on September 28, 2015, in Dadri for the purported use, possession, and consumption of meat.

Lynching Of Chatra, Jharkhand

The mob violence resulted in the deaths of two Muslims in Chatra, Jharkhand in 2016 as they were working as animal dairy merchants. Both were slain based on





the rumour that they were transporting cows, but the truth was completely different as they were really transporting oxygen cylinders for sale in the Chatra market. When a mob arrived, they were supposed to be accused of transporting beef, thus they were hanged.13

Lynching Of Pratapgarh, Rajasthan

A dissident guy named Zafar Khan intervened when several rural village Panchayats officials tried to scare away women who moved to be freshened in the open field during the day by taking their pictures. In spite of his efforts to refrain from taking images of pooping women, the authorities beat him with sticks and kicks as retaliation. After some time, he gave in to his injuries.

Lynching Of Junaid Khan

In the month of June 2017, an unpleasant occurrence involving the killing of a passenger named Junaid Khan occurred in a train.14 He was travelling with his two brothers, who had just returned from Delhi where they had spent the Eid holiday with family. They had several discussions with other passengers about seats throughout the trip, but they quickly escalated into a fight, during which they began to toy with their beards, clothes, and caps while calling them "mullahs" or "hostile to nationality"." uddenly, a bit of a packet of non-vegetarian burger was discovered in Junaid's pocket, and the others in the group began to refer to them as meat eaters.

Tamil Nadu Lynchings (May 10-11, 2018)

In Tamil Nadu, two lynchings were recorded during the course of 24 hours. In the first episode, a man in Plicate beat the living daylights out of another man and swung from a scaffold out of suspicion that the other man was a child lifter. In the second incident, a 60-year-old woman was murdered because she gave "remote chocolates" to children in the Tiruvannamalai region. According to Tamil Nadu police, the twin lynching was caused by fake texts that were sent via WhatsApp. The messages pleaded with the locals not to believe migrants who claimed to be children lifting packs.15

Palghar, Maharashtra Lynching

Lockdown was imposed nationwide due to the Covid-19 outbreak, and all social activities, including travelling from one location to another, were carefully limited as a precaution. On April 16, 2020, two saints and their driver were on their way to Gujarat for a memorial service for a deceased saint when they were attacked by more than 100 people in Palghar, Maharashtra, who believed they were kidnappers. Despite the presence of police officers, all three were brutally beaten until they died.16

## 3. Possible Reasons and Growth of Mob-Lynching

The causes of mob lynchings cannot be linked to a single cause because numerous elements play a role in this type of violence. Mob violence in India is

typically employed against Muslims to exact “Instant Justice” or to uphold their traditional and social standards. It is also used against Dalits, interfaith couples, and mentally challenged women suspected of kidnapping or murdering children. Ghulam Mohammad, a citizen of Bulandshahar District, Uttar Pradesh, was killed only because he lived next door to a Muslim guy who was dating a Hindu girl in the area.17 Scenes of widespread open violence occur so frequently in India for a variety of causes, some of which are listed below:

Structure of Our Society and Religion

The Indian Constitution's Preamble declares the country to be a secular state, meaning it has no official religion of its own and would equally safeguard and respect all other religions. In India, strict savagery includes violent acts committed by followers of one stringent group against adherents and organisations of another strict group, frequently by revolting. Violence committed in the name of religion has a long history in India, and the so-called religious people's blood has been used to write that history.

Our group has an identity. We can identify the stereotypical traits of several groups, such as the sage brahmin, the bloodthirsty butcher, the clueless barber, the terrorist Muslim, etc. The individual and the fact that no two of us are identical are not perceived by us. The mob has it simpler because all that is necessary to arouse their wrath and start treating the accused brutally is for them to know that he belongs to their community. Additionally, youth unemployment in our culture contributes significantly to the escalation of hostility between various groups. According to study, the high incidence of unemployment in the nation is the reason why violent crime, including armed robberies, kidnappings, cult warfare, terrorism, and pipeline, has reached an alarming level in the previous 20 years. Youth unemployment, whether it be involuntary or not, and crime are strongly correlated.

Easy To Spread Rumours Including Hate Speeches

Rumors have always existed and have contributed to important occasions. In the 18th and 19th centuries, word-of-mouth was the primary method of rumour dissemination. However, modern technology is now facilitating the spread of rumours, producing unexpected and frequently harmful results. Nearly all mob violence instances involved rumours that were spread via Facebook, WhatsApp, or other technological platforms. In India, spreading such rumours online is not a recent phenomenon; in fact, during the past ten years, there have been numerous violent episodes in India brought on by internet posts. The Muzzaffarnagar riots in the northern state of Uttar Pradesh in 2013, which resulted in over 60 fatalities and thousands of displaced people, were triggered by a hoax film that went viral on social media which showed a Muslim mob savagely killing a Hindu youth.18

Technology or the internet is a major factor in the dissemination of fake and hateful news. Everyone is their own author on social media. India recently experienced a spate of lynchings and mob assaults motivated by online claims of





kidnappings. Paid news and fake news also have the ability to alter public opinion and incite conflict, hatred, and violence among many socioeconomic groupings. Media reach has substantially risen as a result of the development of social media and technological breakthroughs. It is much more important to ensure its impartiality and non-partisanship because of its power and role in forming public opinion, which calls for the adoption of journalistic ethics.

Rise of Cow Vigilantes Taking Laws in Their Own Hands

In accordance with Article 47 of the Constitution, the State Government has the sole authority to enact laws governing cow slaughterhouses or regulating the trade in milk-producing animals. As a result, the cow is regarded as a sacred animal, and the State is required to uphold Hindu community's religious sentiments above all else. As a result, there is a religious conflict between Hindus and Muslims. The majority of states have passed legislation making it illegal to butcher cows. A fresh wave of cow vigilantism has emerged in the nation ever since the government forbade the sale and purchase of cattle for slaughter at animal markets across India under the Prevention of Cruelty to Animals regulations. One Muslim man was killed when a truck in Jammu and Kashmir State was assaulted with a petrol bomb in October 2015 during riots sparked by reports of cow slaughter. In the tribal state of Jharkhand in March 2016, two Muslims were executed by hanging after being charged with smuggling cows.

Absence of Fear of Being Punished and Support from Many Political Leaders

The fact that those who commit mob lynchings do not fear being rejected for their actions is one of the key causes of the practise. Because a mob lynching lacks a victim, it is challenging to determine responsibility and hold offenders accountable. When one person performs, they are aware of others' expectations, but when many people are there, there is a dispersion of responsibility and blame. Sometimes some of the network's political or local leaders took on the crucial role of either taking an interest in the demonstration of lynching or supporting it in its conclusion. They refuse to charge anyone involved in the lynching or bring charges against them. Their behaviour supported the outcome and, in some unspoken way, encouraged the offenders.

Despite the growing mob violence, the political class and administration continued to observe quietly. As a large portion of those in charge of running the country held the reins or were able to wedge their way into power through tough and forceful political frameworks, the human rights activists believe that there are only a few politicians hiding behind the curtain or nodding their mute ascent of mob violence. Instead of taking action against the perpetrators to eliminate the threat, the covert assistance is enabling them to become even more powerful over the Gangetic fields and history. The most severe example is perhaps Gulab Chand Kataria, the home minister for Rajasthan. According to Kataria, “It is illegal to transport cows, but people ignore it and cow protectors are trying to stop such people from trafficking them” when Pehlu Khan was lynched in Rajasthan in April for allegedly transporting cows.19 Mahesh Sharma, a

minister for the union, described the lynching as only an accident. Sharma went to the home of an accused named Ravi Sisodia after his death in the Dadri case. The Indian Flag, a symbol typically reserved for national heroes, was also placed over Sisodia's body. It is the responsibility of those in charge of the country to try to put an end to lynchings if they are happening frequently in India, not to encourage them.

Role of Police in Supporting Violence

Police is ill-equipped to handle the problem, despite the fact that in all of the occurrences, rumours spread quickly—in some cases, within minutes or even seconds. It is commonly known that India has one of the lowest police-to-population ratios in the world.20 The police were involved in both intentional and unintentional violations of the victims' right to life. Police arrived in Giridih too late to stop Usman Ansari's home from being set on fire after a mob of 200 people attacked him after a dead cow was discovered next to his home.21 Alimuddin Ansari was lynched to death in Ramgarh in June 2017 in broad daylight.22

## 4. Impacts Of Mob-Lynching

Mob lynching has a variety of impacts and repercussions. From the standpoint of the State, it may be claimed that everyone has certain rights, and the mob actually infringes on those rights, which are guaranteed to them by the Indian Constitution, the country's supreme law. In terms of a sociological standpoint, mob lynching actually undermines the equilibrium and peace in society. It demonstrates the environment of majority vs minority, which exhibits a loss of fortitude in the public sphere and people being swayed by emotions, partialities, and so on. And in the end, it influences people's behaviour, sometimes negatively affecting entire generations. Regarding the economic angle, mob lynching has an adverse effect on both domestic and remote speculation, negatively affecting assessments of sovereign states. It plainly impedes internal movement, which affects the economy. These incidents would cause specific speculative transmission that would influence provincial equalisation.

## 5. State Accountability and the Concept of Rule of Law

Rule of law is the fundamental pillar of Indian democracy which provides that no person can be punished without the authority of law. Despite this, there are some so called vigilante groups, who take law into their own hands and impart so called "justice" by lynching any person. In S. Krishna Sradha v. State of A.P23, Justice Dipak Mishra observed that "A right is conferred on a person by the rule of law and if he seeks a remedy through the process meant for establishing the rule of law and it is denied to him, it would never subserve the cause of real justice." In the case of Nandini Sundar v. State of Chhattisgarh24, the Supreme Court held that it is the responsibility of the state to prevent





internal disturbance and to take steps to ensure public order. The same has been provided under Article 355 of the constitution which places the duty on the Union to protect states against any external aggression or internal disturbance.

In India, the law must be upheld by everyone, including the government. Due to legal restrictions, even the government is unable to carry out a death sentence by public shooting for any crime, no matter how heinous or terrible. The crowd merely assumes control of the legal system by lynching and administers what is known as "mob justice".

However, there have been a number of occurrences in recent years where mob violence caused people to lose their lives, livelihoods, and even their lives, as well as their property. Because there is no special law that addresses these situations, a law that can deal with mob violence was needed. The Supreme Court asked for regulations to be passed in this regard in its Tehseen S. Poonawalla case ruling from July 17, 2018, in its ruling. It is therefore advised to file extra charges against mob lynching in addition to other offences under the Indian Penal Code to stop the evil in its tracks and stop the spread of hatred or motivation for mob lynching. A number of States have taken various steps to stop the crime of mob lynching.

The Manipur Protection from Mob Violence Ordinance, 2018, was passed in 2018 by the governor of the Manipur State using the authority granted by Article 213 of the Indian Constitution. The purpose of this particular law in this regard is to instill dread in those who engage in such acts and to also provide relief and rehabilitation to the victims and their family members.

The Gujarat government has not passed any new laws, but it has made crowd lynching illegal under IPC Section 153-A. This section also now makes it illegal to spread false information via social media or any other channel or medium, to deliver inflammatory speeches, and to publish provocative or frightful writings or works that might skew people's perceptions. Anyone found guilty of engaging in behaviour that encourages such deaths will face a three-year prison sentence.

In order to criminalise lynching, establish designated courts for the swift prosecution of such offences, provide for the protection, compensation, and rehabilitation of victims of mob lynching and their families, and provide for matters related to or incidental thereto, the State of Rajasthan has introduced the Rajasthan Protection from Lynching Act, 2019.

The Uttar Pradesh Combating of Mob Lynching Bill, 2019, which contains IX Chapters to prevent this crime, is also being worked on by the state government of Uttar Pradesh.

In order to stop lynchings, the West Bengal Prevention of Lynching Bill, 2019, suggests creating a unique task force with a state coordinator. The measure aims to adequately protect vulnerable persons' constitutional rights while also preventing and punishing occurrences of lynching in the state.

## 6. Indian Laws Dealing with Mob-Lynching

Because organisations protect individual people from the wrongs of the State and provide shelter, civil society is seen as essential to democracy. But who will protect the defenceless when people start harming their kin in bizarre ways? Our civil society, which was once the center of decency and togetherness, has been reduced to silence. As a result, rudeness has replaced consideration and barbarism has taken the place of harmony. India might have passed the point of no return since the nasty web persistently draws people into its murky depths. It diminishes the humanity of the culprits, who engage in heinous atrocities towards anyone. This includes dangerous barriers like "less sympathy for unlucky casualties", which can lead to rougher behaviour and target abused persons who are not part of the original gathering group. Therefore, what may emerge is a growing population of desensitised individuals ready to seize control of the law and perpetrate atrocities against anybody they pick as their target.

Constitution of India

The Indian Constitution, which also serves as the country's Grundnorm and gives all local laws in India's territory legal standing, is regarded as the supreme law of the land. It offers citizens a number of essential freedoms and rights, as well as recourse in the event that these rights are violated. The Indian Constitution defends the fundamental rights of the people by giving them a direct path to the Supreme Court under Article 32 in the event that such rights are violated, as well as to the different High Courts under Article 226.

Equality before the law and equal protection under the law are guaranteed by Article 14. According to this Article, laws will be applied equally to everyone, without distinction, from the prime minister to the policeman. Everyone is treated the same way in the same circumstances. Under this Article, both the victims of mob violence and the offenders receive equal protection. The law ensures equal access to all attainable opportunities. The "Denial of Bias" that is based on religion, race, caste, sex, and place of birth is governed by Article 15 of the Indian Constitution. As it chases, it haggles.

According to Article 19 (1) (a) of the Constitution, everyone has the right to free speech and expression. As long as the state does not impose any unjustifiable restrictions, Article 19 (1) (g) guarantees the right to engage in any trade, commerce, business, or activity of one's choosing. However, this does not imply that one can conduct business in opposition to the policies of the Central or State Governments. For instance, trading of beef is restricted by the various State Governments because cows are considered sacred animals in India, it affects the sentiments of the Hindu community, and it is also one of the main reasons. Additionally, each state government is empowered by Article 48 of the Constitution to impose limitations, control, or monopolies on any trade or business that specifically serves the public interest; to take action to protect and advance plant and animal breeds; and to regulate the slaughter of dairy, other, and draught cattle. Since they eat cow beef and their religion does not forbid it, some members of some groups believed it to be against their beliefs, which led





to a dispute between two communities.

Article 21 of the Indian Constitution guarantees both life and individual freedom. It is the foundation of fundamental rights. "No one shall be deprived of his life and personal liberty except pursuant to procedure prescribed by law", it provides.

Many nations, including Muslim nations (Pakistan, Bangladesh, the United Arab Emirates, Malaysia, etc.) and Buddhist nations (Japan, Sri Lanka, Thailand, Cambodia, etc.), have identified their primary religion as the one that the majority of its citizens practise, however India has not done so. It is stated in the Preamble of the Indian Constitution that India is a secular state. People are free to confess, believe, and follow or not to follow any religion, according to Article 25. This shows that regardless of whether a person is a member of the state's majority or minority, everyone is guaranteed the right under the law to pursue their own interests.

Indian Penal Code, 1860

The IPC's Sections 302 and 304 deal with the penalties for murder and culpable homicide that does not amount to murder, respectively. If a murder attempt occurs, Section 307 specifies the penalty. The penalties for intentionally hurting someone and grave hurt are covered in Sections 323 and 325, respectively. These sections can be read in conjunction with Section 34, which outlines the penalties for actions taken by multiple people to achieve a group goal. Each of these people will be held accountable in the same way as if they had acted alone. The same way, if there are more than 4 people, Section 149 may also be applied. Section 120 may also be used against the perpetrators, which deals with the offence of criminal conspiracy. Section 146 defines rioting and Section 147 provides punishment for every member of such an assembly committing the offence of rioting.

The Code of Criminal Procedure, 1973

The dispersal of an illegal gathering or any gathering of at least five people that poses a threat to public peace is governed by Section 129 of the Criminal Procedure Code. The provided power officials are required by Section 130 to disperse such a gathering. The people are protected from being charged under Section 132 for any protest that is implied to be conducted in accordance with Sections 129, 130, and 131. In 1973, the Criminal Procedure Code (CrPC) was amended to include Section 144. The magistrate of any Indian state or union territory may, under this law, issue an order preventing a meeting of four or more people within a given area. Section 223(a) of the Criminal Procedure Code, 1973 specifies that two or more people may be charged with the same crime committed during the same transaction and that they may be prosecuted jointly for that crime.

## 7. Need Of Particular and Specific Law Relating to Mob-Lynching

In many regions of the nation, vigilante justice is swiftly assuming the status of the norm. In defiance of the law, mobs take to the streets, feeling safe in their numbers, to punish individuals for crimes without first confirming if any wrongdoing has occurred. Regardless of whether the mob's charges are true, these extrajudicial killings are crimes in and of themselves, just like kidnapping children or butchering cows (which appear to be the latest causes for the mob lynching). Police must stop mob violence because it is a state matter, and law and order is a governmental responsibility.

The current legal framework is not strong enough to implement significant changes in order to stop incidents like mob lynchings. As a result, the operational value of the control systems is severely constrained in both application and execution qualities. In order to bring about a more focused mode of operation and execution options in case of unethical conduct like mob lynching, a new and enhanced legal structure is thus necessary. The existence of some significant gaps in the current legal framework is a crucial element in the development of a competent legal framework. The current legal frameworks are largely ineffectual for improvising the process of limiting mob lynching because they are not sufficiently capable of producing improved results.

## 8. Judicial Trends

The Indian Constitution protects citizens' rights against any partial action by the government or its officials and gives the court the authority to judge on disputes based on the rule of law. As seen in the examples below, the Indian court system has recently made an effort to combat mob killings and highlight the rule of law and ideals inherent in the Indian constitution.

In the case of Kodungallur Film Society v. Union of India and Ors.25, the Supreme Court set extensive guidelines to curb destruction committed by enraged audiences. The PIL was documented in the midst of unrestrained destruction committed by Karni-Sena members during the ‘Padmavat’ turmoil. The PIL's major demand was that the Central and State governments immediately abide by the rules that the Court in this decision established.

In Destruction of Public and Private Properties v. State of Andhra Pradesh26, the Supreme Court decided through Justice Khanwikar that no one has the right to coercively supervise their understanding of the law and that of others, especially not through violent means. In order to avoid tragic events and illegal activity that could result in property damage, it was decided that states had a duty to ensure that people or organisations didn't break the law on their own.

In Tehseen S. Poonawala case, the Supreme Court gave the authority of law its maximum extreme potential by outlawing mobocracy protests, asserting that what the law grants cannot be taken away by anything other than the fundamental idea of the law. The Supreme Court issued guidelines in this case as





preventive, therapeutic, and remedial steps to stop India's growing lynching rate. It is one of the Supreme Court's landmark decisions and represents a significant advance in the reform and defence of human rights. It was also stated that “wrongdoing knows no religion and neither the culprit nor the injured individual can be seen through the viewpoint of race, position, class or religion”. The Court finally came to a conclusion by demonstrating the necessity of using the law at every stage and coordinating the Center and the State for the resolution of fundamental rules that include the preventive measures as well as therapeutic and corrective measures too.

## Conclusion

Because life is so valuable, the modern state has a duty to safeguard its citizens' lives. According to Article 21 of the Indian Constitution, it is the state's duty to protect the lives of a large number of people. However, the legislation is put to the test by the increasing number of mob lynching incidents and other violent crimes. Some of the harshest, most cruel, and most corrupt types of violence are mob lynching and brutality, and the nation's customary laws are insufficient to deal with such crimes of mob lynching and killing. Mob justice is a sign that the state is failing to uphold its promise to administer justice successfully, as experience has repeatedly demonstrated. Mob lynching is an insult to human dignity, a serious infringement of the international commitment to human rights, and a violation of Article 21 of the fundamental principles of the Constitution.

Because they have encouraged the wrongdoers to use force, when one segment of society remains silent and does not legally criticise such horrible lynchings, they forget that soon it will be their turn and they might also meet the same destiny. We must all correct things when they are wrong. Making it the new standard in our society would be against the Rule of Law and no one would be protected, thus we shouldn't do it. Another significant problem associated with the rise in mob lynchings is a lack of societal awareness. India's current social climate is highly unsettling. It has been utilised to foster a negative perception of minorities, which has helped to increase the frequency of mob lynching incidents. The legal system, and particularly the constitutional provisions, must be used to analyse social factors. This could be a key initiative in creating a more ideal and integrated social institution all around the nation. Building a collaborative social design for fulfilling these assumptions is a vital attribute because each of the various religious groups and divisions has its own views and understanding.

Working together is necessary to break up the mob. In order to guarantee that criminals will be punished fairly, the public must trust the justice system. Politicians must stop openly or covertly endorsing the mob and start ensuring that measures are taken to curb it. To genuinely guarantee that India remains a free, just, peaceful, and lawful society, it is also necessary for State institutions, particularly the police, to act independently and strongly against the injustice of all types, from mob lynching to child abduction.

In instances of mob lynching against scheduled castes and scheduled tribes, the SC/ST (Prevention of Atrocities) Act 1989 has shown to be an effective deterrent; nevertheless, for other incidents, prompt legislation is essential. There is no simple fix for the heinous crime of lynching. To stop the attacks and punish the offenders, specific legislation and stringent implementation processes are required. State legislatures should be in charge of more than just passing laws with severe penalties, though. State legislatures must remain actively involved in the matter. Their engagement should include a thorough discussion of the budgetary needs of the police and courts as well as ongoing accountability of the state government for every illegal lynching that takes place in the state. The political ruse is to foster amity and unity so that the monster stays on the periphery. The alternate scenario is terrifying. Who knows who the next vigilantism victim will be?

The new laws won't stop all lynchings, but they will definitely keep them under control. In addition, we need to encourage brotherhood among the populace so that no one will even feel the feeling of hatred to commit such a crime. Promoting high standards of education and public awareness is necessary to address these issues. Hate speech cannot be regulated by law; it can only be restrained by more speech. There is, in my opinion, no one answer to the issue of mob lynchings. The preparation of a region-specific action plan, some structural improvements, and ground realities with the aid of local communities are all required. There is no simple fix for the heinous crime of lynching. State legislatures should be held accountable for more than just passing laws with severe penalties. State legislatures must remain actively involved in the matter. Their engagement should include a thorough discussion of the budgetary needs of the police and courts as well as ongoing accountability of the state government for every illegal lynching that takes place in that state.

**References:**


1. Deepak Mishra CJI in Tehseen S. Poonawalla v. Union of India WP (Civil) No. 732 of 2017
2. Krishna Gandhi, 'Anatomy of the Moradabad Riots' (Economic and Political Weekly, 6 September 1980) <https://www.jstor.org/stable/pdf/4369047.pdf> accessed on 1 July 2020
3. Justice Nanavati Commission of Inquiry, 1984 Anti-Sikh Riots (volume 1) <https://www.mha.gov.in/sites/default/files/2022-08/Nanavati-I_eng_0%5B1%5D.pdf> accessed on 05 July 2020
4. S. Viswanathan, 'Khairlanji: the crime and punishment' The Hindu (23 August 2010) <https://www.thehindu.com/opinion/Readers-Editor/Khairlanji-the-crime-and-punishment/article16149798.ece> accessed on 26 June 2020
5. Manob Chowdhury, 'Cow vigilantism: Families contest Jharkhand government's claim on Lather lynchings' (23 March 2016) <https://scroll.in/article/805548/latehar-lynchings-good-step-to-stop-cow-slaughter> accessed on 05 July 2020
6. Soutik Biswas, 'Is India descending into mob rule?' (BBC News, 26 June 2017) <https://www.bbc.com/news/world-asia-india-40402021> accessed on 19 June 2020
7. Jayanthi Pawar, 'Second Tamil Nadu lynching in 24 hours sparked by kidnapping fears' (The New Indian Express, 11 May 2018) < https://www.newindianexpress.com/states/tamil-nadu/2018/may/11/second-tamil-nadu-lynching-in-24-hours-sparked-by-kidnapping-fears-1813202.html> accessed on 27 June 2020
8. Zeeshan Shaikh, 'Palghar lynching: A recap pf what happened' (The Indian Express, 24 April 2020) <https://indianexpress.com/article/explained/palghar-mob-lynching-mahant-kalpavruksha-giri-6370528/> accessed on 20 June 2020
9. Naveed Iqbal, 'An elopement, a murder, shadow of Hindu Vahini rattles UP village' (The Indian Express, 4 May 2017) <https://indianexpress.com/article/india/an-elopement-a-murder-shadow-of-hindu-vahini-rattles-up-village-4639818/> accessed on 15 June 2020
10. 'Muzaffarnagar: Tales of death and despair in India's riot-hit town' ( BBC News, 25 September 2013) <https://www.bbc.com/news/world-asia-india-24172537> accessed on 17 June 2020
11. 'What lynching say about the Indian state'(Livemint, 3 July 2017) <https://www.livemint.com/Opinion/4qb4cm6MxsTeBjsgHixVaJ/What-lynchings-say-about-the-Indian-state.html> accessed on 17 June 2020
12. [2017] 5 SCC 255.
13. 'India's ratio of138 police personnel per lakh of population fifth lowest among 71 countries' (The Economic Times, 13 July 2018) <https://economictimes.indiatimes.com/news/defence/indias-ratio-of-138-police-personnel-per-lakh-of-population-fifth-lowest-among-71-countries/articleshow/48264737.cms> accessed on 29 June 2020
14. Harsh Mander, 'Usman Ansari, like Mohammad Akhlaq' (The Indian Express, 20 September 2017) <https://indianexpress.com/article/opinion/columns/usman-ansari-like-mohammad-akhlaq-lynching-cow-vigilantism-4851729/> accessed on 22 June 2020
15. 'Alimuddin Ansari lynching case: Kin dies, witness unable to depose' (The Indian Express, 13 0ctober 2017) <https://indianexpress.com/article/india/meat-trader-alimuddin-ansari-lynching-ranchi-kin-dies-witness-unable-to-depose-4887836/> accessed on 23 June 2020
16. [2009] 6 SCC 342.

17. Mob lynch, <https://www.collinsdictionary.com/dictionary/english/lynch-mob> accessed on 19 June 2020
18. 'Cowboys and Indians: Protecting India's cows' (The Economist, 16 August 2016) <https://www.economist.com/asia/2016/08/20/cowboys-and-indians> accessed on 17 June 2020
19. 'Indian mob kills man over beef eating rumour' (Al Jazeera, 1 October 2015) <https://www.aljazeera.com/news/2015/10/1/indian-mob-kills-man-over-beef-eating-rumour> accessed on 17 June 2020
20. World Peace Foundation, 'India: Partition, Mass Atrocity Endings' ( 07 August 2015) <https://sites.tufts.edu/atrocityendings/2015/08/07/india-partition/> accessed on 17 June 2020
21. Sohail Mahmood, 'The Darker Side of India: Religious Violence' (Counter Punch, 2 February, 2018) <https://www.counterpunch.org/208/02/02/the-darker-side-of-india-religious-violence> accessed on 20 June 2020
22. Richa Sharma, 'Religious violence in India' (Speakingtree.in, 11 September 2013) <https://www.speakingtree.in/allslides/religious-violence-in-india> accessed on 15 June 2020
23. [2017] 4 SCC 516.
24. [2011] 7 SCC 547.
25. CWP NO. 330 OF 2018.
26. [2009] 5 SCC 212.



# Acid Attack on Women: A Significant Phenomenon of Human Rights Violation

***Dr. Pratima Devi****

**Abstract**

The status of women in India is a matter of serious concern. We are celebrating our seventy fifth birth anniversary of independence but women are still facing violence like dowry, sexual assault, acid attacks, domestic violence etc. in society and family. Acid attack is the most serious crime against the women community. It is considered as"one of the heinous crimes against women in which acid is thrown into the face and body of the women with intention to disfiguring her. It causes immediate damage, disfigurement, pain and long lasting medical complications for victim. Though acid attack is a crime which can be committed against any person, but if we go through the various cases it has a specific gender dimension as most of the reported acid attacks have been committed on women, particularly young women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. A number of women are affected by the acid attacks. The"society today is not therapeutic anymore; there is no local support where individuals can find help before they become victims, without sufficient evidence and case stories, it is really impossible to tackle such a sensitive matter. All the stakeholders working on this cause today don't have clarity on the connection between the cause and effect.

The expansion of knowledge and information, ideas and more number of researches are the only possible ways to expand people's sense of apathy for the survivors and decrease the taboo on the matter. Through this research paper, the researcher will try to bring awareness on acid violence in India. Also discusses various laws, schemes relating to acid attacks, at the end suggest some valuable suggestions.

* *Associate Professor, Faculty of Law, M. D. University, Rohtak*
*prof.pratimadevi@mdurohtak.ac.in*

**Key words:** - *Acid attack, Disfigurement, Pain, Patriarchal, Victims.*

## Introduction

The recent acid attack had happened in Bengaluru on a girl. She had suffered 36 per cent burns and had to undergo 27 surgeries. Her hospital bill came up 40 lakhs. She had her face splashed with acid near her workplace by accused Nagesh on April 28, 2022 for allegedly refusing his proposal to marry with him.

Women are the beautiful gift of nature. At the tender age a girl is worried about her physical changing and looks that even the onset of acne peeve. In this age, she starts dreaming about her future. But what if you grew up in a male dominated family where a woman is often treated as an object. Here, the researcher wants to discuss the story of Lakshmi, an acid attack survivor. She at the age of 15 years was attacked with sulphuric acid, because she dared to say 'NO' to a 32 years old man. The perpetrator was her neighbour and her friend's brother who claimed that he loves her. Can you imagine that a true lover gives severe pain to his/her loving one? "Although she received treatment on time, in a span of 10 years, she went through many surgeries which almost affected her mental health. But with her courage and self-determination, Laxmi took up life's challenge and manage to stand back on her feet." She stood against the acid and created history. In 2006, she filed a Public Interest Litigation (PIL) in Supreme Court to seek a ban on the sale of acid. In 2013, Supreme Court ruled in her favour and directed state governments to issue acid sale licence to only selected retailers. Her PIL played a tremendous role and lead to framing of amendment to the existing criminal laws and compensation provisions.

"After the leading case of Lakshmi, the Supreme Court passed an order to put ban on selling of acid in shops. The Supreme Court has completely prohibited the counter sale of chemical unless the seller maintains record of the full details of the buyer and the quantity. Dealers can now only sell the chemical to buyer after the showing the government issued photo identity card"for specific "purpose of purchase. The seller should submit the details of sale of acid to the local police station within three days of the transaction. Acid should not be sold to any minor."

- "Stocks must be declared with the local Sub Divisional Magistrate (SDM) with 15 days.
- Undeclared stocks could be confiscated and defaulter fined up to 50,000 rupees."
- Acid attack is non-bailable and cognizable offence.

## Meaning of Acid Attack

Acid attack disfigured the face and ruined the life of survivors. "Indian law does not give an exhaustive definition of acid attack. It includes the throwing, spraying or pouring of acid on the body or face of the person with an intention to cause grievous hurt or face disfigurement" or death. The most common type of acids (tezaab in India) used in attacks are sulphuric acid, nitric acid and hydrochloric acid. All of which are generally used for cleaning, manufacturing of cotton and rubber and other industrial purposes." The Prevention of Offences (by Acid) Act, 2008 (NCW Draft Bill) defines the meaning of acid attack.

"According to section 3, Acid shall mean any substance which has the character of acidic or corrosive or burning nature that is capable of causing bodily injuries leading to scars or disfigurement or temporary or permanently disability".

"The United Nations Entity defines it that 'acid attack' as any act or omission, caused by corrosive substance/acid to be thrown or administered in any form on the victim with the intention that such person is likely to cause to the other person permanent or partial damage/injury or deformity or disfigurement to any part of the body or organ or cause death" of such victim.

According to "UNICEF, In an acid attack, a man throws acid on the face of any person; any number of reasons can lead to acid attacks. A rejected marriage proposal is offered as justification for man to disfigure a woman with acid. In an acid attack, the preparator uses some kind of acid for attack. Therefore, it is essential to understand the meaning of acid. According to the Acid Control Act, acid includes any kind of thick fluid or mixed ingredients of sulphuric acid, hydrochloric acid, nitric, phosphoric acid,"carbolic acid, battery fluid (acid), chromic acid and aqua-riga and corrosive items.

Kinds of Acids used in Acid Attacks:

1. Sulphuric Acid including Battery acid and Vitriol Oil: This kind of acid is most commonly used in acid attacks. "Pure sulphuric acid is a colourless, heavy, hygroscopic, oily liquid which emits no fumes, when exposed to the air. When mixed with the water, it evolves much heat and is reduced in volume. Sulphuric acid is also known as oil of vitriol. Malicious people occasionally resort to strong sulphuric acid to disfigure the face or ruin the body by throwing a quantity of it at the hated person." "Old electric bulbs filled with acid are often thrown in civil disturbances"in the cities.
2. "Nitric Acid (Aqua Fortis, Red Spirit or Nitre): Pure nitric acid is a clear, colourless liquid, giving off colourless fumes when exposed to the air and having a peculiar and choking odour. It is a powerful oxidising agent and dissolves all the metals."
3. Hydrofluoric Acid is a colourless gas. It becomes a fuming liquid when dissolved in water.

India has the maximum number of cases related to acid attacks. Approximately 1500 cases were reported globally every year and out of which 1006 cases are committed in India. The reason behinds that the crime was defined as a specific offence crime only after the amendment of 2013. However, the relevant data is not available. For last many years, the various organisations as per data

collected, indicates that the offence of acid attack has been on rise in India.

Acid Attacks 2011 to 2020

| Year | Number of Cases Reported |
|---|---|
| 2011 | 83 |
| 2012 | 106 |
| 2013 | 122 |
| 2014 | 309 |
| 2015 | 222 |
| 2016 | 167 |
| 2017 | 244 |
| 2018 | 228 |
| 2019 | 240 |
| 2020 | 182 |

This table does not reflect the full scope of acid attacks in India because 65 per cent cases of incidents are never reported. The victims are reluctant to report due to fear, pain, shame, social stigma and resources are not available to deal with this heinous crime in rural areas.

Historical aspect

The greatest tragedy has been the grave injustice done to half of the humanity, i.e. women. Woman is regarded as sub-species which have always played a specific and crucial role whether visible or not in society and history. Women enjoyed "considerable freedom and privileges in the sphere of family religion and public life. Traditionally the Indian woman has been the foundation stone of the family and society in general. She creates life, nurtures it, guards and strengthens it. In her task as mother the servant of the family but she is also its centre, for it is through her that the family is perpetuated and in that lies the pride of her status within the family and in society at large. She is the transmitter of tradition, the instrument by which" culture is preserved. The Indian society developed the stereotype ideals of 'pativrata' and custom of 'Sati' which reduced woman to physical and mental slavery of men. Man has converted her into a domestic drudge and an instrument of his pleasure and never regards her as his help mate and better half. The ancient Indian scriptures played prominent role in lowering the image of women in our society. Manu, the ancient Hindu Law





giver "equated woman with a slave and his laws epitomise complete submission of woman to man and they are still the sanctioned codes of conduct ascribed for and by and large accepted by women. Religion has also deeply affected and grievously damaged the image of woman in Indian society. Adishankaracharya, the great founder of Hindu Philosophy called woman as 'the gateway to hell and poison in the shape of nectar.' Family which was perceived as an arena of love, affection, gentleness and centre of solidarity and warmth has now become a centre of exploitation, assault and violence ranging from slapping, hitting, homicidal assault by one member of the family on the other to husbands and in-laws harassment for dowry or for any other reason. Acid-Attack, Dowry deaths, wife-battering, female child abuse, and abuse of elderly female in the family are also included in the violence against women."

History of acid attack is an old age phenomena. It was started in the 1800s. During ancient time, "acid has been used in metallurgy and for etching. In 1879, 16 cases of vitriolage were reported as crime of passion prevalent predominantly by women against another woman. The use of acid as weapon begins to rise in developing countries especially in South Asia. The first acid attack which was recorded in South Asia occurred in Bangladesh in 1967, in India 1982, and in Colombia in 1993."

Causes of Acid Attacks

In India, society is a patriarchal in nature. In acid attack cases mostly the offender is male and the victim is female, so the main cause of acid attack is patriarchal, male dominated society. This barbaric crime has various other responsible factors like refusal of marriage, extra marital affairs, cheap and easy available of acid, property, dowry etc. Following are the various responsible factors of acid attacks:

- Patriarchal society

Indian society is a patriarchal where male dominates. Man has been considered as a boss of the family and women has been subjugated. Woman has always considered the property of male, before marriage she is the property of her father and elder brother after marriage she is the property of her husband and unfortunately if she became a widow then her son will protect and control her. The dominating nature of a man makes a woman always be 'yes boss'. He is not used to hearing 'no' for a throw. The duty of women is to engage themselves within household activities and caring to the children. But today the scenario has been changed. Present era is the era of woman. They excel in every field of life besides strong opposition and adverse environment created by men towards their achievements. Women are asserting their independence in the matters of education, marriage and career etc. Ironically, it is the attitude that spells trouble for them, threatening their lives. The rejection made by a woman lives men devastated, leading him to commit one of the most heinous, barbaric crimes i.e. acid attack.

- Low cost and easy availability of acid

Even though the Supreme Court issued an order regulating the sale of acid, it is still under loose and people can easily purchase it without any difficulty. The acid which the perpetrators use for attacking is also use for cleaning purposes at home. It is easily available on pharmacies, open air market places, goldsmith shops and car repair shops etc.

- Egoistic nature of men

Men due to their ego are not able to tolerate the success of women. They are jealous of their development. They cannot tolerate their success and sometimes their ego becomes so dangerous that they hurt the woman by throwing acid on her. There are number of cases where women suffer due to male ego.

- Illiteracy

Lack of education or illiteracy is also one of the causes of violence against women. Illiterate person has not been well aware about laws and punishments. They are familiar with violence on women since their childhood.

- Religious philosophy

"The Indian culture which glorifies the image of a woman who is tolerant and receptive of whatever is given to her by the husband is another reason which prevents women from walking out of the violent relationship. Religious philosophy, customs and rituals serve to reinforce the phenomenon of 'Sati Savitri' and keep alive the tradition of male dominance and female oppression."

- Suspicion about sexual infidelity

In few cases, "the suspicion of infidelity is reason of acid attack. For example, in a case in India, Hazara Singh laboured under a strong delusion of the faithlessness of his wife. He used to ill-treat his wife due to suspicion and due to his suspicion one night he pours acid on his wife. The witness found that the Anand Kaur (wife of Hazara Singh) was lying dead burnt almost all over her body by acid. The deceased's forehead, face, chest, abdomen, external genitals, thighs, buttocks and mostly all other parts of body were burnt with acid. In another case, the accused was suspicious about the character of his wife and inserted mercuric chloride into her vagina; she died due to renal failure. The accused was charged and convicted under sections 302 and 307 of Indian Penal" Code.

- Revenge by so-called lover

This is the most common cause for throwing acid on the victim. "Such crimes against women are often marked in rhetoric of love. Boys are not in the situation for hearing 'No' from a girl. As in other countries, in India also, women are considered as second class citizens. They are never given opportunity to assert themselves by refusing the so-called love proposals and advances. Tacit submission is the only cause that is open to her."





- Dowry demands

In the twenty first century, still women are not able to combat their rights which are the basic human rights of every individual. Women are still treated as property and men are the sole decision makers. Presently in modern society, women are well aware of their rights. They have started 'say no' but when a woman refugees, it is seen as destroying his reputation, prestige and honour and he restores it by burning her face with acid. "As per the Law Commission of India in its report has asserted that the majority of acid attack victims are women especially young women for spurning suitors, for rejecting proposals of marriage, for denying or giving fewer dowry. The perpetrator cannot bear the fact that he has been rejected by the woman and seeks to destroy the body of the woman who has dared to stand up to him."

Consequences of Acid Attack

An acid attack is an act of throwing, splashing acid on any person irrespective of their gender, religion, caste and creed with the intent to cause harm or injury or to kill. The perpetrator throwing acid does this act due to ego, anger, hatred and jealousy. Sometime the proprietor is an unsound mind or mentally unfit person. Acid attack can cause various effects on the victim. It can be physical such as burn marks, blindness, disfigurement of face and other injuries; psychological as well as societal. Following are the various consequences of acid attack:

1. Psychological effects

Acid attacks adversely affect all aspects of the survivor's lives. The psychological consequences are severe in nature in many instances rendering the survivors mentally retard and eternally shocked. It includes social isolation and suicide plan and internal trauma, taunting behaviour of relative etc. While other belongings like fear, threatening and frustration are very high. Some notorious people also taunt them by saying ghost. They feel isolated and lonely. The society refugees to accept them and treat them like normal beings.

Depression is also a very common consequence of vitriolage i.e. acid attack. It can lead the survivors towards deep sorrow and depressed feeling.

2. Physical effect

The acid is a very dangerous substance which is"capable of eating two layers of skin. Sometimes when acid is thrown, not only the fat and muscles are broken down but also the bone is dissolved. The depth of the injury depends upon the power of the acid and the duration for which it was in contact with the skin. As soon as the acid comes in contact with the face of the person, it quickly eats into the eyes, ears, nose and mouth. Eyelids and lips may burn off completely. Ear wither up. The nose may fuse closing the nostrils. Wherever the acid may drip from the face, neck, shoulders or arm, it burns everywhere. Burning would continue until the acid is completely washed off with water. The worst and the most immediate danger for the victim is breathing failure."

3. Social effect

"In addition to other effect i.e. physical and psychological, there are many social effects which the survivors have to face especially women. The acid attack usually leaves handicapped in some way rendering them dependent on either their spouse or family for everyday activities, such as, eating and way of living. These dependencies are increased day by day because many acid survivors are not able to find suitable work, due to impaired vision and physical handicap. Due to face disfigurement, no one is ready to offer them job. No one wants to continue friendship with them. They have faced social isolation and face discrimination from society whole life. They are embarrassed that people may stare or laugh at them and may hesitate to leave their homes fearing an adverse reaction from the outside world. It becomes hard for the victims to move freely in the society. In Indian society, beauty is first preference for marriage. The face of acid survivors is disfigured, so she lost the chance of marriage. Thus, an acid attacks survivors could not live a normal social Life. One few drops of acid ruin their precious life completely. One acid survivor said in seminar that cost of 15 or 25 rupees bottle spoil our whole life in a second."

Legal Perspectives of Acid Attack in India

"Acid attack is a form of torture, cruel, barbaric and degrading treatment which violates the rights to life of women. Victims face lifetime physical, social, psychological and economic consequences. It"violates the right to life, right to employment and various other human rights. In India following are the laws relating to acid attack:

C0nstitution of India "provides equality to everyone. It states that states shall not deny any person equality before law or the equal protection of laws within the territory of India." Indian constitution provides various fundamental rights under article 14, 15, 16, 19, 21, DPSP, Fundamental Duties; all these Articles provide protection to women.

Indian penal Code 1860,

In India every day, we listen incidents of acid attacks through media."Unfortunately there was no specific law to deal with acid attacks before the passing of the Criminal Law Amendment Act, 2013. The offense was registered under section 320, 322, 325, 326 and 307 of the IPC.

"Often incidences of acid attacks capture the headlines of Indian media. Unfortunately in India, there was no separate legislation to deal with acid attacks before the passing of The Criminal Law (Amendment) Act. 2013. The offense was registered under Sections 320, 322, 325, 326, and 307 of the Indian Penal Code (I.P.C).""

Secti0n 320 –"Grievous Hurt:

The following kinds of hurt only are designated as 'grievous':- Firstly- Emasculation Secondly - Permanent privation of the sight of either eye. Thirdly - Permanent privation of the hearing of either ear, Fourthly - Privation of any





member or joint. Fifthly - Destruction or permanent impairing of the powers of any member or joint. Sixthly - Permanent disfiguration of head or face. Seventhly - Fracture or dislocation of a bone or tooth, Eighthly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 322 - Voluntarily Causing Grievous Hurt:

Whoever voluntarily causes hurt, if the hurt which intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said to 'voluntarily to cause grievous hurt'. Explanation - A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if intending or knowing he to be likely to cause grievous hurt of one kind; he actually causes grievous hurt of another kind.

Section 325 - Punishment For Voluntarily Causing Grievous Hurt:

Whoever, except in the case provided for by Section 335, (Voluntarily causing grievous hurt on provocation), voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 326 – Voluntarily Causing Grievous Hurt By Dangerous Weapons Or Means:

Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offense, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 307 - Attempt to Murder:

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that the act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is hereinbefore mentioned.

Attempts by life convicts - When any person offending under this Section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death. On 2nd April 2013, the Indian Penal Code was amended with the passing of 'The Criminal Law (Amendment) Act, 2013. The amendment resulted in the insertion of Sections 326A and 326B specifically for dealing with acid

violence.

Section 326 A states:

Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with a fine. Provided that such fine shall be enough and reasonable to meet the expenses for medical treatment of the victim and any fine imposed under this Section shall be paid to the victim.

Section 326 B states:

Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Lacuna in the Indian Penal Code (IPC):

Indian Penal Code has provided reassurance to these victims under Sections 320, 322, 325, 326, and 307. But it is seen that these Sections do not fulfill the profundity that is required for the earnestness of these offenses. Moreover, the term ‘acid attack’ was not defined anywhere, and the provisions also restrict them to acerbic substances.

The United Nations General Assembly passed the Declaration on Elimination of Violence against Women in 1993, and India has ratified this declaration and is under an obligation to follow the same. Articles 4(f) of this declaration states that all member states should form certain recommendations, for the safety of women and formulate ways to prevent them. There should also be separate provisions for granting exemplary damages to the victims of the attack. According to Article 253 of the Indian Constitution, the Parliament has the power to make laws to give effect to these international agreements.

Hence India is under an obligation to rein in the peril of acid attack. Now it is seen that the definition of grievous hurt as given under Section 322 of the Indian Penal Code is not inclusive of certain circumstances of acid attack as the definition clearly states the injuries that constitute grievous hurt. Therefore, if the delinquent causes only skin damage to the victim of acid attack, with no substantial damage to other organs, it would not come under the compass of grievous hurt. Further, no provisions are there if there is a loss of income for the victim. Now if the accused is not charged under grievous hurt, then it will fall under hurt, which in turn invites a nominal punishment of three years





imprisonment which is very immaterial to the massive loss suffered by the victim.

Further, there was also a lacuna that, there was no provision for penalizing the accused of throwing acid. In light of the above discussion, it was felt that there was a need to enact an effectual, efficacious, and specific legislation on the issue of acid attack and to cover all the loopholes that were present in the old existing law.

Amendment in the old Act: The Criminal Amendment Act, 2013 which was passed on the recommendations of the Verma Committee Report which brought into light the earnestness to deal with this acid attack offense. It inserted two new Sections i.e. Sections 326A and Section 326B in the Indian Penal Code. Therefore, the new amendment is a welcoming step towards restraining this crime.

For the purpose of rehabilitation, victims may also be given compensation as under Section 357A of the Criminal Procedure Code, 1973. Another laudable step that has been brought by the Criminal Amendment Act, 2013 was the inclusion of Section 357C to the Code of Criminal Procedure. It states that all hospitals, public or private, whether run by the Central Government, the State Government, local bodies, shall instantaneously provide first-aid or medical treatment, free of cost to the victims of any offense covered under Sections 326A, 376, 376A, 376B, 376C, 376D, or 376E of the Indian Penal Code, and shall also inform the police without delay.

One thing is very clear that mens rea is easily proved in an acid attack, which is sometimes difficult to prove in murder also. Throwing acid at a person's face is a deliberate act. It requires the attacker to procure the acid first and this proves that the crime is premeditated. Therefore, the attacker throws acid into the victim's face, fully aware of being aware of the ramifications of his act. This shows that the attacker's actions are completely wilful. This can be a strong point while thinking of some stricter punishment in acid attacks.”

Suggestions and Conclusion

- Research and Education Institutions

The men in our country following this heinous crime like fashion. It is a time that the government, research institution, NGOs should spent time and make efforts on more research and make efforts on more research and impart awareness on this issue in our country. Universities and schools should co-orperte govt. and conduct various awareness programmes, seminars, workshop and use the movie ‘Chhapak’ as a teaching and learning tool to sensitise our younger generation and build a new role model of compassion and caring among younger males.

- Strict Implementation of Laws

After 2013, Criminal Law Amendment Act, 2013, we have special laws and schemes for acid survivor but the implementation is poor at grass-root level.

National government hold the ultimate responsibility for inducing and implementing laws and policies around acid violence against women and girls. Therefore, Governments should be held accountable for doing so.

- "Enacting effective Laws to combat Acid Violence

The State is duty bound to prevent Human Rights violations includes an obligation to enact legislation designed to ensure that women are free from gender based violence. Thus, to comply with this duty, State should enact legislation that specifically targets violence against women rather than resort to generally applicable criminal laws. Legislation and Policies also address the underlying causes of"vi0lence. Not only must state enact targeted legislation and policies to address acid violence but they must also ensure effective implementation to those laws and policies.

- Appropriate Investigation

In order to effectively implementation of Laws States must conduct appropriate, impartial and prompt investigations. The "State's commitment to serious and effective investigations reiterates the condemnation of violence against women by society and ensures women's trust in the authorities' ability and dedication to protect them from violence".

- Medical staff

It is a medical staff who first responds to acid attack survivors, they must be trained in the proper first aid response.

- Both Acid-attack and its attempt must be considered and treated as the same offence with similar punishment of minimum 14 years up to life imprisonment.

- Acid sale must be regulated by the Government

It is the need of the hour that we must regulate the sale and purchase of acid. The main reasons of increasing number of acid attacks are unregulated sale of acid.

- Mind Set of Society

Gender based discrimination results in violence against women. We should start from our home by educating and working with young boys and girls promoting respectful relationship and gender equality.

- Role of NGOs

NGOs can play "very important role in combating acid-attack. NGOs provide a ray of hope to the victims. They try to balance their scattered life after the attack. They can help in uniting the victims from different parts of the country so that they don't feel alone in their battle against violence. Living together with each other would provide every one of them with additional support. When the Government is not able to do much NGOs come forward and try to raise Funds for treatment and medication of the victims. They can organise summons where the victims can participate and work towards developing skills."





- All women should be trained in self-defence. In schools, self-defence training should be a part of curriculum.

Conclusion

Acid attack is one of the most heinous crimes which ruin the whole life of the victim. A cheap price bottle can totally disfigured the beauty of a woman. This heinous offence is much gruesome then rape and murder because a woman can bounce back in life after rape but not easy task in after acid attack. After acid attack the skin of the victim is totally damaged and after going through various surgery, the original skin never come back. The victim has to live with disfigured face to whole life. When we analysing this heinous crime of acid attack various common questions comes into the mind; what is the origin point of this heinous act; are they individual decline in the minds of man or a sign of a broader socio-political discomfort? Whether we consider it as an individual weakness or societal riddle? This heinous act or offence against women is a combination of all segment such as moral, societal and philosophical one and it affects the all aspect of life of a victim. Every problem has a solution and the same with this violence. The heinous act is borne out of revenge and it deserves the strict punishment. Here judicial play the important role. The amount of compensation given to the acid attack victim is increased and the provisions of death penalty to the perpetrator are commendable. However, the every State Government needs to play a vital role for the strict implementation of the Recommendation and Rules Regulations relating to the availability, sale of acid and rehabilitation of acid attack survivor. It should the prime duty of the State for providing good job opportunity with a proper training to the survivors so that they are able to earn their livelihood. It's a prime time to encourage value added education. There is an essential requirement to conduct various gender sensitized programme for dotors, Judges, Police and other important personnel and especially society as a whole so that the people help the victim and not blamed or shamed her. The acid attack leaves the scars on the face, body and mind of the victim. There should be a well trained counsellor easily available to her so that the victim can think to return back in her life. The economic strength is most important for woman emancipation. Change in the mind of male domination in society is the need of hour.

**REFERENCES:**

1. Das Ashish Kumar. Mohanthy, Prashant Kumar, (2007). Human Rights in India, Sarup & Sons, New Delhi.
2. Guharaj, P.V. (2003). Forensic Medicine, (2nd Edition). M.R. Chandran, Orient Longman Pvt Ltd, Hyderabad.
3. Kaur, Gurkirat . (2005).Women and the Law, Shree Publishers and Distributors, New Delhi.

4. Rao, Mamta (2012). Law Relating to Women and Children. Eastern Book Company, Lucknow.
5. Vij, Krishan. (2011). Textbook of Forensic Medicine & Toxicology: Principles & Practice. Elsevier publishers, New Delhi.

## Scope, Aims & Objectives

NIU International Journal of Human Rights, a UGC CARE listed, peer-reviewed annually published journal since 2014 seeks to provide a platform for engaging in multi-disciplinary discussions on themes of social sciences, law and humanities. The journal has a global reach and is widely read by scholars and practitioners across the world.

1. The purpose of the journal is to disseminate research results and the content supports high level learning, teaching and research in human rights & allied disciplines.
2. Articles accepted for publication in the journal are peer-reviewed.
3. More than 75% of contributions published in the journal emanate from multiple institutions.
4. The journal has an International Standard Serial Number (ISSN).
5. The journal is published annually.
6. The journal has an Advisory Board with more than two-thirds of the editorial board members beyond a single institution including international members, which is reflective of their expertise in the relevant subject area.
7. The journal is well circulated beyond a single institution; and has a wide range of audience from policy makers to academicians, researchers, and human rights experts.

**Accredited Indices**

1. UGC CARE listed (since 2018)
2. India Citation Index

It is a matter of great satisfaction that scholars, academicians, and writers from literature, social sciences, humanities, social work, law and health studies fields have been contributors to our annual journal which covers a spectrum of Human Rights issues broadly classified as follows-

- **Articles:** Research-based scholarly writings
- **Reviews:** Insightful surveys of the literature
- **Statements:** Opinions and thoughts
- **Whistleblowers:** Pioneering work with new dimensions
- **Reflections:** Anything worthy of sharing
- Other **general contributions** such as Book Reviews and Case Comments are also welcome.

We would be honored if you contribute to NIUIJHR 2022 as per your expertise and your interest. The articles will be published only after approval of our Editorial and Advisory Board (Peer-Review Committee).



NIU International Journal of Human Rights

A UGC CARE listed Journal (Volume 9, 2022, ISSN: 2394-0298)

## Guidelines for the Submission of Manuscripts

Only manuscripts of sufficient quality that meet the aims and scope of NIU IJHR will be reviewed. As part of the submission process, the author(s) will be required to warrant that they are submitting original work, that they are submitting the work for first publication in the Journal and that it is not being considered for publication elsewhere and has not already been published elsewhere, and that you have obtained and can supply all necessary permissions for the reproduction of any copyright works not owned by you.

**Article types**

Manuscripts must be in English and should be submitted via the peer-review and submission system. The preferred lengths for submissions are as follows –

i) Articles : 6000–8000 words.
ii) Notes/Comments : 3000–4000 words.
iii) Book Reviews : 1500–2500 words.

**ARTICLE FORMATTING**

**Articles/Manuscripts must be submitted in Microsoft Word only.**

1. **Title and Author Information:** following information should be included
   - Paper title
   - Author and all co-author(s) names
   - Affiliation of the institution
   - e-mail addresses and contact details of author and all co-authors.

2. **Abstract:** As mentioned earlier, the manuscript should contain an abstract, which is self-contained and citation-free, having a word limit of 300-500 words.

3. **Key words:** Add about four-five key words or phrases in alphabetical order, separated by comma.

4. **Introduction:** This section should be succinct, with no subheading and no references.

5. **Main Manuscript:** please ensure that the format of your manuscript adheres to these criteria:
   I. The articles should be double-spaced.
   II. The articles should include an abstract (300 – 500 words).
   III. Contains no more than 8,000 words (including references, notes, tables and figures).

IV. Does not contain page numbers.

V. Use ‘s’ spellings instead of ‘z’ spellings. This means that words ending with ‘-ize’, ‘ization’, etc., will be spelt with ‘s’ (e.g., ‘recognise’, ‘organise’, ‘civilise’).

VI. Use British spellings in all cases rather than American spellings (hence, ‘programme’ not ‘program’, ‘labour’ not ‘labor’, and ‘centre’ and not ‘center’).

VII. Use single quotes throughout. Double quotes only to be used within single quotes. Spellings of words in quotations should not be changed. Quotations of 45 words or more should be separated from the text and indented with one space with a line space above and below.

VIII. Use ‘twentieth century’, ‘1980s’. Spell out numbers from one to nine, 10 and above to remain in figures. However, for exact measurements, use only figures (3 km, 9 per cent, not %). Use thousands and millions, not lakhs and crores.

IX. Use of italics and diacritics should be minimised. Tables and figures to be indicated by numbers separately (see Table 1), not by placement (see Table below). All figures and tables should be cited in the text. Source for figures and tables should be mentioned irrespective of whether or not they require permissions.

6. **References:** NIUIJHR adheres to two methods of Citations.

- **APA** (American Psychological Association) citation Style for research papers in social sciences like psychology, anthropology, sociology, as well as education and other fields.
- **OSCOLA** (Oxford Standard for the Citation of Legal Authorities) citation style) for research papers related to Law & Legal Affairs.

Authors are responsible for ensuring that the information in each reference is complete and accurate.

**Editorial Policies**

1. **Peer-review**

- NIUIJHR is a peer-reviewed journal, which follows a doubly blinded review process.
- Under the process, author's scholarly work and research is subjected to the scrutiny of other experts - at two different levels in the same field to check its validity and evaluate its suitability for publication.
- Article would then be accepted / rejected or accepted after modification which the author is required to carry out subsequently.

2. **Plagiarism**

NIU IJHR takes issues of copyright infringement, plagiarism or other breaches of best practice in publication very seriously.

- We seek to protect the rights of our authors and we always investigate claims of plagiarism or misuse of published articles.
- Equally, we seek to protect the reputation of the journal against malpractices.
- Submitted articles may be checked with duplication-checking software. Where an article, for example, is found to have plagiarised other work or included third-party copyright material without permission or with insufficient acknowledgement, or where the authorship of the article is contested, we reserve the right to take action including, but not limited to:
  a. publishing an erratum or corrigendum (correction); retracting the article;
  b. taking up the matter with the head of department or dean of the author's institution and/or relevant academic bodies or societies; or
  c. taking appropriate legal action.

Any correspondence, queries or additional requests for information on the manuscript submission process should be sent to the NIU IJHR editorial office as follows:

PROF. (DR.) APARNA SHARMA
*Editor – in – Chief*
NIU International Journal of Human Rights
Dean, School of Liberal Arts
Noida International University
Email: *editorinchiefniuijhr@niu.edu.in / dir.sla@niu.edu.in*
Phone: +91-9871251999

PROF. (DR.) MANU SINGH
*Associate Editor*
NIU International Journal of Human Rights
Dean, School of Law and Legal Affairs
Noida International University.
Email: *editorinchiefniuijhr@niu.edu.in / dir.slla@niu.edu.in*
Phone: +91-8853590315

**Website: niu.edu.in/niuijhr/**