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## **EDITORIAL**



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The social behaviour depends upon the behaviour of the people living in the society. Since human needs are varied, so the inter relations with various disciplines. It has impact on the administration of Justice System and governance. In order to explore the significance of interdisciplinary study, 'the Chanakya Law Review (CLR)' is being launched by the CIRF in IPHD of CNLU. This Journal will provide a platform to the academicians all over the world on the inter-disciplinary, cross-disciplinary and multi-disciplinary issues in Sciences, social sciences and humanities interface with laws. Keeping in view the needs and nature of the journal, the editorial board has been constituted. I express my gratitude to all esteemed members on the editorial board. It is an online journal for open access to all. The ISSN no. shall be obtained as per rule.

**Prof. Dr. Subhash C. Roy**  
*EDITOR-IN-CHIEF*  
*THE CHANAKYA LAW REVIEW (CLR)*  
*CNLU, PATNA*

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**A REFLECTION ON VIRTUAL RAPE IN THE METAVERSE: A NEED FOR LEGAL INTERVENTION***Dr. Ashok P. Wadje<sup>1</sup> & Jivantika Gulati<sup>2</sup>***Abstract**

*Metaverse is a hypothetical concept which perceives the world as a single Virtual reality (VR) and Augmented reality (AR). The arena is 3 dimensional which can be used for a plethora of activities such as conducting businesses, online games and interaction with virtual avatars. The word 'Metaverse' originated in a science fiction novel, named 'Snow Crash' by Neal Stephenson in the year 1992. It is an immersive technology which uses Artificial Intelligence (AI) which has the capacity to construct new characters and environment in the digital space. However, with paradigm shift and rise in Information technology, the role of the technology has taken an ugly turn which has led to rise in cybercrimes. One such category is rise of virtual rape in the metaverse. In 2019, 'Rape Day', a video game was created by 'Desk Planet' where the protagonist intends to rape women during zombie apocalypse. In response to this, there was a lot of uproar and backlash by the women activists which called for shutting down its operation. However, the point of concern is there isn't a special legal mechanism which helps in combatting virtual rape in the metaverse. India still lags behind in developing stringent laws on such technologies which turn malignant from time to time. We are staying in an era of misinformation and disinformation. Metaverse rape is an emerging area of criminality which requires a wake-up call.*

**KEYWORDS:** *Artificial Intelligence, Augmented Reality, Metaverse, Virtual Rape and Virtual Reality.*

**INTRODUCTION**

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<sup>1</sup> Associate Professor of Law and Associate Dean, Maharashtra National Law University, Aurangabad, Maharashtra.

<sup>2</sup> Assistant Professor of Law, Symbiosis Law School, Pune, Symbiosis International (Deemed University), Pune, India, Doctoral Research Scholar, Maharashtra National Law University, Aurangabad, Maharashtra.

In the Metaverse, it is possible to see someone sitting in the living room and experiencing the sensation of exploring the volcano bed with a buddy who lives on the opposite side of the globe. A world where one can observe both the real and virtualized worlds has been made possible by the concept known as the "metaverse." The Greek words "meta," which means "beyond," and "verse," which denotes wholeness on something, are the roots of the term "metaverse."<sup>3</sup> By utilizing technology, it generates a different experience that transcends our physical existence. To put it succinctly, Metaverse is the next iteration of the internet. Perhaps because of the development of artificial intelligence (AI), individuals are interacting more on social media, which has led to an increase in sexual offenses. It is impossible to characterize the metaverse in a single definition. There is still need for further clarification on this nebulous idea. Understanding the scope of the metaverse's impact on our lives and how it encompasses everything around us is necessary before entering the realm of sexual offenses occurring there. Although it seems like the Internet, it is now more appropriately described as "an integrated network of 3D virtual worlds."<sup>4</sup> The characteristics of the metaverse is stated as below:

- Metaverse uses immersive technology wherein which provides sensorial view;
- Conglomeration and physical and virtual world and there overlapping effects;
- Element interconnectivity and synchronization in virtual spaces.

*"Metaverse is the internet that you are inside, rather than just looking at,"* states Mark Zuckerberg. As we can see, the world is now accessed through virtual reality headsets, allowing users to navigate using their own body movements, such as eye movements, voice commands, and feedback controller systems. These properties allow us to observe that consumers have a physical, sensory reaction as though it were a genuine thing. One way to describe this sensory response is as adding a tactile element to virtual reality, which elevates it above previous VR experiences. With the introduction of the Metaverse, virtual reality has evolved from a social good to a disguised evil. The rise in social media usage has coincided with a corresponding surge in online bullying and harassment. The metaverse can engage users in very powerful ways when handled appropriately. Metaverse is fostering more connectivity, dismantling geographical boundaries, and creating opportunities for equity for its users. However, when people start to view the Metaverse as their "reality" outside of the physical world, it might have severe effects.

It has been observed that certain people have been addicted to the metaverse far more than others, which leaves them vulnerable to the metaverse's vulnerabilities. Studies have indicated that the Metaverse is more capable

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<sup>3</sup> Mateusz Dolata and Gerhard Schwabe, "What is the Metaverse and who seeks to define it? Mapping the site of social construction" 38 *Journal of Information Technology* (2023), available at: <https://doi.org/10.1177/02683962231159927>. (last visited on February 15, 2025).

<sup>4</sup> John David N. Dionisio, William G. Burns III, et.al, "3D Virtual Worlds and the Meta worlds and the Metaverse: Current Status and Fent Status and Future Possibilities" *Computer Science Faculty Works* (2013), available at: [https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1004&context=cs\\_fac](https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1004&context=cs_fac). (last visited on February 15, 2025).

than internet portals of enabling users to be sexually harassed and bullied online.<sup>5</sup> The present study will be delving more into the aspects of sexual harassment and cyberbullying of users using the metaverse and how this booming sector is bringing in more convoluted challenges for the legislatures.

## RESEARCH OBJECTIVES

1. To analyse till what the extent cyber harassment and cyber bullying against women and children poses risk to human life and bodily integrity.
2. To understand the scope of legal injury in the Metaverse space.
3. To dwell upon whether existing legal framework is adequate enough to combat the crimes committed in the metaverse arena.
4. To review the current laws and legislations both at national and global scale to curb the menace of sexual offences committed in the metaverse.

## RESEARCH QUESTIONS

1. Whether acts of sexual harassment and cyberbullying against women and children in the Metaverse poses threat to the human life, body and dignity?
2. Whether acts of sexual harassment and cyberbullying in the Metaverse poses a serious question of definition of legal injury?
3. Whether existing laws, including the criminal laws of the country could be extended to the Metaverse?
4. Whether it is necessary to review or to have a retake, both national and international regulatory regime vis-à-vis sexual offenses in the Metaverse?

## SCOPE OF THE RESEARCH

The present scope of the research is to emphasize upon the crimes which are committed against women and children in the metaverse. The scope of crimes is restricted to analyzing the sexual offence primarily, cyber harassment and cyber bullying. The authors will also be dealing with ethical considerations and human rights aspects in safeguarding the privacy, bodily integrity, interaction in the social sphere and avoiding discrimination.

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<sup>5</sup> Soyeon Kim and Eunjoon Kim, "Emergence of the Metaverse and Psychiatric Concerns in Children and Adolescents", *Journal of Korean Academy of Child and Adolescent Psychiatry* (2023), available at: <https://doi.org/10.5765/jkacap.230047>. (last visited on February 15, 2025).

## SEXUAL VIOLENCE IN THE METAVERSE:

Sexual Violence in the real time world as we see in society, incrementally prevailed and available in the virtual spaces also making it difficult and posing as a challenge to society and legal fraternity and thereby calling for overhauling of the regulations governing virtual spaces such as Metaverse. Law does not operate vacuum. It has to see the reality of society and then it has to respond. Further, law needs to know the experience of society to understand and to formulate the policies and regulations to better govern virtual spaces. This paper in the following instances and data available on the topic will take a survey of the experience of the society in relation to the presence of sexual harassment and sexual violence in the virtual spaces such as Metaverse.

### 1. Sexual harassment and assault

According to several studies, online gaming is mostly seen as a male-dominated pastime where women are assigned a secondary status and frequently become the victim of sexual harassment.<sup>6</sup> In 2020, women made up 41% of video gamers in the US and between 40% and 45% in Asia.<sup>7</sup> Sexism and sexual harassment are still prevalent in online gaming communities, even though women have made up a sizable share of the gaming population throughout time.<sup>8</sup>

One female player of Team Fortress 2 encountered a lot of improper sexual questions, such as, "What are you wearing? Do you have any pictures? "Have you got any nude pics?" she asked other players as soon as she started talking in-game. On the other hand, in the metaverse, invasions of privacy and threats against one's virtual body are no longer confined to a screen.<sup>9</sup>

According to Outlaw's (2018) poll, which involved 609 virtual reality users, 49% of female users and 36% of male users disclosed that they have experienced sexual harassment in virtual reality at least once. They included virtual groping, getting "humped" by someone else, and having one's face thrust at. These results imply that Patel's metaverse encounter was not a singular instance.

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<sup>6</sup> Peter Meiksins and Peggy Layne, "Sexism in the Gaming Industry: Are Things Beginning to Change?" *Magazine of the Society of Women Engineers*, (2022), available at: <https://swe.org/magazine/gaming-sidebar/>. (last visited on February 15, 2025).

<sup>7</sup> Dayna Pilger, "We've Always Been Here": Women in the Video Game Community" *Folklife* (2023), available at: <https://folklife.si.edu/magazine/women-video-games-experiences-representation#:~:text=According%20to%20Forbes%2C%20%E2%80%9CIn%202020,underrepresented%20within%20the%20gaming%20world.> (last visited on February 15, 2025).

<sup>8</sup> Mariela Bustos Ortega, Hugo Carretero Dios, et.al. "Sexist Attitudes in Online Video Gaming: Development and Validation of the Sexism Against Women Gamers Scale in Spanish and English" *Psychology of Women Quarterly* (2023), available at: <https://doi.org/10.1177/036168432311628>. (last visited on February 15, 2025).

<sup>9</sup> Yogesh K. Dwivedi, Laurie Hughes, et.al, "Metaverse beyond the hype: Multidisciplinary perspectives on emerging challenges, opportunities, and agenda for research, practice and policy" *International Journal of Information Management* (2022), available at: <https://doi.org/10.1016/j.ijinfomgt.2022.102542>. (last visited on February 15, 2025).

## 2. Adolescents Being Sexually Harmed Online

The process of building a trustworthy relationship with a minor, usually with the intention of sexually abusing or exploiting them, is known as grooming. Although the majority of metaverse platforms mandate that users be 13 years of age or older, neither identification nor age verification is in place at the moment. Put otherwise, a child of 10 years old could claim to be 30 years old, while an adult of 30 years old could act the part of a 10-year-old child. In these kinds of situations, people might meet kids through kid-friendly avatars and win their trust in the metaverse before having private video chats or connecting offline.<sup>10</sup> This raises the possibility of sexual exploitation. Children as young as six have been observed communicating with adult strangers on metaverse platforms such as Altspace, VRChat, and Horizon Venues.<sup>11</sup> They point out that embodiment in metaverse platforms allows strangers to physically connect through their avatars, which could encourage sexual grooming, in contrast to non-immersive online venues (e.g., chatrooms) where strangers primarily talk and share content.

Similar concerns associated with children in the metaverse have been emphasized in numerous media stories. For instance, in Horizon Worlds, where the age restriction is eighteen, a nine-year-old was utilizing their parent's virtual reality system.<sup>12</sup> Another instance was a deep-voiced avatar saying to a child-voiced fairy avatar, "I just want to put you in my pocket and bring you home, little fairy girl." A man who collected sexual content from children by lying about his age and using a young person's avatar was given a four-year prison sentence in South Korea.<sup>13</sup>

## 3. Being in the presence of sexual materials

By going to age-neutral virtual spaces, individuals can also interact with others through their avatars in the metaverse. While some of these rooms include avatars that mimic sexual behaviors, others are more like strip clubs. Some users talked to a BBC news reporter about "erotic roleplay" as she used a virtual reality headset to explore VR Chat while dressing like a young adolescent. Notably, a user informed her that the program enabled "unspeakable things" and "getting naked" for avatars. Additionally, multiple adult avatars approached her and displayed condoms and sex toys to her. According to her description, there are actors playing out sexual behaviors in large groups on the dance

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<sup>10</sup> *Ibid.*

<sup>11</sup> The Institution of Engineering and Technology, available at: <https://www.theiet.org/media/9836/safeguarding-the-metaverse.pdf>. (last visited on February 15, 2025).

<sup>12</sup> Welcoming Preteens to Meta Horizon Worlds, Meta, available at: [https://www.meta.com/blog/preteens-horizon-worlds-family-friendly-vr-mr/?srsltid=AfmBOorzsbTwovBKd3v\\_-Mtdp2Z2YRxiSbbrRe8LX62GvADKz4TTVNX](https://www.meta.com/blog/preteens-horizon-worlds-family-friendly-vr-mr/?srsltid=AfmBOorzsbTwovBKd3v_-Mtdp2Z2YRxiSbbrRe8LX62GvADKz4TTVNX). (last visited on February 15, 2025).

<sup>13</sup> Oluwapelumi Adejumo, "South Korea sentences metaverse sexual abuser to 4 years imprisonment" *CryptoSlate*, available at: <https://cryptoslate.com/south-korea-sentences-metaverse-sexual-abuser-to-4-years-imprisonment/>. (last visited February 15, 2025).

floor, conversing with each other like kids pretending to be grownup couples.<sup>14</sup> In addition, one person tried to engage in sexual activity with the researcher's avatar, and another threatened to "rape [her] little sister" following their intercourse. Similar results were reported by another journalist, who used the aliases of a 13-year-old child and a 22-year-old woman. In addition to seeing users who appeared to be juveniles engage in sexual simulation, the journalist experienced the following:

- Continually approached and intimidated by an avatar who wanted her to reproduce with him, posing the question, "Who's going to stop me?"
- Before mimicking a sexual act, another user asked, "you like getting head from minors?"
- Reportedly, a different individual expressed a preference for "young girls ages nine to twelve."

Sexual age play is a concern associated with exposure to sexual material. When adults choose child avatars to participate in child-adult or child-child sexual acts in the virtual world, they are knowingly simulating child abuse. Although sexual age play may not be illegal in and of itself because the participants are consenting adults, these role-playing activities have the potential to normalize sexual behavior for youngsters who observe and encourage sexual grooming.

Sr. No.	Platform	Individual	Experience
1	Horizon Worlds	Sum of Us researcher	Led into a private room at a virtual party where she was raped by a user who kept telling her to turn around so he could "do it from behind while users outside the window could see"
2	Population One	Maria DeGrazia	Abused while wearing a haptic vest when another player groped her avatar's chest.
3	Echo VR	Sydney Smith	Encountered "lewd, sexist remarks" while another player claimed to have "recorded her [voice] to jerk off". After the incident, Smith described having difficulty reporting the player in the game.

**Table 1. Examples of sexual violence in the metaverse**

<sup>14</sup> Angus Crawford and Tony Smith, "Metaverse app allows kids into virtual strip clubs" *BBC*, available at: <https://www.bbc.com/news/technology-60415317>. (last visited on February 15, 2025).

## DIFFICULTIES IN PROVING METAVERSE SEXUAL OFFENCES

The emergence of intricate operating systems and programming codes has given rise to a vicious cycle of offenses masquerading as prospectuses. The use of graphic sexual content on virtual reality platforms and regular occurrences of minors being subjected to sexual harassment are reported by The Center for Countering Digital Hate (U.S.A.). Because the inclusion that happens with the contact might easily aggravate what we perceive to be misuse of social media, it is evident that these identifying problems of bullying and harassment are more severe in cases of metaverse.

People are now more eager to explore new avenues for social interaction as a result of the pandemic. The introduction of Metaverse has heightened people's inclination to partake in activities that transport them back in time. More offenses arose when businesses like Google and Apple started experimenting with technologies like virtual reality and haptic technology, which allow users to engage with blended reality by navigating these platforms as avatars.

It is commonly assumed that online gaming is mostly a male-dominated hobby, with female participation ranking secondary. Sexual harassment frequently stems from such actions. Despite the fact that women made up about 45% of Asian gamers, it is evident that sexual harassment and offenses still occur in the Metaverse.<sup>15</sup> One of the main concerns regarding the institution of sexual offenses is that many of these platforms or virtual rooms are designed as strip clubs, where obscene activity is encouraged and avatars are seen in engaging and promoting erotic activities. The metaverse allows users to meet each other through their avatars regardless of age restrictions. Such sexual content is quite concerning.

During the investigation of this avenue, several patterns of sexual violence were discovered. For example, Research was led into a private room at a virtual party where she was sexually assaulted by a user who repeatedly urged her to turn around so that "he could do it from behind and users outside the window could see." Maria DeGrazia was the victim of another incident in which a player touched her avatar's chest in the 'Population One' platform while she was wearing a hepatic vest. In "Echo VR," Sydney Smith had heard "lewd sexist remarks" and someone had captured her voice telling her to "jerk off." She also mentioned how challenging it was to report on the game's participant.

Youth have been drawn to the metaverse to a significant extent, and studies show that young children are more likely than adults to be victims of sexual offenses. One such procedure is grooming, where young children are tricked by predators disguised as avatars and fall into their trap. Through this technique, a relationship is formed with the implicit goal of harassing someone sexually. Even if the age restriction is 13 years old, this is

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<sup>15</sup> Sananda Bhattacharyajee, "The Dark Side of Metaverse- The rise of Sexual Violence through Metaverse: A Critical Analysis" *International Journal of Novel Research and Development*, (2024), available at: <https://www.ijnrd.org/papers/IJNRD2402097.pdf>. (last visited on February 15, 2025).

not verified. As a result, it is not difficult for a 50-year-old to pass for a 10-year-old or vice versa. The boundary of protection is dubious under such conditions. It frequently occurs in these situations that young toddlers come into contact with people who use kid-friendly avatars to get to know one other before doing things like offline interactions or private video chats, which puts kids at risk for sexual offenses or harassment.

Sexual harassment on social internet has long been considered a criminal offense. The only noticeable shift over time has been that, whilst it was formerly primarily centered on verbal and visual erotic texts, with the emergence of the metaverse, its roots have expanded to encompass a larger range of human existence. With the introduction of haptic touches, sexual abuse in the Metaverse can be experienced as emotionally taxing as real-life sexual harassment. In addition to the physical harm that results from such acts, in certain instances they can be fatal, especially when people have been threatened with being killed or having their loved ones sexually assaulted. When someone is exposed to a touch stimulus, the trauma is multiplied to a greater extent with the introduction of hybrid touches. Many people have experienced such uncomfortable conditions that have permanently damaged their lives and prevented them from leading normal lives.

People are becoming more aware of mental health concerns and are more sensitive to them, therefore these behaviors have merely served as triggers in these instances. It is considerably harder to prove for the general public to grasp whether or not this is a crime because of the prima facie problem that it occurs in virtual reality. Compared to those who have experienced direct-contact sexual harassment, the groups that experience non-contact sexual harassment are nevertheless seen to be able to recover from the trauma of such offenses. Another thing that contributes to an untreated psychiatric problem is victim blaming. It is typical for people to place some or all of the blame on the victim in order to justify the actions of the offender.

These kinds of behaviors have also resulted in traumatic suppression in the victim's mind. The victims are primarily female, and in a nation like India where the male counterpart is typically viewed as belonging to a stronger social group, it can be extremely difficult for them to shed these labels from their identities. This leads to ongoing psychological trauma that is kept private.

### **THE CONSEQUENCES OF SEXUAL HARASSMENT IN VIRTUAL SPACES:**

A user who experiences ongoing sexual harassment may have unparalleled sexual trauma with both immediate and long-term effects. Common symptoms of sexual trauma include shock, trauma, post-traumatic stress disorder, and social disengagement. Furthermore, young children are more vulnerable to conditions like PCOS, which have an impact on their mental and eventually physical health. Adolescents under the age of thirty start to exhibit odd sexual traits or indulge in drug use.



**Mental Effect:****Removing Psychological Trauma and Real-Life Sexual Victimization Responses**

Since the early days of the internet, virtual sexual harassment has persisted as a feature of online platforms.<sup>16</sup> Previously, these hostile exchanges were mostly limited to sexually suggestive words and images. As a result, they were frequently written off and minimized as unreal experiences.

In actuality, because of its degree of immersion and realism, sexual violence in the metaverse has the potential to evoke strong emotions just as real-life sexual violence encounters.<sup>17</sup> In doing so, even if a person's physical body may not be touched, virtual reality elicits the same psychological, emotional, and physical response. People who encounter sexual violence in the metaverse could react to it like they would in real life—for example, by raising their pulse rate—exhibiting similar fight-or-flight reactions.<sup>18</sup> In addition to the psychological damage brought on by the event itself, people like Patel have been the target of offline threats against their lives, including rape and death. Thus, even when people are not online, these kinds of traumatic metaverse events may still have an impact on their physical and psychological health

Emotions are felt through one's avatar when interacting with non-immersive media, creating a psychological and physical barrier between the person and avatar.<sup>19</sup> However, because users now directly experience these emotions from a first-person embodied perspective, sexual abuse in the metaverse may cause psychological damage.

Associate Professor Jesse Fox of Ohio State University claims that people who strongly identify with their avatars and authentically represent themselves would feel violated when their avatars are abused, and it would be comparable to sexual violence in real life.

According to earlier studies on sexual assault in virtual reality, there may be a lasting effect on the victim's unpleasant emotional responses and sensation of presence following the virtual encounter.<sup>20</sup> The results imply that sexual aggression experienced in the metaverse through virtual reality may intensify fear and anxiety

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<sup>16</sup> Rachel Killean, Anne-Marie McAlinden, et.al, “Sexual Violence in the Digital Age: Replicating and Augmenting Harm, Victimhood and Blame” *Social and Legal Studies*, (2022) available at: <https://doi.org/10.1177/09646639221086592>. (last visited on February 15, 2025).

<sup>17</sup> Sexual violence in the metaverse has a real-world impact on victims, Equality Now (2024) available at: [https://equalitynow.org/press\\_release/sexual-violence-in-the-metaverse-has-a-real-world-impact-on-victims/](https://equalitynow.org/press_release/sexual-violence-in-the-metaverse-has-a-real-world-impact-on-victims/). (last visited on February 15, 2025).

<sup>18</sup> Yogesh K. Dwivedi, Nir Kshetri, et.al. “Exploring the Darkverse: A Multi-Perspective Analysis of the Negative Societal Impacts of the Metaverse” *Information Systems Frontiers*, (2023), available at: <https://link.springer.com/article/10.1007/s10796-023-10400-x>. (last visited on February 15, 2025).

<sup>19</sup> Rivu Radiah, Daniel Roth, et.al. “The Influence of Avatar Personalization on Emotions in VR” *Multimodal Technologies and Interaction*, available at: [https://www.researchgate.net/publication/369686360\\_The\\_Influence\\_of\\_Avatar\\_Personalization\\_on\\_Emotions\\_in\\_VR](https://www.researchgate.net/publication/369686360_The_Influence_of_Avatar_Personalization_on_Emotions_in_VR). (last visited February 15, 2025).

<sup>20</sup> John Danaher, “The ethics of Virtual Sexual Assault” available at: <https://philarchive.org/archive/DANTEO-27>. (last visited on February 15, 2025).

reactions, potentially leading to serious suffering and psychological damage for the user. Because haptic technology allows users to feel tactile input, it may result in increased psychological damage. Sexual trauma involving physical contact has been linked to increased anxiety and avoidance of being touched by others in comparison to non-physical sexual trauma (such as verbal sexual harassment) (Christensen, 2016). Furthermore, even if both groups endure terrible outcomes, victims of contact sexual trauma have reported more impairment to their everyday functioning than victims of non-contact sexual trauma. Pinchevsky and colleagues, 2019). Therefore, these results imply that touch is important in trauma.

### **ESTABLISHING SEXUAL OFFENCES IN METAVERSE: LEGAL DIFFICULTIES**

It is difficult to comprehend crimes in the Metaverse because this is a constantly changing field and there is no set definition for this avenue, making it difficult to classify them under the statutory definition of a crime. The issue will remain unresolved until the statute contains the necessary components to designate a metaverse offense. Since the metaverse is a global place, crimes committed there cannot be covered by local laws because the victim and the perpetrator may be subject to separate laws. Women experience a significant amount of verbal and nonverbal harassment online. This abuse occurs all over the internet. Sexual offenses are now frequently discussed as a major problem in social virtual reality. Female user voices and avatars are examples of how virtual reality is bringing out the bodies of women in the virtual world. Sadly, because of this gender-biased perception of individuals, women are more likely to experience unwelcome sexual attention or other virtual interactions in virtual reality locations. Unwanted virtual groping, non-consensual sexual behaviors, and accounts of rapes and other acts of sexual violence are the primary dangers to women's physical safety.

Therefore, it would be more regionally particular to apply the meaning of rape in cases of sexual harassment in the metaverse as specified in Section 375 of the Indian Penal Code 1860. Furthermore, the penalties for rape vary from nation to nation, as does the definition of the crime. Therefore, it may be difficult to prosecute a cross-border offender due to the states' legal principles being violated, which may work to the offender's advantage.

Under Section 67 of the Information Technology Act, which lists the penalties for publishing any obscene material via electronic form, if we consider a man posting any obscene or defamatory content in the virtual platform with the intention of harassing a woman, it will be considered a crime. Furthermore, Sections 67A<sup>21</sup> and 67B<sup>22</sup> of the Information Technology Act specify guidelines for the electronic transmission of sexually explicit acts and the transmission of content featuring minors performing explicit acts, respectively.

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<sup>21</sup> Information Technology Act, 2000 (Act 21 of 2000) s. 67A.

<sup>22</sup> Information Technology Act, 2000 (Act 21 of 2000) s. 67B.

Other legal measures that could be helpful in these kinds of situations include The Indian Penal Code, 1860, which, while being an ancient legislation, is making every effort, with the Supreme Court's assistance, to adapt its provisions to the contemporary circumstances. Clauses such as Section 354 (A) (I) and Section 294. Furthermore, according to The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013<sup>23</sup>, an employee is defined as any person employed at a workplace for any work on a regular, temporary, ad hoc, or daily wage basis, either directly or through an agent, including a contractor, with or without the principal employer's knowledge, whether for remuneration or not, or working on a voluntary basis or otherwise, regardless of whether the terms of employment are stated explicitly or implicitly. This includes coworkers, contract workers, probationers, trainees, apprentices, or by any other similar titles. However, the point of concern is there isn't a special legal mechanism which helps in combatting virtual rape in the metaverse. India still lags behind in developing stringent laws on such technologies which turn malignant from time to time. The Information Technology Act, 2000 which is the pioneer Act in combatting cybercrimes, doesn't defines what constitutes a 'cybercrime'. The current IT law is not in sync with the present technological advancements.

Its paramount to understand and ensure the dignity and safety of the women in the cyberspace. There isn't a provision which combats crimes committed in metaverse. The idea behind the topic is to make a policy for ensuring gender justice and establishing feminist jurisprudence. The European Union came out with the Digital Services Act 2022 which bars the distribution of the content in the online world.<sup>24</sup> The EU has also introduced the world's first proposed Act on Artificial Intelligence. However, it's pertinent to understand while regulating the framework of AI, there is a requirement to inject standards as AI is dynamic and keeps transforming daily basis. Hence, the moment the legal framework is in place it becomes defunct due to updating technology. The Bhartiya Nyaya Sanhita, 2023 which is expected to replace Indian Penal Code, 1860 with effect from 1<sup>st</sup> July 2024 also is silent on provisions related to crimes committed in metaverse.<sup>25</sup> Also, it's important to understand the degree of harm principle when a woman is a victim of such offences. There isn't a physical harm or bodily pain affecting the women. However, harm principles extend to violation of privacy and tarnishing of the reputation. We are staying in an era of misinformation and disinformation. Metaverse rape is an emerging area of criminality which requires a wake-up call.

Metaverse is an arena where women have been exposed to various sexual offences such as groping, cyber bullying and harassment. As per the report of '*Sexual Violence and Harassment in the Metaverse: A New Manifestation of Gender-Based Harms*' states that woman is under the grip of technology facilitated gender-based violence. It calls for extending the current legislation to the metaverse arena. Article 08 of the Council

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<sup>23</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (Act 14 of 2013).

<sup>24</sup> Digital Services Act, 2022.

<sup>25</sup> Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023).

of Europe Convention on Data Protection remains pertinent, as it states privacy protection should be at the epitome as there are high chances that cybercriminals may attack by remaining anonymous identity.

Another important issue is the legal personality of digital avatars in the metaverse. If a crime is committed by the digital person in the metaverse then the question of liability and prosecution crops up. As far as the privacy of the data is concerned, the current technology is not fully equipped in combatting the crimes committed in metaverse as the technology changes on an everyday basis.

With respect to children’s rights, children explore various immersive technologies in the metaverse via Virtual reality (VR) and Augmented reality (AR) such as games, chats and interact with anyone without any restrictions. But having said that, no restrictions pose a great challenge for the children’s safety and security. As per the guidelines of the United Nations Convention on Rights of Child and the Lanzarote Convention, the safety of the child should be given paramount consideration in the digital environment and protecting them from legal injury. If the child is spending a lot of time in the metaverse environment, it can result into motion sickness, insomnia and sedentary lifestyle. Cyber bullying is also reported amongst the children, which has profound psychological implications such as anxiety and depression.<sup>26</sup>

The existing laws, rules and regulations are not adequate to combat the sexual crimes committed in the metaverse platforms. In India, the pioneer law to combat the cybercrimes is the Information Technology Act, 2000. However, when this law came into existence it primarily deals with e-commerce. The term ‘cybercrime’ isn’t defined in the said Act and only a handful of crimes are mentioned in IT Act, 2000. Our country doesn’t have laws on Artificial intelligence and the metaverse, hence, it isn’t creating a deterrent effect in society.

Recently, the European Union became the first organization which has adopted and has given the final nod to the Artificial Intelligence Act, 2024. But, since the technology of AI and metaverse is changing on everybody’s basis, we need to inject standards to be in sync with contemporary times.

<p><b>Limiting access</b></p>	<ul style="list-style-type: none"> <li>• Ensure your child is old enough to be on the metaverse platform/app or uses the device under close supervision</li> <li>• Consider signing out of your metaverse account when not in use</li> </ul>
<p><b>Acquiring knowledge</b></p>	<ul style="list-style-type: none"> <li>• Important for parents to be aware of their children’s online activity</li> <li>• Remain informed about the metaverse, virtual reality devices, and</li> </ul>

<sup>26</sup> Charissee L Nixon, “Current perspectives: the impact of cyberbullying on adolescent health” *Adolesc Health Med Ther* (2014), available at: <https://doi.org/10.2147/AHMT.S36456>. (last visited on February 15, 2025).

	<p>the games your child or teen is interested in (including available privacy controls, reporting features, and blocking tools)</p> <ul style="list-style-type: none"> <li>• Have your child cast their activity in the metaverse onto another phone or laptop screen making it possible for parents to supervise children’s activity.<sup>27</sup></li> </ul>
<b>Maintaining communication</b>	<p>Have regular conversations with children and teens about their experience in the metaverse and online safety</p> <ul style="list-style-type: none"> <li>• Talk with your child about the apps being used, potential risks, and what they could do to protect themselves</li> <li>• Educate your child that not everyone in the metaverse may be who they claim to be.</li> <li>• Discuss with your child how to get out of uncomfortable situations. The immersive nature of the metaverse might make it more difficult for youth to leave a situation or conversation.</li> <li>• Reinforce that you are available for support if your child needs help, is upset, or has an uncomfortable experience in the metaverse.</li> </ul>

*Table 2. Tips for parents to help children better protect themselves in the metaverse*

## CONCLUSION

Even while the metaverse is still relatively new, there are more and more allegations of sexual assault taking place there. Although the prevalence of sexual abuse in the metaverse is probably the same as it is on other online platforms, the increased immersion and realism provide worrying psychological ramifications, particularly for younger victims. In order to lessen this growing hazard, it is imperative that users, educators, parents, and legislators take prompt action and implement adequate preventive and remedial measures. The Metaverse is no longer a far-off hypothesis; first, it is here to stay; second, it will continue to grow; and third, it will continue to evolve as new obstacles arise in its path. As a result, the researcher thinks it is still very unlikely that such illegal operations might be established in virtual reality. Metaverse has helped a lot of

<sup>27</sup> Metaverse for Kids: Everything That Parents Need To Know in 2025, *JET Learn* (2024), available at: <https://www.jetlearn.com/blog/metaverse-for-kids>. (last visited on February 15, 2025).

people, but its aftereffects have also had an impact on society as a whole. The concept of sexual harassment has spread beyond the public or workplace to the realm of virtual reality, such as Metaverse. This further dims the prospects for equality and Life, which is a life free from sexual harassment. Therefore, it is crucial that academics, lawyers, and legislators handle mitigating virtual reality designs in the Metaverse. Let's use this statement to navigate the laws toward the realm of virtual reality and demonstrate how technological advancements directly contradict rather than coincide with anti-sexual harassment regulations. As a result, the researcher is able to draw the conclusion that the hypothesis, which they had before starting their investigation, is valid and can be further refined.

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**LEGAL FRAMEWORK FOR PROTECTING THIRD GENDER RIGHTS IN INDIA:  
ISSUES AND CHALLENGES***Swechha Malik\****ABSTRACT**

*There have been incidents of both verbal abuse as well as physical violence against third gender people. The third gender kids are harassed by their classmates at the school, and they are not treated equally like other students. They also encounter problems within the healthcare sector of the nation, since doctors refuse to provide medical treatment to them due to their gender identity. The goal of the paper is to catalogue and examine the different obstacles and difficulties that transgender people in India encounter, such as violence, exclusion from mainstream society, prejudice, and social stigma. The author has analysed the merits, demerits, and shortcomings of Transgender Persons (Protection of Rights) Act, 2019. A principal aim of the research is to conduct a critical analysis of legal cases and ensuring that the legislative and policy measures which are intended to safeguard the rights of transgender persons in India are followed in letter and spirit. The Transgender Persons Act, 2019 does not adequately address several related rights, such as marriage and adoption rights. The Act imposes a maximum prison sentence of two years together with a fine, which seems inadequate for prevention of serious crimes like violence and sexual abuse of third gender people in our country. There is a need of providing free education up to the twelfth grade for transgender kids. Strict legal measures must be taken in the case when derogatory remarks or dishonourable statements are made against third gender people. Doctors and other medical professionals have a responsibility to cater to the special requirements of transgender individuals. There is a requirement of creating public awareness about the difficulties faced by the third gender people.*

**Keywords:** Third Gender, Transgender, Equality, Fundamental Rights, Gender Identity.

## INTRODUCTION

Transgender persons are individuals whose identities deviate from the conventional gender norms that exclusively classify individuals as either male or female.<sup>28</sup> They have experienced stigma, societal oppression, and physical and sexual abuse as a result of refusal by society to acknowledge their gender identities.<sup>29</sup> The Indian legal system has undergone a substantial socio-legal transformation with the recognition of the rights of the third gender. People who identify as third gender have long struggled with stigmatization from the society and legal invisibility as a result of being historically marginalized and misunderstood. Recently implemented social and legislative reforms have the goal of removing these barriers and paving the way for a society that is more equal and welcoming to people of all backgrounds.

## POSITION AND PLACE OF THIRD GENDER IN INDIAN SOCIETY: HISTORICAL PERSPECTIVE

The concept of the 'third gender' is intimately woven into the fabric of Indian Civilisation, which includes its cultural beliefs, religious practices, and social structure.<sup>30</sup> A unique position has been held by the hijras or the third gender over the course of history.<sup>31</sup> This position has varied between respect and marginalisation. The Mahabharata, one of India's great narratives, features figure such as 'Shikhandi' who was a woman that has transformed into a man. It also mentions the character of 'Brihannala' who was Arjuna's eunuch manifestation. These stories show that society accepts the third gender during ancient time by treating them as normal human beings and by assigning them significant responsibilities. The character of 'Shikhandi' who was a warrior of significant importance in the Kurukshetra battle in the Mahabharata, is sometimes regarded as a figure belonging to a third gender. Shikhandi, a character that exemplifies the flexibility of gender roles, was born as a 'female' but subsequently took on the personality of a 'male' in order to accomplish a certain purpose. Medieval temples, such as those in Khajuraho, have engravings of hijras, suggesting their integral role in society. Throughout the Middle Ages, the 'third gender' occupied a multifaceted position inside the royal courts, particularly during the Mughal period.<sup>32</sup> Frequently, hijras were assigned the roles of trust and power as counsellors, and harem guards.<sup>33</sup> The advent of British colonisation in India resulted in a significant transformation in the perception and treatment of the third gender.<sup>34</sup> In comparison to the rigid Victorian moral

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\* Research Scholar, Department of Law, Central University of Haryana, Mahendergarh.

<sup>28</sup> Saumya Agarwal, "What are the Rights of Transgender in India" *iPleaders*, October 23, 2015, *available at*: <<https://blog.iplayers.in/legal-rights-of-transgender-india/>> (last visited on August 29, 2024).

<sup>29</sup> *Ibid*

<sup>30</sup> Dipika Jain and Kimberly M. Rhoten, "Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism" 26 *Journal of Human Values* 30-49 (2020).

<sup>31</sup> *Ibid*

<sup>32</sup> M. Michelraj, "Historical Evolution of Transgender Community in India" 4 *Asian Review of Social Sciences* 18 (2015).

<sup>33</sup> *Ibid*

<sup>34</sup> Bandana Meher and Arun Kumar Acharya, "De-Identifying the Distressed in the Transgender Community Related to Their Identity Formation and Discrimination in India" 6 *Genealogy* 92 (2022).



norms enforced by the British, Indian rituals exhibit greater inclusivity and flexibility.<sup>35</sup> The third gender faced institutional marginalisation throughout this period.

## **RIGHTS OF THIRD GENDER IN INDIA: ISSUES AND CHALLENGES**

The discrimination against third gender in educational institutions is prevalent in our country. The third gender kids are harassed by their classmates at the school, and they are not treated equally like other students.<sup>36</sup> They also encounter problems within the healthcare sector of the nation, since doctors refuse to provide medical treatment to them due to their gender identity.<sup>37</sup> There have been incidents of both verbal abuse as well as physical violence against them. Instances of suicide are frequently observed within the transgender population. They are frequently subjected to a great deal of inequality by the society which leads them to resort to suicide to escape the situation. It has been observed that third gender people are compelled to engage in prostitution.

Another significant problem faced by third gender people is poverty.<sup>38</sup> This problem arose due to the lack of educational training among these individuals, as they faced restrictions in accessing and registering for primary educational institutions. Their employment prospects are quite limited as they were not integrated into the society by the people. Due to their extreme poverty, they faced significant challenges in procuring food for two times in a day. They were compelled to either pursue prostitution or resort to begging or dancing at small events in order to sustain themselves and generate income for themselves.<sup>39</sup>

Third gender people are being denied entry into public places and religious places which is clearly inhumane but it is still carried out by the society.<sup>40</sup> They are subjected to verbal insults, unwarranted beatings, and exclusion from the society.<sup>41</sup> The act of referring a third gender person as a 'non-human' and subjecting him to physical violence for the same purpose is inherently inhumane.<sup>42</sup> There is a large amount of discrimination directed towards transgender individuals in public venues like restaurants, movie theatres, and shopping malls.<sup>43</sup> They frequently confront a significant challenge in terms of access to public restrooms or toilets. There

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<sup>35</sup> Dr. Neena S. Sawant, "Transgender Status in India" 1 *Annals of Indian Psychiatry* 59 (2017).

<sup>36</sup> Rashi Sharma, "Transgender and Rights of Transgender" *iPleaders*, June 27, 2020, available at: <https://blog.iplayers.in/transgender-rights-transgender/> (last visited on August 29, 2024).

<sup>37</sup> Sireesha Jaddidi and Gunjan Sharma, "Position of Transgender in Contemporary India: An Analytical Study" 4 *International Journal of Law Management and Humanities* 2754 – 2768 (2021).

<sup>38</sup> Dipayan Chowdhury and Atmaja Tripathy, "Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India" 3 *BRICS Law Journal* 43-60 (2016).

<sup>39</sup> Dipali A. Purohit, "Third Gender & Marriage" 6 *International Journal of Creative Research Thoughts* 302 (2018).

<sup>40</sup> G.K. Venugopal, "A Sociological Study of Third Gender Community in India: Special reference to Mysore District of Karnataka" 10 *Journal of Research in Humanities and Social Science* 38-41 (2022).

<sup>41</sup> Dr. Dilip Pandey, "Protection of Rights of the Third Gender Persons in India" 10 *International Journal of Scientific and Research Publications* 133-138 (2020).

<sup>42</sup> Akanksha Mishra, "Third Gender Rights: The Battle for Equality" 5 *Christ University Law Journal* 9-21 (2016).

<sup>43</sup> Abhinav Kumar, "Non-Recognition of Third Gender: A Failure of Indian Legislation" 4 *International Journal of Law Management and Humanities* 121-131 (2021)

are no separate restrooms or toilets that are specifically designated for transgender people, so they are forced to use the restrooms or toilets that are reserved for men. This puts them at the risk of being sexually assaulted or harassed.

One of the myriad challenges faced by the transgender individuals is homelessness due to the lack of housing options available to them.<sup>44</sup> They are compelled to live on urban streets due to their eviction from their residences for being transgender. They also leave their homes as a means of escaping from an abusive environment. Homeless same-sex couples do not have access to family lodging across the country because no one wants to even let out their house to the homosexuals.

### **CONSTITUTIONAL AND LEGISLATIVE SAFEGUARDS TO THIRD GENDER IN INDIA**

The Indian Constitution establishes a robust framework for safeguarding the fundamental rights of the third gender, including non-discrimination and equality.<sup>45</sup> The Constitution protects right of third gender people to live a dignified life by outlawing discrimination based on their gender and sexual orientation.<sup>46</sup> The third gender community has historically experienced systemic discrimination and exclusion, despite these constitutional guarantees.<sup>47</sup>

A major piece of legislation that addressed the rights and welfare of transgender people is the Transgender Persons (Protection of Rights) Act, 2019. The Act guarantees equality in the workplace and in education, acknowledges transgender identity, and forbids discrimination.<sup>48</sup> The Act provides a definition of ‘transgender people’ and outlaws discrimination against them in the workplace, in the healthcare system, and in other contexts.<sup>49</sup> Additionally, it offers welfare benefits like social security, healthcare, and educational opportunities. According to the Act, the Central Government is required to establish a National Council for Transgender Persons (NCT) in order to provide guidance, monitor and analyse the policies that pertain to transgender individuals.<sup>50</sup> Another function of the Council is to address the grievances of transgender individuals.<sup>51</sup> The Statute now includes offences such as coercing transgender people into labour, denying access to public facilities, engaging in mental, physical, and sexual abuse, and other connected offences.<sup>52</sup> The

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<sup>44</sup> Madhubrata Mohanty, “Recognition of a Third Gender-A Way Forward” 3 *Global Journal for Research Analysis* 154-156 (2014).

<sup>45</sup> The Constitution of India, art. 14.

<sup>46</sup> Akash Kori, “Laws for third gender in India - Section 377 and the debate” *iPleaders*, August 8, 2018, available at: <https://blog.ipleaders.in/laws-relating-to-third-gender/> (last visited on August 29, 2024).

<sup>47</sup> Nidhi Verma, “Legal Status of Third Gender in Our Society” 9 *International Journal of Current Advanced Research* 21466-21468 (2020).

<sup>48</sup> The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019).

<sup>49</sup> Ishikaa Seth, “Transgender Persons (Protection of Rights) Act, 2019 and its impact on the third gender” *iPleaders*, December 19, 2021, available at: <https://blog.ipleaders.in/transgender-persons-protection-rights-act-2019-impact-third-gender/> (last visited on August 29, 2024).

<sup>50</sup> The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s.16.

<sup>51</sup> The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s.17.

<sup>52</sup> The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s.18.

Act prescribes punishment for these offences to create deterrence among the wrong-doers.<sup>53</sup>

The Transgender Persons Act is ineffective as it does not adequately address several related rights, such as marriage and adoption rights. This is a missed chance to enhance its comprehensiveness. The Act imposes a maximum prison sentence of two years together with a fine, which seems inadequate for prevention of serious crimes like violence and sexual abuse of third gender people in our country. Committing a similar offence against a cisgender individual may result in a sentence of life imprisonment or, in certain cases, even capital punishment. The implementation of less severe penalties perpetuates the existing disparities among the transgender population and makes their situation even worse. The Act has only resulted in the formation of a National Council. On the other hand, state councils should also be established. The transgender persons are dispersed over the entire nation. So, it is not possible for them to approach a body in Delhi every time in order to voice their complaints.

### **ROLE OF JUDICIARY TOWARDS PROTECTION OF RIGHTS OF THIRD GENDER**

In “*National Legal Service Authority v. Union of India (NALSA)*,”<sup>54</sup> the third gender was officially recognised by the law. The Hon'ble Supreme Court held that the third gender category have the same fundamental rights which are available to men and women. An equal treatment should be extended to them in a manner consistent with the treatment afforded to males and females. The Court upheld the fundamental rights guaranteed by the Constitution to transgender people and acknowledged their right of self-determination of their gender identity. The Court ordered that the third gender category must be provided on all official government documents, including PAN cards, ration cards, passports, and other such documents. The Court observed that the transgender community have been subjected to injustice for generations. They have the full right to receive the benefits of all projects and programmes that have been created by the government for the public. The Supreme Court observed that the recognition of transgenders as a ‘third gender’ will safeguard their basic human rights.

As a result of the *NALSA* case, the idea that the third gender is a separate category gained importance. It is imperative to acknowledge that the transgender community has experienced prolonged periods of suffering, humiliation, and anguish. They remained silent and faced hardship, but ultimately, as a result of this verdict, the state of the transgender community has improved. This ruling has a significant influence not just within the borders of India but also on a global scale. A significant violation of human rights occurs when members of the transgender community are prevented from participating in the society. India adheres to a democratic system that encompasses all individuals, regardless of their physical or mental state. If we adhere to the requirements of the Rule of Law, then it is imperative that all individuals must receive equal treatment and legal protection of their fundamental rights.

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<sup>53</sup> *Ibid*

<sup>54</sup> (2014) 5 SCC 438.

In “*Ganga Kumari v. State of Rajasthan*,<sup>55</sup>” the petitioner Ganga Kumari, a transgender, was initially chosen for the vacant position of female constable. But the selectors rejected her based on the medical test rendering her ineligible for the job. In the Court, she contended that her rejection was a result of gender-based discrimination, which is both legally and morally wrong. It is important to note that the phrase ‘person’ has been used in both Article 14 and Article 21. It is clear that this gender-neutral expression pertain to human beings. In light of this, the term ‘person’ includes transgender people within their ambit and are not restricted to either the male or female gender. The ruling established that ‘gender identity’ is a fundamental aspect of sexuality, and individuals including those who identify as third gender, cannot be subjected to any kind of discrimination based on their ‘gender identity’. The Court further determined that Ganga Kumari possesses the right to establish a ‘Self- Identity’ in relation to her gender and should be re-employed again for the position. The Hon’ble Supreme Court in “*Navtej Singh Johar v. Union of India*,<sup>56</sup>” ordered for decriminalisation of Section 377 of IPC to some extent. The Court held that the private sexual practices of the homosexual couple, when conducted consensually, do not result in harm to any third party or pose any societal risks. The determination of whether a provision of an Act infringes upon fundamental rights should be guided by ‘constitutional morality’ rather than ‘societal morality.’ The Court also observed that the arbitrary nature of this clause is evident in its failure to differentiate between consensual and non-consensual sexual actions. Justice Deepak Mishra relied on ‘transformative constitutionalism’ and held that Constitution must guide the transformation of society from an archaic to pragmatic society where fundamental rights of every human being is fiercely guarded. As a consequence of this decision, homosexuals are now able to live in an environment that is more respectful of their own dignity and are able to openly express themselves. The judgement is in consonance with the notion of progressive society.

In the case of “*Jasmine Kaur Chhabra v. Union of India*,<sup>57</sup>” a public interest litigation (PIL) was submitted with the intention of drawing attention to the fact that the transgender community do not have access to adequate public bathrooms or toilets. Transgender people possess the right to have different toilets from men and women since they are now seen as a third gender. In this particular case, the Delhi High Court issued an order to the government directing them to construct such toilets within the allotted time.

In “*Supriyo @ Supriya Chakraborty v. Union of India*,<sup>58</sup>” it was held that the Judiciary does not have the authority to legalise same-sex marriages as they are unable to interfere in the functioning of the Legislature. The Judiciary is prohibited from legalising or interpreting language in a manner that deviates from its intended purpose. Its role is limited to interpreting the law, not creating it. The Court ordered the Central Government to establish a committee with the purpose of addressing the marriage related issues raised by same-sex couples. Furthermore, the Court affirmed that couples who identify themselves as LGBT, are not eligible to adopt

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<sup>55</sup> Writ Petition (Civil) No. 14006 of 2016 decided on November 13,2017.

<sup>56</sup> AIR 2018 SC 4321.

<sup>57</sup> Writ Petition (Civil) No. 2997/2021 decided on May 13,2024.

<sup>58</sup> *Supriyo @ Supriya Chakraborty v. Union of India*, Writ Petition (Civil) No. 1011 of 2022 decided on October 17,2023.

children.

The ruling in *Supriyo @ Supriya Chakraborty* case which was decided in 2023 is a backward step towards realization of human rights of transgender people in our country. The idea of ‘constitutional morality’ means that no person can be discriminated on the basis of sexual orientation. It is different from ‘public morality’ which imposes the notion of majority of the people in the society about the morality of a particular action. It can be argued that ‘constitutional morality’ is clearly ignored by the Supreme Court in this case. The primary objection raised in the Court against legalising of the same-sex marriages was the potential instability in the society. It was also argued that India is not adequately prepared for such legislation and that it will contradict the cultural values prevalent in the society. This is clearly the act of imposition of ‘public morality’ on the LGBTQ community. An action cannot be prohibited on the ground that it is considered as ‘immoral’ by the majority of the people. Earlier the practice of Sati was prevalent in our country and was considered as right by the majority of the people. But law was used as a weapon to prohibit this inhumane practice and bring social transformation. In a similar way, there is a need of introducing entirely novel and gender-neutral legislations pertaining to same-sex marriages in India. The fundamental right to choose one's spouse is vested in every adult which is ignored in this ruling.

## CONCLUSION AND SUGGESTIONS

India has made great strides in formally respecting and safeguarding the rights of the third gender, but more has to be done to enable society to embrace these rights. The real change depends on the prevailing attitudes of society and the proactive implementation of these legislative safeguards. It is very important to recognise third gender identities if we want to make a society that is more equal and fairer for everyone. In order to challenge conventional ideas of gender and work towards establishing environment where everyone can live authentically and without facing discrimination, we must first acknowledge the diversity of gender experiences and identities. The implementation of education and awareness-raising initiatives is crucial for removing misconceptions and promoting tolerance and acceptance of various gender identities. Educational institutions, workplaces, and healthcare institutions have a significant obligation to provide inclusive environments that enable individuals to freely express their gender identity without apprehension of violence or prejudice.

- There is a need of providing free education up to the twelfth grade for transgender kids.
- Promote mutual respect among students and implement stringent measures to combat harassment of third gender people.
- Inform the police about the harassment and discrimination faced by the transgender community. This will help in resolving the problems encountered by these people. Strict legal measures must be taken in the case when derogatory remarks or dishonourable statements are made against third gender people.
- It is important that matters pertaining to human rights of third gender people be brought to the attention of the public through the media and other public platforms in order to increase public awareness and

improve the knowledge of third gender individuals to exercise these rights. We must put an end to the stigmatisation of third gender people.

- Doctors and other medical professionals have a responsibility to cater to the special requirements of transgender individuals.
- There is a requirement of creating public awareness about the difficulties faced by the third gender people. There is a need for more education among the members of the society on the acceptance of children with gender differences. The equitable treatment of the third gender individuals is necessary for the effective implementation of laws, policies, and programmes. The creation of ‘friendly’ environment for the all-round development of third gender people will help them to live a dignified life.
- It is necessary to determine whether the rules and policies formulated by the legislature and executive are properly implemented or not.
- The provision of free legal aid to third gender people is recommended to enhance the quality of their social lives.
- The education sector, including schools and colleges, should actively help third gender kids to ensure that they receive equal treatment and value in the society.
- There should be more laws that deal with the health care problems faced by third gender people.
- Lack of knowledge about the issues faced by the transgender people around the world is a big problem that needs to be redressed by giving more information to the public about their human rights.
- Establish Commissions or Specialised entity tasked with supervising the implementation of legislation concerning third gender rights and providing practical remedies in case of legislative violations.

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# CHALKING OUT A SKELETON FOR STATE AID REGULATIONS UNDER THE INDIAN COMPETITION LAW FRAMEWORK

Divyansh Morolia<sup>59</sup> & Kumkum Suneja<sup>60</sup>

### ABSTRACT

*The concept of State Aid in Indian competition law jurisprudence has remained absent, thereby arising the need to incorporate certain substantive provisions in regard thereof. This paper undertakes an interdisciplinary approach to identify the rationale behind the grant of “specific” aids by the State and their deleterious impacts on the market.*

*Accordingly, the paper indicates some conceivable effects of such aids on both domestic and international competition, also triggering the international trade and investment law regime. Subsequently, the paper references some contemporary industry practices and evaluates the (ab) use of such aids by corporations to initiate monopolistic trends.*

*Thereafter, the paper explores the scheme of existing laws on such state actions in countries such as Brazil and Australia, and those including constitutional and trade law provisions in India, that presumably take cognizance of such situations. It then argues how the current legal apparatus stands insufficient for the provision of requisite reliefs to parties challenging such actionable grants.*

*Subsequently, it substantiates the need for a separate mechanism to tackle such aids under the Indian Competition law to render both ex-post and ex-ante remedies, with specific reference to the European Competition law which comprehensively accommodates state aid regulations under its anti-trust provisions.*

*Conclusively, the paper endeavours to engineer a characteristic model for a legal-regulatory framework in India, inspired by but distinct from European law. The proposed template aims to embody the particularities of the Indian landscape in fulfilling the paired objectives of preventing distortive state measures as well as protecting a single integrated market.*

**KEYWORDS:** Globalisation, International Trade Law, Competition Commission, Trade law.

<sup>59</sup> Student, National Law Institute University Bhopal

<sup>60</sup> Student, National Law Institute University Bhopal

## A PREMIER ON STATE AID

State aid refers to the benefits transferred to a particular entity, or a group of entities, by the government, using public resources.<sup>61</sup> This includes direct benefits, in terms of grants, cash transfers, etc., as well as indirect benefits such as subsidies, tax benefits, and the sale/purchase of assets by the government at a favourable rate.<sup>62</sup> “State aid” may be granted in favour of a whole sector of the economy and the players falling therein, for instance, the aid rendered by the Indian government to the agricultural sector.<sup>63</sup> It also includes benefits transferred to certain specific entities/corporations or a group of corporations, like the government subsidies provided to TATA Motors.<sup>64</sup> This type of aid offered in favour of certain specified players is called “selective aid”, and is often considered to be distortive of the competition in the market.<sup>65</sup> This section thus focuses on the concept of state aid in general, the motive underlying the same, and its consequential effects on the market dynamics.

Erstwhile colonies, such as India, were faced with the challenge of developing secondary and tertiary sectors in order to survive the economic crisis faced in the initial years of independence.<sup>66</sup> Consequently, a protectionist regime was constructed with the extension of aid by the government to local industries, to help them rise against their foreign counterparts.<sup>67</sup> However, as the world metamorphosed towards globalisation, these state aids were derided by international players, like organisations such as the World Trade Organisation (“WTO”) which aimed to eliminate these state measures to ensure equitable international competition.<sup>68</sup> However, even presently, states are nonetheless inclined to grant aid, specific as well as sectoral.<sup>69</sup> This can be explained by political incentives or even purely economic reasons.

Although, national governments are encouraged to abide by international agreements acting against “state aid”, they are often faced with what may be regarded as the “prisoners dilemma”. In weighing the reciprocal benefits of all member states to such agreements *vis-a-vis* the competitive advantage bestowed on national

<sup>61</sup> Péter Staviczky, ‘Cumulation of State Aid’ (2015) 14(1) European State Aid Law Quarterly 117.

<sup>62</sup> Vincent Verouden, ‘EU State Aid Control: The Quest for Effectiveness’ (2015) 14(4) European State Aid Law Quarterly 459.

<sup>63</sup> Ministry of Agriculture & Farmers Welfare, Government of India, ‘Assistance to Farmers affected by Floods and Covid-19 Pandemic’ (2021) <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1697514>> accessed 8 March 2023.

<sup>64</sup> Romita Datta, ‘West Bengal’s costs to retain Tata Nano beginning to mount’ (*Mint*, 16 September 2008) <<https://www.livemint.com/Politics/XEPNHMHIDW0KLEFXcmSjeK/West-Bengal8217s-costs-to-retain-Tata-Nano-beginning-to-m.html>> accessed 8 March 2023.

<sup>65</sup> Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law* (7th edn, Oxford University Press 2019).

<sup>66</sup> Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (Macmillan, 2007).

<sup>67</sup> John Toye, ‘Political Economy and the Analysis of Indian Development’ (1988) 22(1) *Modern Asian Studies* 97.

<sup>68</sup> WTO, ‘History of the Multilateral Trading System’ (*World Trade Organisation*) <[https://www.wto.org/english/thewto\\_e/history\\_e/history\\_e.htm](https://www.wto.org/english/thewto_e/history_e/history_e.htm)> accessed 8 March 2023.

<sup>69</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.



firms as a result of such aids,<sup>70</sup> the governments often end up choosing the latter, for instance in the European subsidies granted to Airbus.<sup>71</sup>

With regards to their influence on the market, “State aid” often has positive impacts on the market, such as the grants provided to bail out certain high-potential corporations undergoing financial crunches that can actually prevent a market crisis.<sup>72</sup> However, at times, these aids may result in deleterious ramifications not just on competition, but on the market structure in general. Providing grants to low-performing firms can disincentivize efficient firms from rendering their best.<sup>73</sup> It can also lead to capital misallocation, subsequently causing reduced total production.<sup>74</sup>

### **SELECTIVE AID: A CONCUSSION IN THE MARKET**

“Selective aids” refer to the specific aids granted by the government in favour of certain entities which, in most cases, are corporations.<sup>75</sup> Such aids, given only to certain specific players, place them in an advantageous stance as compared to their counterparts. Governments across nations are motivated by several factors for providing such aid.

In some cases, there exist political considerations behind such state actions; Directors and CEOs of certain corporations/entities might have personal associations among political leaders with vested interests, who issue state grants in favour thereof.<sup>76</sup> Furthermore, state governments in federal nations often tend to compete with each for attracting better investments and thus, attempt to provide exorbitant subsidies and grants to certain corporations as incentivizes to set up plans in their respective states. Such instances have become common, including in India, where for instance the West Bengal government granted inordinate subsidies to TATA Motors.<sup>77</sup>

In certain cases, the government also grants such aids in favour of state-owned enterprises, rendering them at an advantage relative to their private counterparts, which was evident from the inordinate direct and indirect

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<sup>70</sup> James A. Brander, Barbara J. Spencer, ‘Export subsidies and international market share rivalry’ (1985) 18 *Journal of International Economics* <<https://www.sciencedirect.com/science/article/abs/pii/0022199685900066>> accessed 9 March 2023.

<sup>71</sup> Loren Thompson, ‘European Aircraft Subsidies: A Study of Unfair Trade Practices’ (Lexington Institute 2010) <<https://www.lexingtoninstitute.org/wp-content/uploads/EuropeanSubsidiesBrochureFinal.pdf>> accessed 8 March 2023.

<sup>72</sup> Timothy Besley and Paul Seabright, ‘The Effects and Policy Implications of State Aids to Industry: An Economic Analysis’ (1999) 14(28) *Economic Policy* 14.

<sup>73</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

<sup>74</sup> *Ibid*

<sup>75</sup> Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

<sup>76</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

<sup>77</sup> Romita Datta, ‘West Bengal’s costs to retain Tata Nano beginning to mount’ (*Mint*, 16 September 2008) <<https://www.livemint.com/Politics/XEPNHMHIDW0KLEFXcmSjeK/West-Bengal8217s-costs-to-retain-Tata-Nano-beginning-to-m.html>> accessed 8 March 2023.

benefits provided to state-owned entities, such as Indian Airlines in the earlier years of Indian independence.<sup>78</sup> An additional incentive behind providing selective aid, specifically with the governments of developing nations, might also lie in rendering corporations capable of making investments in foreign nations.<sup>79</sup>

Such steps often lead to complications which can be analysed from an interplay of different legal provisions, including those of international trade and investment law. The competitive gain is apparent from certain instances wherein corporations have utilised such state aids to develop technologies and obtain intellectual property rights there over, consequently establishing a monopoly in the market.<sup>80</sup> Further, subsidies, at times, are also effected through liberalising the labour codes, which helps corporations in cutting down on input costs,<sup>81</sup> in grave violations of the labour laws.

## A DIVE INTO THE EXISTING JURISPRUDENCE CONCERNING “STATE AID”

The following section enumerates the various “laws” that govern the grant of selective state aid and further analyses their violation along with the remedies present therein. It then assesses the insufficiency of these laws in comprehensively addressing the situations arising out of such aids.

### 1. International Trade Law

International trade law takes cognizance of specific state actions affecting international trade. The World Trade Organisation (hereinafter the “WTO”) is the central authority responsible for ensuring the existence of free trade among its members and guaranteeing fair international competition.<sup>82</sup> The Agreement on Subsidies and Countervailing Measures (hereinafter the “SCM”),<sup>83</sup> entered into by the member states, came into force in 1996 and has been governing “specific” state subsidies and aids ever since.<sup>84</sup> The said agreement recognizes direct as well as indirect benefits given to specific industries or sectors of the economy as “subsidies”, and classifies these subsidies into “prohibited” and “actionable.”<sup>85</sup> It takes cognizance of aids that are specifically likely to affect the trade between nations by either providing grants and subsidies to domestic entities engaged in exports or by favouring

<sup>78</sup> Romita Datta, ‘West Bengal’s costs to retain Tata Nano beginning to mount’ (*Mint*, 16 September 2008) <<https://www.livemint.com/Politics/XEPNHMHIDW0KLEFXcmSjeK/West-Bengal8217s-costs-to-retain-Tata-Nano-beginning-to-m.html>> accessed 8 March 2023.

<sup>79</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

<sup>80</sup> Pierre Mathejsin, ‘State aids, state monopolies, and public enterprises in common market’ (1972) 5 *Duke Law Journal* <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3372&context=lcp>> accessed 9 March 2023.

<sup>81</sup> PJ Secki, ‘Seismic Shifts in Indian Labour Laws’ (2015) 50(40) *Economic and Political Weekly* 19.

<sup>82</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021).

<sup>83</sup> Subsidies and Countervailing Measures 1996 (WTO).

<sup>84</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021).

<sup>85</sup> Subsidies and Countervailing Measures 1996, Art. 3 (WTO).

domestic entities competing against foreign goods and services.<sup>86</sup> Cognizance is either taken by the WTO on *suo motu* basis, or on complaints filed by member states.<sup>87</sup>

There have been instances in contemporary times of the involvement of developing countries like India in matters concerning state aid, allegedly violative of the SCM provisions.<sup>88</sup> However, such provisions only concern aids and grants as and when they are deemed to be violative of inter-state trade and international competition, while aids that are merely detrimental to domestic competition are not taken cognizance of. Additionally, filing a complaint under the WTO regime concerns international diplomacy and bilateral relations between concerned states and, consequently, incidents of filing an actual “complaint” are rare.<sup>89</sup> Moreover, in light of the developments in American politics, some commentators are of the opinion that the WTO SCM has lately been latent.<sup>90</sup> Hence, the SCM and its provisions prove to be insufficient, especially when it comes to governing state aid specifically affecting the domestic competition of a nation.

## 2. International Investment Law

International investment law concerns bilateral and multilateral investment treaties between nations and the settling of disputes arising therein.<sup>91</sup> In such investment treaties, it is a practice, as common as a custom, to include provisions of “minimum standard treatment”. These provisions call for “fair and equitable treatment” of foreign corporations and entities setting up their plants in the signatory state’s territory. Such provisions have been widely incorporated in bilateral and multilateral treaties, for instance, in the India-America Bilateral Investment Treaty.<sup>92</sup>

Selective aids and subsidies granted in favour of domestic players are deemed to be violative of such “fair and equitable treatment” clauses, as the same render the foreign corporations at a comparative disadvantage. Such actions violating the minimum standard requirements have, time and again, been taken cognizance of by arbitral tribunals settling investment disputes, such as in the matter of *ADF Group Inc. v. United States of America*.<sup>93</sup> Hence, even the investment laws and provisions arising from treaties agreed upon thereunder consider specific state aids as violative. However, these restrictions are

<sup>86</sup> Ilze Jozepa, ‘EU State Aid Rules and WTO Subsidies Agreement’ (House of Commons Library 2021) <<https://researchbriefings.files.parliament.uk/documents/SN06775/SN06775.pdf>> accessed 8 March 2023.

<sup>87</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021).

<sup>88</sup> WTO, ‘India appeals panel reports in disputes targeting Indian sugar subsidies’ <[https://www.wto.org/english/news\\_e/news22\\_e/ds579\\_580\\_581apl\\_11jan22\\_e.htm](https://www.wto.org/english/news_e/news22_e/ds579_580_581apl_11jan22_e.htm)> accessed on 9 March 2023.

<sup>89</sup> Barry H. Steiner, ‘Diplomacy and International Theory’ (2004) 30(4) *Review of International Studies* 493.

<sup>90</sup> Rachel Brewster, ‘The Trump Administration and the Future of the WTO’ (2018) *Yale Journal of International Law Online* <<https://ssrn.com/abstract=3328929>> accessed 8 March 2023.

<sup>91</sup> Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022).

<sup>92</sup> India-America Bilateral Investment Treaty, 2015.

<sup>93</sup> *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1 (2013).

limited to alleged violations of treaty provisions and do not concern either the distortion of national competition or the integrated market concerns arising out of selective aids.

### 3. Labour Laws

Domestic labour laws are responsible for ensuring minimum wages and a minimum standard of working conditions for employees. These laws add to the input costs involved in the production of goods and services and are hence, at times, looked down upon by corporations and potential investors.<sup>94</sup> Consequently, in order to attract better investments, governments tend to dilute these labour law provisions, which serve as an aid/subsidy for corporations, providing indirect benefits to the same.<sup>95</sup> Such dilutions are often challenged in courts, for instance, the challenge to dilution of Indian labour codes in the Pankaj Kumar Yadav case.<sup>96</sup>

Consequently, it can be concluded that existing labour laws, at times, do act as a bar against indirect state aid, however, even these provisions are restrictive in their approach as the same concern only matters involving labour code violations.

### 4. Anti-trust Provisions

It is evident, that there do exist legal provisions which, in part, act against selective aids, however, none comprehensively addresses the concern regarding the distortion of domestic competition in the market arising from such aids. In this context, anti-trust provisions aimed at regulating such state aids gain significance. The International Competition Network, which serves as a system of competition authorities worldwide, among other recommended practices, has proposed measures and provisions against “state-created” and “state-facilitated” monopolies.<sup>97</sup>

Certain states have incorporated these provisions regulating aids and subsidies in their respective anti-trust frameworks. However, the European Union has comprehensive anti-trust provisions regulating “selective state aids” which this paper in the following section would make a thorough analysis of. Moreover, other nations, including Brazil, Peru, Hungary and Australia have also, in part, enacted similar provisions.<sup>98</sup>

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<sup>94</sup> PJ Secki, ‘Seismic Shifts in Indian Labour Laws’ (2015) 50(40) Economic and Political Weekly 19.

<sup>95</sup> Ibid.

<sup>96</sup> Murali Krishnan, ‘Plea in SC against Labour Law Dilution’ (Hindustan Times, 15 May 2020) <<https://www.hindustantimes.com/india-news/plea-in-sc-against-labour-law-dilution/story-DwyPdSZ8COi7VFBIO3k5MM.html>> accessed 8 March 2023.

<sup>97</sup> ‘State-created monopolies, Analysis pursuant to unilateral conduct laws’ (2006) ICN Unilateral Conduct Working Group <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG\\_RP\\_SCMonopolies.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_SCMonopolies.pdf)> accessed on 9 March 2023.

<sup>98</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

Nations such as Brazil and Australia have enacted provisions to ensure “competitive neutrality”. The said principle ensures that government-owned business activities do not enjoy a competitive advantage over their private counterparts. As discussed earlier, governments may be incentivised to provide selective aid in favour of state-owned business corporations, however, the competitive neutrality principle restricts the same by establishing grounds for neutrality in state actions, for instance, taxation neutrality, debt neutrality, etc.<sup>99</sup> In cases of violation of these neutrality principles, the said states provide for a complaint mechanism to private players, wherein they can get register their grievances with competition authorities.<sup>100</sup>

## EXPLORING THE EU ANTI-TRUST PROVISIONS ON “STATE AID”

The European Competition Law Provisions, as enshrined under the founding treaty,<sup>101</sup> provide for a comprehensive state-aid regulation framework.<sup>102</sup> The said provisions ensure a twin benefit, *firstly*, ensuring fair competition in the market, and *secondly*, protecting the view of a single integrated market, wherein businesses are subjected to similar conditions in all member states of the Union.<sup>103</sup>

The EU law classifies “selective” state aids which benefit certain corporations/groups of corporations and prohibits the same.<sup>104</sup> It provides for an *ex-ante* as well as an *ex-post* regulation of aids; there is a requirement to notify any aid, apart from the exempted ones, being provided by a member state to the Commission.<sup>105</sup> The Commission, after the receipt of information with regard to such aids, engages in an analysis as to whether such aid is likely to distort competition in the market, and accordingly, approves or disapproves the said aid.<sup>106</sup> Additionally, even after approving certain aid, if it finds reasons to believe that the said aid is being “misused” in a manner as to distort competition, it can abolish the same.<sup>107</sup> However, certain specific kinds of aid, aimed at promoting public welfare, such as the aids to compensate for damages caused by a natural disaster, or aid to promote economic development in selected areas are excused.<sup>108</sup>

In order to ascertain whether any state action concerning a certain corporation/group of corporations constitutes “state aid” or not, the European law applies the “private investor test.”<sup>109</sup> The state actions which are found akin to that of a private investor are exempted. A counterfactual test is applied to test whether the

<sup>99</sup> ‘Commonwealth Competitive Neutrality Statement’ (1995) <<https://treasury.gov.au/sites/default/files/2019-03/cnps.pdf>> accessed on 9 March 2023.

<sup>100</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

<sup>101</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47.

<sup>102</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 107-109.

<sup>103</sup> Jonathan Faull and Ali Nikpay, *Faull and Nikpay: The EU Law of Competition* (3rd edn, Oxford University Press 2014).

<sup>104</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 107.

<sup>105</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 108.

<sup>106</sup> Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

<sup>107</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 108.

<sup>108</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 107.

<sup>109</sup> Case T-196/04, *Ryanair Ltd v Commission of the European Communities*, ECLI:EU:T:2008:585.

state is acting as a private investor in the normal market situation.<sup>110</sup> If it is found that a private person would have acted similarly in the said situation, it is concluded that the alleged action does not constitute “state aid”.<sup>111</sup> Hence, investments and disinvestments made by the state as a “private investor” are exempted from the application of the said state aid provisions.

However, it is pertinent to note that the said provisions of “state aid” are not restricted to the direct grants and subsidies provided by the government, and have been interpreted liberally by the European Court of Justice.<sup>112</sup> It has been observed that any benefit in cash or kind can comprise a “state aid”.<sup>113</sup> It can include tax benefits,<sup>114</sup> subsidised services,<sup>115</sup> and even debt write-offs, and direct grants of loans.<sup>116</sup> “Aids” can also include holding in the capital of an undertaking<sup>117</sup> or specifying rules on insolvency procedure.<sup>118</sup> Even public statements from the government on market situations which are beneficial for a particular undertaking have been interpreted as “State aid”.<sup>119</sup>

These provisions provide for extensive regulation of state aid and subsidies, and the paper in the coming sections would propose incorporating a similar model in the Indian competition law framework. However, certain distinctions from the European provisions would also be drawn, looking at the peculiar needs of the Indian market.

## ADDRESSING THE DEFICIENCIES IN THE EXISTING REGIME IN INDIA

This section of the paper would lay emphasis on the specific conditions and instances in India that necessitate anti-trust state aid provisions. A reference to case laws would be made wherein specific aids have been challenged under other domestic laws which would be analysed and their insufficiency highlighted.

In India, there have been numerous instances of direct and indirect benefits being granted to specific entities and corporations. Such aids have been motivated by various incentives highlighted earlier in the paper, including the desire of different states to compete with each other for attracting better investments.<sup>120</sup> Such specific aids lead to deleterious impacts, including distortion of competition in the market, however, in a

<sup>110</sup> Ibid

<sup>111</sup> Case C-142/87 Belgium v Commission (‘Tubemeuse’) [1990] ECR I-959, ¶ 29; Case T-16/96 Cityflyer Express v Commission [1998] ECR II-757, ¶ 51.

<sup>112</sup> Case C-39/94, *Syndicat français de l’Express international (SFEI)*, [1996] ECR I-3547.

<sup>113</sup> Case 30-59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1961:2.

<sup>114</sup> Case T-198/12, *Germany v. Commission*, ECLI:EU:T:2014:251.

<sup>115</sup> Jonathan Faull and Ali Nikpay, *Faull and Nikpay: The EU Law of Competition* (3rd edn, Oxford University Press 2014).

<sup>116</sup> Ibid

<sup>117</sup> Case C-39/94, *Syndicat français de l’Express international (SFEI)*, [1996] ECR I-3547.

<sup>118</sup> Case C-200/97, *Ecotrade v Altiforni e Ferriere di Servola (AFS)*, [1998] ECR I-7907, para 41; Case C-295/97 *Piaggio*, [1999] ECR I-3735, ¶ 36.

<sup>119</sup> Joined Cases T-425/04, *France and Others v Commission*, [2010] ECR II-2099, ¶ 234; Joined Cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, ¶ 89.

<sup>120</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

developing country like India, such aids also ought to be analysed from the perspective of the “opportunity cost principle”. Government funds, being limited, can only be allocated to certain limited uses at a time.<sup>121</sup> Hence, the fund which is allotted to provide aid to selective corporations could be used elsewhere in the counterfactual, like for provision of direct benefit transfers in the sectors of health and education. Therefore, the opportunity cost of using government funds for selective state aid is huge and leads to a compromise between social benefits and public goods.

In this light, it becomes even more pertinent to regulate and restrict specific state aids. As discussed earlier, international trade and investment law, like other countries, govern India as well. However, the said laws are narrow in their approach and do not address the domestic concern of the nation. Apart from the said laws, there are two major domestic law provisions that, in part, cover state aid. The first is the Comptroller and Auditor General (hereinafter the “CAG”) Report, and the second is the constitutional provisions enshrined under Article 14.<sup>122</sup>

The CAG Report is issued at the end of every financial year.<sup>123</sup> It provides an analysis of government spending, including the spending on state aid and subsidies, however, the said report is a soft document and cannot act as a basis of action in a court of law.<sup>124</sup> Hence, the said report, although addressing selective aids, cannot provide a recourse for the same.

Another potential provision addressing the selective aid concern in Indian domestic law is Article 14 of the Indian Constitution.<sup>125</sup> It provides for recourses against “differential treatment” by the state.<sup>126</sup> Hence, in cases of selective aid being provided to certain corporations/entities, others can challenge the same on the ground of inequality in state action. Such challenges have been made, and selective state aids, indeed, have been arraigned for violation of Article 14,<sup>127</sup> for instance, in the matter of *Union of India vs Government Of Tamil Nadu*.<sup>128</sup> However, there are certain limitations pertaining to the said constitutional remedy, which render it insufficient for comprehensively addressing the state aid concerns.

*Firstly*, Article 14 violation provides for a writ remedy and the burden of proof therein is high. Additionally, the only recourse in such cases is to approach the Supreme Court or a High court, and given the burden on and

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<sup>121</sup> Stelios H. Zanakis, Tomislav Mandakovic, Sushil K. Gupta, Sundeep Sahay and Sungwan Hong, ‘A review of program evaluation and fund allocation methods within the service and government sectors’ (1995) 29(1) Socio-Economic Planning Sciences 59.

<sup>122</sup> The Constitution of India, 1950 art 14.

<sup>123</sup> The Constitution of India, 1950 art 148.

<sup>124</sup> *Manish Kumar Aggarwal v. Union of India*, 2017 SCC OnLine HP 1972.

<sup>125</sup> The Constitution of India, 1950 art 14.

<sup>126</sup> MP Jain, *Indian Constitutional Law* (8th edn, LexisNexis 2018).

<sup>127</sup> The Constitution of India, 1950 art 14.

<sup>128</sup> *Union of India v Government of Tamil Nadu*, 2013 MAD LJ 4 721.

pendency of cases in these courts,<sup>129</sup> the said remedy, in effect, is mostly rendered redundant. *Secondly*, the said remedy only provides for an *ex-post* remedy and does not touch upon the *ex-ante* regulation of aids.

Thus, the existing laws in India stand inadequate to regulate state aid, however, this does not mean that instances and industrial practices of state aid do not exist. There have been numerous cases of selective aid and the same has been challenged time and again in different courts. For instance, specific aid provided to certain industries during the COVID-19 pandemic was challenged in the Supreme Court.<sup>130</sup> Specifically, in the Electric Vehicle sector, it was believed, that the government has provided aid in favour of certain selected entities.<sup>131</sup> Another example, as earlier touched upon, can be of exorbitant aid granted to TATA Motors.<sup>132</sup> Pursuant to the said aid, it was alleged in the court that the said corporation has attained “dominance” in the market.<sup>133</sup>

Instances of beneficial treatment in favour of state-owned entities are also not unprecedented in India. Exceptional efforts have been made for development as well as the bailout of government aviation players like Air India;<sup>134</sup> there have also been similar instances in the transport sector, wherein license applications of private players have been turned down, to reserve certain routes for state corporations.<sup>135</sup>

Therefore, it can be concluded that there are instances of selective state aid in India, which lead to pernicious impacts, including but not limited to distortion of competition. However, legal provisions governing the same have their own limitations. Consequently, there is a requirement for a comprehensive model, addressing the said concern, which shall be introduced in the next section.

## **A BID FOR A NEW REGULATORY TEMPLATE**

It is evident that there is an absence of comprehensive provisions governing selective state aid in India. This section would thus propose a model for the inclusion of such a provision under the competition law regime. It is inspired by European law but is characteristic of the particularities and the market dynamics distinctive to India.

<sup>129</sup> K.G. Balakrishnan, ‘Judiciary in India: Problems and Prospects’ (2008) 50(4) Journal of the Indian Law Institute 461.

<sup>130</sup> *Small Scale Industrial Manufactures Association v Union of India* 2021 SCC OnLine SC 246.

<sup>131</sup> Shally Seth Mohile and Nitin Kumar, ‘Start-up EV makers allege partial treatment, halt of FAME subsidies’ (Business Standard, 11 October 2022) <[https://www.business-standard.com/article/companies/start-ups-allege-partial-treatment-halt-of-fame-ii-scheme-subsidies-122101100894\\_1.html](https://www.business-standard.com/article/companies/start-ups-allege-partial-treatment-halt-of-fame-ii-scheme-subsidies-122101100894_1.html)> accessed 8 March 2023.

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<sup>133</sup> *Neha Gupta v. Tata Motors Ltd.*, 2021 SCC OnLine CCI 25.

<sup>134</sup> Arijit Mazumdar, ‘Deregulation of the Airline Industry in India: Issues, Causes and Rationale’ (2009) 70(2) The Indian Journal of Political Science 451.

<sup>135</sup> Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.



India should incorporate a provision for regulation and restriction of state aid under its Competition Act.<sup>136</sup> This provision can take inspiration from the European model and can mandate an *ex-ante* notification for all the state aids to the Competition Commission. The said aids could only be brought into effect after the same has been approved by the Commission. Additionally, it could also provide for an *ex-post* regulation, wherein, certain aids initially approved, could still be declared restricted due to the impact it creates on the market, once affected. Certain specific aids, either falling under a minimum threshold (*de-minimis*) or aimed at social welfare could be exempted and such exemptions can be included in the act as well.

However, it must be noted that the requirements of the market of a developing country like India differ from that of its European counterpart. Consequently, a distinction must be drawn from the European provisions, at least on two grounds.

*Firstly*, unlike the European state-aid regulation provision, state actions taken by the government to bail out specific corporations in times of financial crunches and insolvency must be exempted from the purview of competition law. The European model takes cognizance of state actions assisting certain corporations even during insolvency procedures, given that these are specifically benefitting certain players.<sup>137</sup> However, it must be noted that the Indian market is at a nascent stage as compared to its European or American counterparts. Consequently, corporations and entities therein do require the support of the government, specifically in times of market crisis. Hence, the state-aid regulation in India can be restricted to grants, subsidies, and other similar benefits, and assistance provided under insolvency procedure or other similar assistance during financial crunches can be exempted.

*Secondly*, it must be noted that although, the European provision does provide for an *ex-post* restriction provision,<sup>138</sup> however, the same is not taken recourse to actively.<sup>139</sup> The European Competition Commission has evolved comprehensive tests over time to analyse the likelihood of distortion of competition and such tests are applied at the stage of *ex-ante* notifications. Consequently, instances are rare wherein a requirement might arise to restrict a particular aid after the same has been approved, and such *ex-post* recourses are largely limited to situations wherein, some member state does not notify the commission timely about certain aid.<sup>140</sup>

It is noteworthy that the nascency of Indian competition regime warrants more novel and extensive tests in the state aid provisions to undertake comprehensive analyses of their likely effects on the market. Therefore, there might arise such situations wherein the Commission initially approves a particular state aid, but later finds it

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<sup>136</sup> The Competition Act, 2002 (12 of 2003).

<sup>137</sup> Case C-200/97, *Ecotrade v Altiforni e Ferriere di Servola (AFS)*, [1998] ECR I-7907, para 41; Case C-295/97, *Piaggio*, [1999] ECR I-3735, para 36.

<sup>138</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 108.

<sup>139</sup> Alison Jones, Brenda Sufirin, and Niamh Dunne, *EU Competition Law* (7th edn, Oxford University Press 2019).

<sup>140</sup> *Ibid.*

to be creating a deleterious impact on the market. Hence, *ex-post* restrictions should be equally given heed to and there should exist comprehensive statutory provisions for the same.

## CONCLUSION

As discussed earlier, the European state-aid regulations serve a twin purpose- preventing distortion of the market and safeguarding the principle of a single integrated market.<sup>141</sup> The inclusion of a similar yet distinctive provision in the Indian competition law framework would benefit the Indian market, not just with respect to the first objective, but also the second one. Enabling state aid regulation would restrict the state governments' actions of providing selective subsidies in order to compete with one another. Hence, it would lead to integration of the Indian market.

It has rightly been stated that “*competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.*”<sup>142</sup> Monopolies created resultant of state actions have been widely recognized as one of the leading causes of distortion of competition in the market.<sup>143</sup> Introducing a state-aid control mechanism in the Indian competition law framework, as proposed in the paper, would restrict such monopolies, leading to a libertarian market, conducive to the Indian competition law regime.

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<sup>141</sup> Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

<sup>142</sup> Joseph Stiglitz, ‘Competing over Competition Policy, Project Syndicate’ (2001) < <https://www.project-syndicate.org/commentary/competing-over-competition-policy>> accessed on 9 March 2023.

<sup>143</sup> State-created monopolies, Analysis pursuant to unilateral conduct laws’ (2006) ICN Unilateral Conduct Working Group <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG\\_RP\\_SCMonopolies.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_SCMonopolies.pdf)> accessed on 9 March 2023.



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### THE DARK SIDE OF MARKETING: UNMASKING MISLEADING ADVERTISEMENTS TO EMPOWER INDIAN CONSUMERS

Ms. Diwanshi Rohatgi<sup>144</sup> & Ms. Tuhina Sinha<sup>145</sup>

#### ABSTRACT

Consumers want value for money in the form of higher-quality goods and services. Modern technical innovations have undoubtedly had a significant impact on the quality, availability, and safety of goods and services. The saddest aspect is that consumers are victims of a variety of unscrupulous and exploitative activities, one of which is misleading or deceptive advertising, which has a far-reaching impact on consumers. In today's Indian context, the concepts of "consumer are sovereign" and "consumer is the king" are mere myths. Advertisements, as a form of communication, capture the attention of many consumers. It has become an essential component of Indian business today. However, using advertisements to entice consumers with unsubstantiated claims is detrimental to their interests. Companies like Patanjali, PepsiCo, Johnson & Johnson, Fair & Lovely, and others have been fooling customers for many years. The Consumer Protection Act of 2019 establishes a methodology for how the Indian judicial system would handle cases involving misleading advertisements. It thus, protects innocent consumers from unethical trade practices and ensures that consumers are not duped into a trap by falsely describing the product or services, providing a false guarantee, deceiving consumers as to the nature, substance, quantity, or quality of such product or service, or intentionally concealing important information. The Act also empowers the "District Collector" to investigate consumer rights violations resulting from false information and report to the Central Consumer Protection Authority (CCPA). CCPA can levy fines against those individuals and entities that are involved in misleading advertisements. In addition to the aforesaid, the researcher would also focus on how to safeguard the consumer from misleading advertisements by raising consumer awareness and making corporations accountable.

**KEYWORDS:** Consumers, Misleading Advertisements, Consumer Protection Act of 2019, Central Consumer Protection Authority, Consumer awareness and corporate accountability.

<sup>144</sup> Assistant Professor (Law) at Amity Law School, Amity University, Jharkhand, Ranchi

<sup>145</sup> Assistant Professor (Law) at Amity Law School, Amity University, Jharkhand, Ranchi

## INTRODUCTION

*“Trying to do business without advertising is like winking at a pretty girl through a pair of green goggles.*

*You may know what you are doing, but no one else does.”<sup>146</sup>*

- **Cyrus McCormick**

Advertising is a means of communication that informs a company’s target audience about its current and prospective products or services. It does this through advertising to persuade the public to use its products/goods or services by putting across an appeal that the product/goods or services are relevant, and that by using them, one would gain a social, economic, or even psychological advantage over persons who do not use these goods or services.

Advertisements provide essential information about the product, such as its uses, benefits, and how it compares to competitors and by providing accurate information company builds trust and credibility with consumers.<sup>147</sup>

Advertisements can take various forms, including newspaper, television commercials, print ads, advertisement in cinema, web series, you tube, Instagram, blogs, magazines, emails, online banners, social media posts, radio spots, and outdoor billboards. Effective advertisements create demand for products and services, leading to increased sales therefore, Companies spend a significant amount of money on advertising (both online and offline). Though, it has become a vital part of Indian business today but, when advertisement is used to induce consumers by way of unsubstantial claims, it is against their interests. Many companies such as Patanjali, PepsiCo, Johnson & Johnson, Fair & lovely etc, have mislead the consumers for years. Misleading advertisements are promotional materials that provide false, exaggerated, or deceptive information to persuade consumers to purchase a product or service. Such misleading advertisements always have a negative effect on society, directly or indirectly affecting every member of its ecosystem. This makes the consumers root for a fantasy when reality is very different.

The three main categories in which misleading advertisements can be classified are -

- a. Fraudulent
- b. False &
- c. Misleading.

Fraudulent means that the advertiser distorts the real facts and projects the products or services as something it is not.

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<sup>146</sup> Shubhank Khare, “Protection of Consumers with Reference to Misleading Advertisement in India: A Critical Analysis” *4 International Journal of Legal Developments and Allied Issues* 352 (2018).

<sup>147</sup> False Or Misleading Advertisements Under Consumer Protection Act 2019, *available at*: [https://lawcorner.in/false-or-misleading-advertisements-under-consumer-protection-act-2019/#google\\_vignette](https://lawcorner.in/false-or-misleading-advertisements-under-consumer-protection-act-2019/#google_vignette) (Last Visited on June 20, 2024).

Falsity can also refer to an advertising lie on parameters like price, quantity, and availability. Misleading though any media focuses on a consumer's belief. Misleadingness requires that the advertiser observe the false belief of consumers in relation to exposure to the advertisement. Unfair and misleading advertisements are not just unscrupulous but also, they distort competition and consumer choices.

Misleading and unfair advertisements violates several rudimentary consumers rights, such as:

***“The right to choose, the right to be informed, right to safety, protected against unsafe goods and services, as well as, unfair trade practices.”***

Hon'ble Supreme court had said in the case of ***“Dabur India v. Colortek Meghalaya Pvt. Ltd.,***<sup>148</sup> *that an advertisement is protected under Article 19(1)(a) of the Constitution as long as it is not false, misleading, or deceptive in nature.*” In another case of ***“Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.,***<sup>149</sup> *hon'ble Court has held that an advertisement can praise or magnify the product keeping in mind that it does not disparage a rival product.”*

Further, in order to protect consumers from such advertisements that were confusing or unfair, the hon'ble Supreme Court of India issued directions to all advertisers to furnish "self-declarations" before issuing any advertisement in the media for their products.<sup>150</sup>

Advertisers will be required under the ADARI guidelines to "expressly clarify that their displays shall not mislead or falsely represent about any fact of their products or services so as not to lead the consumers into error." Advertisers wanting to air their TV commercials would need to fill in the affidavits in the 'Broadcast Seva Making' it a single window system for all stakeholders involved in seeking permissions, registers, and licenses for various broadcast related activities to the Ministry of Information and Broadcasting depot.<sup>151</sup>

Our Consumer Protection Act of 2019 acts as an exception to the rule of caveat emptor and protects the rights of consumers from misrepresentation, false statements or misleading advertisements. ‘Section 10’ clearly states that the *“Central Consumer Protection Authority”* is being established to regulate the matters relating to misleading advertisements which violate the consumer rights.<sup>152</sup>

Before advent of new consumer protection Act of 2019, “Advertising Standards Council of India (ASCI)” is the only self-regulatory authority. It had adopted a code for self-regulation in advertising. ASCI has been active in monitoring advertisements and has introduced guidelines, especially concerning health and nutrition

<sup>148</sup> Dabur India Ltd v. Colortek Meghalaya Ltd, 2010 (42) PTC 88 (Del.).

<sup>149</sup> Pepsi Co Inc v. Hindustan Coca Cola Ltd., 2003(27) PTC 305 (DEL).

<sup>150</sup> Indian Medical Association v. Union of India, Writ Petition (Civil) No.645/2022.

<sup>151</sup> Regulating Misleading Advertisements in India, *available at:* <https://www.drishtiiias.com/daily-updates/daily-news-analysis/regulating-misleading-advertisements-in-india> (Last Visited on June 21, 2024).

<sup>152</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 10.

claims, to ensure that advertisements are not misleading.

Some well-known brands were purportedly claiming that their product offerings, such as against effectiveness of COVID-19, were obvious. Some among the list were advertising by Asian Paints, Sairam, Lifebuoy, Berger Paints and Kent Ro. The government also noted this and took rest on such allegations.

Through this study, we will examine the present legislative framework governing deceptive advertisements, identify problems with them, and make recommendations for modifications as needed.

## **THE LABYRINTH OF MISLEADING ADVERTISEMENTS**

Misleading advertisements in India have been a significant concern, leading to regulatory actions and consumer backlash. For instance:

### **Horlicks Growth +**

The advertisement claimed that Horlicks Growth+ could make children “grow taller, stronger and sharper.” The Advertising Standards Council of India (hereinafter referred as ‘ASCI’) found the claims to be unsubstantiated and misleading as the product did not have enough scientific backing to support the promises. ASCI asked the company to withdraw or modify the advertisement.

### **Amway Nutrilite**

Amway advertised that Nutrilite Daily was a “complete supplement for daily nutrition needs.” This claim was found to be misleading as it gave the impression that ‘Nutralite Daily’ alone could meet all daily nutritional requirements, which was not scientifically proven. ASCI directed Amway to withdraw or modify the advertisement to accurately reflect the product's benefits.

### **Dabur Chyawanprash**

Dabur advertised that consuming Chyawanprash could protect individuals from ‘COVID-19’. The claim was misleading because there was no scientific evidence that Chyawanprash could prevent or cure COVID-19. ASCI intervened, and the advertisement was modified to remove the misleading claim.<sup>153</sup>

### **HUL’s Lifebuoy**

An advertisement depicted a healthcare professional recommending Lifebuoy soap over others. This was misleading as there was no scientific basis or specific endorsement from the healthcare community for

<sup>153</sup> ASCI asks Dabur to ‘modify or withdraw’ Chyawanprash ad claiming Covid protection, *available at*: <https://www.afaqs.com/news/advertising/asci-asks-dabur-to-modify-or-withdraw-chyawanprash-ad-claiming-covidprotection#:~:text=The%20Advertising%20Standards%20Council%20of%20India%20%28ASCI%29%20has,of%20the%20product%20daily%20provided%20protection%20against%20COVID-19> (Last Visited on June 21, 2024).

Lifebuoy over other soaps. ASCI instructed Hindustan Unilever Limited (HUL) to modify the advertisement to remove the implied endorsement by healthcare professionals.

### **Patanjali Products**

Patanjali has faced multiple accusations of making exaggerated claims about the benefits of their products, including claims that certain products could cure serious diseases. Many of these claims were found to lack scientific evidence and were deemed misleading. Various advertisements were either pulled from circulation or modified following ASCI guidelines and consumer complaints.

### **Kurkure**

An advertisement for Kurkure snacks claimed that the product contained “40% less fat than regular potato chips.” The claim was misleading because the comparison was made to an unspecified standard and could mislead consumers about the health benefits of the product. The “ASCI” directed the company to withdraw or else, modify the advertisement to avoid making unsubstantiated comparisons.

### **Fair & Lovely**

Advertisements for formerly ‘Fair & Lovely’ which is now ‘Glow & Lovely’ implied that the cream could significantly lighten skin tone. The claims were found to be misleading and perpetuated unrealistic beauty standards. In response to regulatory pressure and public backlash, Hindustan Unilever rebranded the product and toned down the claims of fairness, focusing instead on overall skin health.<sup>154</sup>

### **Santoor Soap**

The advertisement suggested that Santoor soap could give users younger-looking skin. The claim was deemed misleading as it suggested guaranteed results without sufficient evidence to prove so.

### **Patanjali Coronil**

Patanjali claimed that their product ‘Coronil’ could cure COVID-19. The claim was found to be misleading as there was no scientific evidence to support that ‘Coronil’ could cure or prevent COVID-19. The Ministry of AYUSH intervened, and Patanjali was directed to stop advertising ‘Coronil’ as a COVID-19 cure.<sup>155</sup>

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<sup>154</sup> Fair & Lovely’ Gets Changed to ‘Glow & Lovely’; Emami Threatens Legal Action Against HUL, *available at*: [https://lawstreet.co/business/fairandlovely-emami-hindustanunilever/#google\\_vignette](https://lawstreet.co/business/fairandlovely-emami-hindustanunilever/#google_vignette) (Last Visited on June 22, 2024).

<sup>155</sup> Coronavirus: The misleading claims about an Indian remedy, *available at*: <https://www.bbc.com/news/56172784> (Last Visited on June 22, 2024).

## LEGAL FRAMEWORK ON MISLEADING ADVERTISEMENTS

### Consumer Protection Act of 2019

The Consumer Protection Act of 2019 is the fundamental law addressing misleading advertisements in our country. The term “misleading advertisement” has been defined in ‘Section 2(28)’ of the Act, 2019 which is as follows: “*Misleading advertisement in relation to any product or service, means an advertisement, which:*

- *falsely describes such product or service;*
- *gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service;*
- *conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice;*
- *deliberately conceals important information.*”<sup>156</sup>

Under ‘Section 10’ of this Act, a ‘Central Consumer Protection Authority’ has been established to regulate matters relating to misleading advertisements. The section reads as:

***“Establishment of Central Consumer Protection Authority -***

***(1) The Central Government shall, by notification, establish with effect from such date as it may specify in that notification, a Central Consumer Protection Authority to be known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class.***

***(2) The Central Authority shall consist of a Chief Commissioner and such number of other Commissioners as may be prescribed, to be appointed by the Central Government to exercise the powers and discharge the functions under this Act.***

***(3) The headquarters of the Central Authority shall be at such place in the National Capital Region of Delhi, and it shall have regional and other offices in any other place in India as the Central Government may decide.***”<sup>157</sup>

The ‘Central Authority’ ensure that no incorrect or misleading advertisement is shown in respect of any goods or services which violates the provisions of Act, rules or regulations made thereunder.<sup>158</sup>

This ‘Central Authority’ have its investigation wing headed by a ‘Director-General’ for the purpose of conducting an inquiry or investigation under the Act as may be directed or ordered by the Central Authority.<sup>159</sup>

<sup>156</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 2(28).

<sup>157</sup> *Id* at 7.

<sup>158</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 18 (C).

<sup>159</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 15.



By virtue of ‘*section 17*’, a complaint regarding misleading advertisement can be made before the ‘Central authority’, ‘District collector’ or the ‘Commissioner of regional office’.

***“Complaints to authorities. - A complaint relating to violation of consumer rights or unfair trade practices or false or misleading advertisements which are prejudicial to the interests of consumers as a class, may be forwarded either in writing or in electronic mode, to any one of the authorities, namely, the District Collector or the Commissioner of regional office or the Central Authority.”***<sup>160</sup>

‘*Section 16*’ states that ‘*District Collector*’ can investigate into the matter which is within its jurisdiction. The section reads as:

***“Power of District Collector.- The District Collector (by whatever name called) may, on a complaint or on a reference made to him by the Central Authority or the Commissioner of a regional office, inquire into or investigate complaints regarding violation of rights of consumers as a class, on matters relating to violations of consumer rights, unfair trade practices and false or misleading advertisements, within his jurisdiction and submit his report to the Central Authority or to the Commissioner of a regional office, as the case may be.”***<sup>161</sup>

Section 19 states about the power of ‘Central Authority’ to refer the matter for an investigation.

***“Central Authority may, after receiving any information, complaint or directions from the Central Government or of its own motion, conduct or cause to be conducted a preliminary inquiry as to whether there exists a prima facie case of violation of consumer rights or any unfair trade practices or false or misleading advertisements, by any person, which is prejudicial to the public interest or to the interests of consumers and if it is satisfied that there exists a prima facie case, it shall cause investigation to be made by the District-General or by the District Collector.”***<sup>162</sup>

Those suspected premises, documents, and record articles are allowed to be searched and seized as may be necessary to ascertain the violation of information consumer rights.

If an advertisement is found to be untrue or misleading, the 'Central Authority' may give instructions to discontinue or modify the advertisement.

It empowers the Central Authority to impose a financial penalty on any party found in a misleading advertisement, whether it is on the manufacturer, endorser, or publisher. He/it shall be liable for a minimum/maximum penalty of ten lakh rupees (Rs.10,00,000).<sup>163</sup> Further, in the case of subsequent violations by a manufacturer/endorser, additional penalty to the tune of up to fifty lakh rupees can be imposed by the Central Authority.<sup>164</sup>

<sup>160</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 17.

<sup>161</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 16.

<sup>162</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 19.

<sup>163</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 21(2).

<sup>164</sup> *Id.*

If the ‘Central Authority’ believes it is necessary, it can impose a penalty on the maker, endorser, or publisher of the false advertisement of the product. It may, by order, impose on manufacturer or endorser a penalty which may extend to ten lakh rupees (Rs.10,00,000). Provided that the ‘Central Authority’ may, for every subsequent contravention by a manufacturer or endorser, impose a penalty, which may extend to fifty lakh rupees.<sup>165</sup>

On finding upon an inquiry that a person or organisation has issued a misleading advertisement or caused to publish for the benefit of a person, the Central Authority may impose a penalty extending to ten lakh rupees on such person or organisation.<sup>166</sup>

*“While determining the penalty, regard shall be had to the following, namely:*

- (a) the population and the area impacted or affected by such offence;*
- (b) the frequency and duration of such offence;*
- (c) the vulnerability of the class of persons likely to be adversely affected by such offence; &*
- (d) the gross revenue from the sales effected by virtue of such offence.”<sup>167</sup>*

### **Misleading Advertisements and Endorsements Guidelines (2022)**

All advertisements are subject to these rules, regardless of the format (print, electronic, or online). They go after:

- Producers, suppliers, or dealers whose goods or services are promoted.
- The companies that create the ads, advertising agencies.
- Sponsors who show up in commercials.<sup>168</sup>

Although not stated clearly, it appears from the standards that websites and TV networks that publish advertisements are not held directly accountable. The Consumer Protection Act (CPA) does, however, provide some protection under Section 21(6). If platforms run advertisements in the regular course of their business and have no prior information that the advertisement is misleading, they cannot be penalized for doing so.

### **Valid Advertisements & Disclaimers:**

If an advertisement follows these guidelines, it is deemed legitimate and not deceptive:

- Truthful Representation: The product or service is not overstated or given incorrect information.

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<sup>165</sup> *Id.*

<sup>166</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 21(4).

<sup>167</sup> The Consumer Protection Act, 2019 (Act No. 35 of 2019), s. 21(7).

<sup>168</sup> Prevention of misleading advertisements – Analysis of guidelines issued by Central Consumer Protection Authority, *available at*: <https://www.lakshmisri.com/insights/articles/prevention-of-misleading-advertisements-analysis-of-guidelines-issued-by-central-consumer-protection-authority/#> (Last Visited on June 25, 2024).

- Scientific Accuracy: Statements must be supported by substantiated data.
- Consumer Rights: Avoid using them as differentiators in your marketing.
- Scientific Consensus: Steer clear of assertions that go against accepted scientific wisdom.
- Risk Disclosure: Provide accurate information regarding the dangers of not purchasing the product.
- Content Accuracy: Verify that statements made in reliance on publications are accurate.
- Adherence to Sector-Specific Laws: Respect laws that are particular to the marketed good or service.<sup>169</sup>

It may happen that occasionally, during large production, there may be inadvertent failures to live up to promised claims. To be eligible for this exemption, the advertiser must, however, show that:

- *Product failures are within acceptable bounds;*
- *Advertised specimen can normally fulfil the promise; and*
- *Prompt action is taken to correct the deficiency for customers.*

It is also stated in the guidelines that while disclaimers can resolve problems and clarify claims, they cannot contradict the principal claims, withhold information about the claims, or correct previously stated erroneous claims. Disclaimers must be synchronized with voiceovers in audio advertising and prominently placed on packaging in the same language and typeface as the claim (preferably on the same panel).<sup>170</sup> Suppose advertisement might be in Hindi and disclaimer is in Urdu language, obviously in such a case, Hindi speaking population will not understand. Therefore, the disclaimer shall be in the same language as the advertisement.

### **The Allure of the Elusive Bargain: The Bait Advertisement**

The term “bait advertisement” refers to a deceptive tactic employed in marketing. It entices consumers with the promise of incredibly low prices for goods, products, or services. However, upon closer inspection, it becomes frustratingly difficult to acquire the advertised items at those prices. This creates a sense of false scarcity, pressuring potential customers to consider alternative, often more expensive, options. They are not outright prohibited; they must meet certain requirements only then they are allowed:

- *Don't trick customers into purchasing things they don't need.*
- *Make sure there is enough supply to satisfy the expected demand. Indicate in detail the reasons for your restricted availability (if any).*
- *Indicate any more terms (such as age or regional restrictions) that may have an impact on availability, supply, or demand. Avoid misleading customers regarding the state of the market.*

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<sup>169</sup> *Id* at 23.

<sup>170</sup> ASCI GUIDELINES FOR DISCLAIMERS MADE IN SUPPORTING, LIMITING OR EXPLAINING CLAIMS MADE IN ADVERTISEMENTS, *available at*: <https://www.ascionline.in/wp-content/uploads/2023/07/Amendments-Disclaimer-Guidelines-July-2023.pdf> (Last Visited on June 27, 2024).

Surrogate advertising is used to promote products which are banned from advertising due to government regulations. Surrogate advertising employs a clever tactic: promoting a brand or product that closely resembles a banned item. This strategy aims to maintain brand awareness and visibility despite the ban. However, the law cracks down on such “indirect advertisements.” Essentially, it prohibits any attempt to circumvent existing legal restrictions by portraying a surrogate ad for a banned good or service as an advertisement for something entirely permitted. This ensures that the spirit of the law protecting consumers from harmful products is upheld.<sup>171</sup>

The advertising landscape recognizes the vulnerability of children and has enacted safeguards to protect them. Certain advertisements are deemed off-limits if they:

- **Glamorize Danger:** These ads promote or trivialize behaviors that could put children at risk.
- **Exploit Inexperience:** They capitalize on a child’s lack of life experience to push products or services.

Advertisements that endorse, motivate, or excessively imitate behaviour that could be hazardous for children, or exploit their lack of experience, trustfulness, or loyalty, are banned. Advertising directed at children should not encourage negative body image or suggest that the advertised products are superior to natural or traditional foods that children might eat.

## UNRAVELLING THE LABYRINTH: SOLUTIONS AND RECOMMENDATIONS

Our examination reveals some inherent weaknesses within the statute that threaten to impede the Act’s intended goals. Notably, the Act fails to provide a clear definition of “unfair” when outlining misleading advertisements. This omission creates a situation where: **“any advertisement could be deemed misleading if, through its actions or inactions, it fosters unfair trade practices.”** However, the very notion of “unfairness” hinges on subjective interpretation, leaving it vulnerable to exploitation.

Furthermore, the Act restricts the ability to file claims solely to consumers who have directly purchased a specific product or service. This presents a potential roadblock, as there are situations where legal entities who would not qualify as traditional consumers might wish to pursue claims in the public interest.

**“An Act that clearly states protection of public interest as its primary objective ironically does not create an avenue for vigilant citizens to file a case in public interest or a Public Interest Litigation.”**

As a suggestion, we should work towards enhancing consumer awareness is vital in combating misleading advertisements. Educated consumers are better equipped to identify and challenge deceptive marketing practices. Creating a public awareness campaigns and consumer education programs plays a significant role in this regard.

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<sup>171</sup> Surrogate Advertisement, *available at*: <https://www.clearias.com/surrogate-advertisement/> (Last Visited on June 28, 2024).

Online platforms need to implement stricter monitoring and control mechanisms to prevent the spread of false information. Collaboration between tech-companies and regulatory bodies is essential in this regard.

## **CONCLUSION**

Companies engaging in misleading advertising risk damaging their reputation. Consumer trust is crucial for business success, and once lost, it is challenging to regain. Ethical advertising is essential for long-term sustainability and brand loyalty.

While India has made significant strides in addressing misleading advertising through legislative and regulatory measures, continuous efforts are required to enhance enforcement, consumer awareness, and industry cooperation. The combined efforts of the government, regulatory bodies, businesses, and consumers are crucial to creating a fair and transparent advertising landscape in India.

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### LAW CASTE AND URBAN SPACE: A CRITICAL ANALYSIS

Atharva Shukla<sup>172</sup>

#### ABSTRACT

*In the intricate tapestry of urban life, the dynamics of law and societal structures play a profound role in shaping the landscape of cities worldwide. One such pivotal factor deeply entrenched within the urban fabric, particularly in regions like South Asia, is the system of caste. Stemming from ancient societal stratification, caste continues to exert its influence on various aspects of life, including access to resources, opportunities and so on.<sup>173</sup> Many people believe that caste is still mostly practiced in rural areas and that caste boundaries are becoming hazier as a result of urbanization and economic expansion. But the situation of the urban spaces shows otherwise.<sup>174</sup> Usually the intersection of law, caste, and urban space encapsulates a complex web of historical legacies, socio-legal dynamics, and spatial inequalities that profoundly shape the urban experience and for understanding the interplay between these three it requires delving into the historical contexts, contemporary realities, and the real experiences of marginalized communities. In this piece of research work we are going to analyze the intricate relationship between Caste and the Urban Spaces like how the caste based segregation and discrimination is still prevalent in urban spaces and we'll analyse this relationship in the light of the existing legal framework, in addition to that this work also shed light on some of the real life experiences, wherein the people belonging to the Marginalized section of the society has faced adverse effects of caste system even in the Urban cities. This work is imperative in the sense that by analyzing the contemporary situation we can develop a deeper understanding of the phenomenon of caste and can discover the challenges that can be addressed through the policy measures.*

**KEY WORDS:** Caste, Urbanization, Varna System, Reformative movement, Discrimination.

<sup>172</sup> 3rd year student of B.A L.L.B (Hons.), National Law University, Nagpur.

<sup>173</sup> Sarthak Mehra, "Caste in Contemporary Urban India" <https://velivada.com/2020/07/17/caste-in-contemporary-urban-india/> (Last Visited on 8<sup>th</sup> Feb, 2024)

<sup>174</sup> Vasudev Chakravarti, "The Myth of Caste Free Meteropolises" <https://www.newslick.in/myth-caste-free-metropolises> (Last Visited on 8<sup>th</sup> Feb, 2024)

## HISTORICAL BACKGROUND OF CASTE IN INDIA

The caste system is a social hierarchy that has its roots in ancient India and has been a significant aspect of Indian society for centuries. Early written evidence about the caste system appears in the Vedas, Sanskrit-language texts that date from as early as 1500 BCE. The Rigveda, one of the oldest scriptures of Hinduism, contains references to varnas, which consists of four main social classes: Brahmins (priests and scholars), Kshatriyas (warriors and rulers), Vaishyas (merchants and landowners), and Shudras (laborers and servants). The division was initially based on occupation and was relatively fluid.<sup>175</sup>

There are multiple theories on the origins of the caste system in India. “There are religious and biological ones among them. The religious theories explain that the Rig Veda, an ancient Hindu text, states that the four distinct varnas were produced by the components of the original man, Purush, who destroyed himself in order to create human civilization. On the other hand, as per the biological theory, all living things inherit one of three types of characteristics. Varna is a Sanskrit word for various colour or texture tones and also for mental attitude. Three Gunas exist: Tamas, Rajas, and Sattva.”<sup>176</sup>

The Manusmriti, an ancient legal text, played a significant role in codifying and perpetuating the caste system, prescribing strict rules for each caste’s behavior and interactions. By creating a social structure, the caste system determined every aspect of an individual’s life, including occupation, social interactions, marriage, and even diet. Each caste had its own duties, privileges, and restrictions, and social mobility was limited.

### Varna System

For ages, the Varna system a social hierarchy with strong roots in ancient Indian society has divided people. The Varna system finds its earliest mentions in ancient Indian scriptures, particularly the Rigveda, dating back to around 1500–1200 BCE. Initially conceived as a stratification based on occupational roles rather than birth, the system gradually evolved into a hereditary caste hierarchy over centuries. The Purusha Suktam verse of the ancient Sanskrit Rig Veda contains the first recorded reference of Varna. Purusha is the original entity, made up of the four Varnas combined. Its ‘mouth is made up of Brahmins’, ‘its arms are made up of Kshatriyas’, ‘thighs for Vaishyas’ and ‘its feet are made up of Shudras’. Similar to this, a society is made up of these four Varnas, who are able to maintain prosperity and order by abiding by the Varna laws.<sup>177</sup>

At its core, the Varna system was structured around the principle of dharma, or duty, with each varna assigned specific responsibilities and privileges. The major purpose of the varna division is to assign duties to different individuals, preserve caste integrity, and create enduring order. This system is thought to prevent disputes

<sup>175</sup> Kallie Szczepanski, “History of India's Caste System” <https://www.thoughtco.com/history-of-indias-caste-system-195496> (Last Visited on 21<sup>st</sup> March, 2024)

<sup>176</sup> Manali S Deshpande, “HISTORY OF THE INDIAN CASTE SYSTEM AND ITS IMPACT ON INDIA TODAY” <https://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1043&context=socssp> (Last Visited on 22<sup>nd</sup> March, 2024)

<sup>177</sup> Nikul Joshi, “Caste System in Ancient India” <https://www.worldhistory.org/article/1152/caste-system-in-ancient-india/> (Last Visited on 22<sup>nd</sup> March, 2024)

within the business and interference with individual duties.<sup>178</sup> Each Varna propounded specific life principles to follow; newborns are required to follow the customs, rules, conduct, and beliefs fundamental to their respective Varnas.<sup>179</sup>

The Varna system underwent various transformations, influenced by religious, political, and social factors. While initially flexible, the system became rigid over time, perpetuating inequalities and divisions within society. The rise of Buddhism and Jainism challenged the hierarchical order, advocating for spiritual equality and social justice. However, the system still persisted, adapting to changing socio-political landscapes. With the advent of colonialism, the British administration further institutionalized caste distinctions, exacerbating social tensions and inequalities. And still in today's world also caste continues to exert a profound influence on Indian society not only in rural areas but also in urban areas.

## **CASTE IN URBAN INDIA**

### **Interrelation b/w caste and urbanization**

In India the Caste systems have long been integral to the social fabric of various societies, particularly prominent in rural areas. Urbanization on the other hand brought the growth of cities and the associated changes in population density, economic activities, and social organization. Historically, urban areas have often been more heterogeneous and socially fluid compared to rural areas, but they still as like, the rural areas reflect underlying caste dynamics. The caste identities are often persists influencing the social interactions and community structures within urban settings. In urbanization where people from rural areas move to cities in search of better economic opportunities and improved living standards. However, caste identities and social structures often persist among migrants, shaping their experiences and interactions in urban areas. Migrants may form caste-based communities or networks within cities, maintaining social ties and practices from their rural origins. Also on urban areas, this can manifest as occupational segregation, where certain castes are overrepresented or concentrated in specific industries or professions. In urban centers the caste-based discrimination can also limit access to employment opportunities and hinder social mobility for certain groups within urban settings.

The interrelation between caste and urbanization underlines the nuanced facets of social change and continuity in rapidly evolving urban societies. "Urging Dalits to move to cities in keeping with the aspiration that urbanization will break the shackles of the caste system, Bhim Rao Ambedkar, the father of the Indian Constitution once said, what is a village but a sink of localism, a den of ignorance, narrow mindedness and

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<sup>178</sup> Varna System, <https://www.indiatoday.in/education-today/gk-&-current-affairs/story/class-12-history-crashcourse-varna-system-1434558-2019-01-19> (Last Visited on 23<sup>rd</sup> March, 2024)

<sup>179</sup> *Ibid.*



communalism.”<sup>180</sup> B R Ambedkar a Dalit social reformer and the author of India’s Constitution-believed that “the migration of marginalized castes to urban areas would help them escape discrimination and even caste identity. Today’s cities have moderately lived up to this expectation.”<sup>181</sup> While urbanization offers opportunities for economic advancement and social mobility, it also highlights persistent inequalities rooted in caste-based discrimination and social stratification.

### **Relevance of Caste in Urban Spaces**

Some of the following factors need to be considered regarding the relevance of caste in urban areas:

#### **Access to Resources and Opportunities:**

In some urban contexts, caste-based discrimination can still affect access to resources, employment opportunities, housing, and education. Discrimination based on caste may manifest subtly through biases in hiring practices, unequal treatment in educational institutions, or exclusion from certain social circles.

#### **Marriage and Social Interactions:**

Despite urbanization and modernization, caste continues to play a significant role in marriage alliances and social interactions within certain communities. Many urban families still prefer to maintain caste endogamy (marrying within the same caste), and caste considerations often influence social interactions and relationships.

#### **Social Networks and Communities:**

In urban areas, people often form social networks and communities based on shared cultural backgrounds, including caste. These networks can provide social support, access to resources, and a sense of belonging, which can reinforce the relevance of caste identity. These networks can influence various aspects of life, including social gatherings, community events, and even professional opportunities.

#### **Cultural Practices and Traditions:**

Urban areas may serve as melting pots of diverse cultures, including those with strong caste traditions. Certain cultural practices, rituals, and traditions associated with caste continue to be observed within urban communities, contributing to the persistence of caste identity. While urbanization brings about changes in social dynamics and may lead to the dilution of caste-based identities to some extent, caste continues to exert influence in various aspects of life in urban areas, albeit often in complex and evolving ways. The ugly reality

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<sup>180</sup> Nikhil Ramphal, “Does urbanization end caste, religious differences? Developmental economists measure ‘segregation’ in India” <https://theprint.in/india/does-urbanisation-end-caste-religious-differences-developmental-economists-measure-segregation-in-india/1630723/> (Last Visited on 24<sup>th</sup> March, 2024)

<sup>181</sup> Ankitha Gattupalli, “Urban Disparities: How Caste Shapes Cities” <https://www.archdaily.com/983475/urban-disparities-how-caste-shapes-cities> (Last Visited on 24<sup>th</sup> March, 2024)

of caste discrimination, which manifests itself in various forms such as residential segregation, discrimination in labour markets, educational disparities, and overt and covert instances of untouchability, lies beneath the twin myths of caste anonymity and meritocracy in urban India.<sup>182</sup>

## **SOCIAL/REFORMATIVE MOVEMENT AGAINST CASTE SYSTEM**

### **Vaikom Movement**

Vaikom Satyagraha was a significant event in the Indian independence movement, particularly in the struggle against untouchability and for the rights of the lower castes. The moment began on March 30, 1924, as a nonviolent agitation at Vaikom, a temple town in the princely state of Travancore. This was the first of several temple entry movements that would soon spread throughout the nation.<sup>183</sup> The satyagraha was organized to protest against the denial of access to the public roads near the Vaikom Temple in Kerala to people belonging to the lower castes. Under the leadership of social reformers like K. Kelappan, T. K. Madhavan, and K. P. Kesava Menon, the satyagraha attracted widespread support from different sections of society.

The Vaikom Satyagraha was an incredible campaign that persevered for more than 600 days in the face of oppressive societal forces, police crackdowns, and one of the biggest floods to ever hit the town in 1924. Unprecedented unity across caste lines was shown during the satyagraha, which was essential for its ongoing mobilisation. But many were disappointed by the eventual compromise. Famously, Periyar and Gandhi had a falling out over the topic, with Periyar having imagined a far more spectacular outcome. But the historic Temple Entry Proclamation, signed by the Maharaja of Travancore in November 1936, ended the long-standing prohibition on members of disadvantaged castes entering state temples. The Vaikom Satyagraha was a significant success because of this as well as the display of Gandhian methods of civil disobedience as useful tools of protest.<sup>184</sup>

### **Self-Respect Movement**

The Self-Respect Movement in India was a socio-cultural and political movement initiated by E. V. Ramasamy, popularly known as Periyar, in the early 20th century.. The Self-Respect Movement aimed to empower the marginalized sections of society, particularly the Dalits (formerly known as "untouchables") and non-Brahmin communities, by challenging the existing caste-based social hierarchy and advocating for social justice, equality, and rationalism. The Self Respect Movement sought to grant the oppressed classes equal rights and a life of dignity and respect, which Brahminism had denied them, by dismantling the repressive caste and gender systems that had made humans superior and inferior from birth. Periyar thought that the only

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<sup>182</sup> Ashwini Deshpande, "The Ugly Reality of Caste Violence and Discrimination in Urban India" <https://thewire.in/caste/ugly-reality-caste-violence-discrimination-urban-india> (Last Visited on 25<sup>th</sup> March, 2024)

<sup>183</sup> Arjun Sengupta, "Remembering Vaikom satyagraha, a 100 years later" <https://indianexpress.com/article/explained/explained-history/remembering-vaikom-satyagraha-a-100-years-later-9241758/> (Last Visited on 25<sup>th</sup> March, 2024)

<sup>184</sup> *Id.* at 6.

way to truly gain independence was through the Self Respect movement.<sup>185</sup>

Periyar had laid down the principles of the Self-Respect Movement “to be no kind of inequality among people; no difference such as rich and poor in economic life; men and women to be treated as equals in every respect without differences; attachments to caste, religion and country to be eradicated from society with a prevalent friendship and unity around the world; with every human being seeking to act according to reason, understanding, desire, and perspective, and shall not be subject to slavery of any kind or manner.”<sup>186</sup> As a result of this moment Periyar was finally able to ensure representation of the lower classes. When the British government on December 15, 1928, guaranteed communal participation to all sections of society based on their proportionate numbers.

### **Other Reformatory Movements and Steps**

Other than two above mentioned movements there were various reformatory moments took place in India like various Dalit movements took place in India which has been one of the most significant social movements against caste discrimination Leaders like Dr. B.R. Ambedkar played a pivotal role in advocating for Dalit rights and equality. The movement has led to various legal and social reforms aimed at improving the socio-economic status of Dalits and challenging caste-based discrimination. Formation of various political parties such as the Bahujan Samaj Party (BSP) that was Founded by Kanshi Ram and led by Mayawati, primarily advocates for the interest of the Bahujan Samaj, which includes Dalits, Adivasis OBCs and religious minorities. The party aims to provide a political platform for marginalized communities to address their issues and concerns.

Some of the recent reformatory steps or Anti-Caste movement that took place against the evil of caste system includes the appointment of Ashwini K P. Ashwini K.P was the first Dalit woman to serve as a rapporteur on racism, xenophobia, and associated intolerance for a period of three years. Ashwini’s perseverance, fortitude, and commitment won her the support of the 57-member UNHRC (Geneva), and she was one of the three individuals the Consultative Group shortlisted and recommended. Globally, this was a victory for the Dalit community as well as a sign that other marginalised groups are being taken seriously by society at large.<sup>187</sup>

Other than this recently Several people participated in a cultural resistance event that was organised by various Karnataka groups by taking it to the streets. Dalits in blue gathered in large numbers at the National College grounds in Bengaluru for a big convention to demonstrate against the oppressors of the upper caste. This massive gathering took place in the midst of several atrocities and the untouchability policy in a Karnataka

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<sup>185</sup> Sankul Sonawane, “Periyar and The Self Respect Movement” <https://mavelinaducollective.com/periyars-self-respect-movement/> (Last Visited on 26<sup>th</sup> March, 2024)

<sup>186</sup> *Id.*

<sup>187</sup> Anshula Agarwal, “5 Anti-Caste Moments Of 2022 That Challenged Casteism In India” <https://feminisminindia.com/2022/12/22/5-anti-caste-moments-of-2022-that-challenged-casteism-in-india/> (Last Visited on 26<sup>th</sup> March, 2024)

village where a man was accused of using cow pee to clean a water tank that a Dalit woman was drinking.<sup>188</sup>

## **LEGAL MECHANISMS: For Preventing Caste Based Discrimination**

### **Constitutional provisions**

In the Indian Constitution, several provisions are specifically aimed at combating caste discrimination and promoting equality. Some of the key constitutional provisions are as follows:

- **Article 14** - Equality before law – “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”<sup>189</sup>
- **Article 15** – “Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth. Article 15(2) specifically prohibits discrimination in access to public places on these grounds.”<sup>190</sup>
- **Article 330 and 332** – “Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People (Lok Sabha) and in the Legislative Assemblies of the States, respectively.”<sup>191</sup>
- **Article 46** – “Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes, and other weaker sections. It directs the State to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and to protect them from social injustice and all forms of exploitation.”<sup>192</sup>

### **Statues**

1. **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**: This Act provides for the prevention of atrocities against members of Scheduled Castes and Scheduled Tribes, and for the effective enforcement of the constitutional rights of these groups. It prescribes punishment for various offenses committed against SCs and STs.
2. **Protection of Civil Rights Act, 1955**: This Act provides for the imposition of penalties for enforcing any disability arising out of “untouchability.”
3. **Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013**: This Act prohibits the employment of manual scavengers and the manual cleaning of sewers and septic tanks without protective equipment. It also provides for the rehabilitation of manual scavengers.

<sup>188</sup> *Id.* at 8.

<sup>189</sup> The Constitution of India, art. 14.

<sup>190</sup> The Constitution of India, art.15.

<sup>191</sup> The Constitution of India, art. 330 and art. 332.

<sup>192</sup> The Constitution of India, art. 46.

4. Protection of Human Rights Act, 1993: While not specifically focused on caste discrimination, this Act establishes the National Human Rights Commission (NHRC) and the State Human Rights Commissions (SHRCs), which play a role in addressing human rights violations, including those related to caste discrimination.

### **CASE STUDY: REAL LIFE INCIDENT OF CASTE DISCRIMINATION**

The experience of caste-based discrimination in the Urban City by Preeti Koli, a PhD Scholar in Education Studies at Dr. B.R. Ambedkar University, Delhi. In her experience Mrs. Preeti has shared various aspects of her life wherein she had encountered the caste-based discrimination in the Urban city.

#### Hiding her Caste identity

“Since I was in school, I have made an effort to disregard caste-related issues. I've always made an effort to conceal my caste identity because I go to school wherein lot of people were from the dominant caste such as Brahmins My grandfather moved from the village to the city in search of employment, therefore I have never experienced caste-based discrimination as it is in rural places. My father was a first-generation student who struggled throughout his life before getting a government job. He has always encouraged and pushed us to work hard in our studies in order to advance socially and in status. However, in the midst of this story, the entire tale of identifying ourselves by our first names is an excellent example of how members of marginalised groups conceal their caste identities when they migrate to cities. in my case ‘Koli’ is a scheduled caste sand When someone asks me for my complete name, they instantly translate ‘Koli’ to ‘Kohli,’ which is a Punjabi surname. As a surname, Koli is not as well-known as Kohli. When I was in second grade, my class teacher initially changed my surname from Koli to Kohli on my name slip, thinking I had spelt it incorrectly. I presented that to my father as soon as I got home, and he said, “It's just Koli. Please tell your teacher the same.” However, we don't use surnames anywhere, and that particular instance alone let me realise that there is a problem with my surname. I keep my caste a secret out of fear that if I am discovered to be a member of a Scheduled Caste, people will judge me harshly for the rest of my life.”<sup>193</sup>

#### Friendships and Romantic Relationships

“In one of the instances when my sister was applying for post-graduate (PG) in their final year of graduation, several of her close friends made comments about her social position as a SC. They left her alone, believing that her reservation would help her anyhow and that she would be in without even trying to study. They began organising study groups and applying for PG entrance tests with friends from the same caste. due to this the

<sup>193</sup> Preeti Koli, “Urban spaces and Caste-based Disenfranchisement: My Personal Experiences of Education, Romance and Merit” <https://www.decentermag.com/politics-urban-spaces-caste> (Last Visited on 26<sup>th</sup> March, 2024)

majority of friendships either dissolve or take on a formal character. and at the end, the people become friends with friends from their own caste.”<sup>194</sup>

### Questions of Merits

“Caste-based issues if at all, are only talked about and discussed regarding the concept of ‘merit’ in urban India when I was in school, I was less aware of my identity and social standing but now when I think back on those times, I can see how castes varied greatly from one another. One of the striking events I can still clearly recall has to do with the scholarships awarded to SC/ST students. The government's scholarships for worthy students from scheduled castes are awarded to the school administration after being accepted by the qualifying pupils from the caste. It is ironic that while the goal of these scholarships is to support underprivileged populations, the process by which these students were awarded was fraught with difficulties because the teachers would frequently shout out the students' names out loud in class. I was among the students who chose not to accept the scholarships in order to avoid the situation and become the object of any sort of marginalisation. I don't even know if any of my old friends who used to brag a lot about their caste origins were aware of who I was.”<sup>195</sup>

### Analysis of the above Incident

The above experience of Mrs. Preeti Koli gives the clear hint that caste functions very subtly in urban areas beneath the cover of modernity Because discussing one's own identity particularly in ‘modern’ urban settings, is fraught with notion of biasness and judgement. These notions not only oppress the marginalised but also foster ‘difference’ and ‘othering’ towards their group, which makes them feel alone. The idea is that, contrary to popular belief, urban areas are not very ‘liberal’ It is often argued that although caste oppression may not exist in urban, contemporary, and liberal India, but it is still a issue that people nonetheless experience it, which is why they typically suffer and battle on their own.

## **CONCLUSION AND ANALYSIS**

In the end it is submitted that the enduring presence of the caste system in urban India underscores the complexity of social change in modern cities. Despite urbanization’s promises of heterogeneity and social fluidity, caste identities persist, influencing access to resources, employment, social interactions, and marriage alliances. Efforts to challenge caste discrimination, through reformative movements or legal mechanisms, have made strides but remain insufficient in the face of deeply entrenched social hierarchies. Real-life experiences, like those of Preeti Koli, serve as poignant reminders of the pervasive nature of caste-based discrimination in urban spaces, undermining efforts to conceal or downplay caste identities. Marginalization and bias persist,

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<sup>194</sup> *Supra* note 193 at 10.

<sup>195</sup> *Id.*

hindering true social mobility and perpetuating social stratification. While urbanization has undoubtedly brought economic opportunities and increased social mobility, its transformative power has yet to fully dismantle the caste system's grip on Indian society. To achieve meaningful progress, there must be a collective commitment to fostering inclusivity, equality, and social justice. This requires not only continued advocacy and legal reform but also a cultural shift towards challenging entrenched beliefs and behaviors that perpetuate caste-based discrimination. Ultimately, eradicating caste-based discrimination demands a multifaceted approach that addresses structural inequalities, promotes empathy and understanding, and cultivates a society where every individual is valued regardless of their caste background. Only through such collective efforts can urban India truly fulfill its potential as a space of opportunity, equality, and dignity for all its inhabitants.

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# SAFEGUARDING PRIVACY IN THE DIGITAL ERA: BALANCING RIGHTS, SECURITY, AND INNOVATION

Ms. Adyasha Behera<sup>196</sup> & Mr. Bhanu Pratap Singh<sup>197</sup>

### ABSTRACT

*"Privacy is not something that I'm merely entitled to, it's an absolute prerequisite."*

– Marlon Brando<sup>198</sup>

*In the digital age, privacy rights have become a cornerstone of individual freedom and autonomy. This article examines the evolution of privacy rights in India, tracing key judicial decisions and legislative developments that have shaped this fundamental right. From early recognitions under Article 21 of the Constitution in cases like Kharak Singh and Govind, to landmark judgments in R. Rajagopal and Justice K.S. Puttaswamy, India's judiciary has consistently emphasized the importance of protecting personal data. We explore the India Digital Personal Data Protection Act (DPDPA) 2023, a significant milestone that sets stringent standards for handling personal information, and examine existing laws like the Information Technology Act, 2000. The discussion includes the role of technological innovations such as Virtual Private Networks (VPNs), antispyware solutions, password managers, and privacy-oriented search engines, along with advanced privacy-enhancing technologies (PETs) like zero-knowledge proofs and disk encryption. We also consider future trends in privacy rights and security, including advancements in encryption, AI, decentralized technologies, and global collaboration. By balancing technological advancements with the necessity of protecting individual privacy, this article aims to envision a digital landscape that respects and safeguards personal freedoms, fostering trust in the digital ecosystem. Through comprehensive analysis, we underscore the critical need for robust privacy protections in an ever-evolving technological world.*

**KEY WORDS-** Privacy Rights, Data Protection, Digital Age, Technological Innovations, Judicial Decisions

### INTRODUCTION

<sup>196</sup> Faculty of Law, Madhusudan Law University, Cuttack, Odisha

<sup>197</sup> Faculty of Law, Madhusudan Law University, Cuttack, Odisha

<sup>198</sup> David Shipman, *Marlon Brando*, Ch. 11 (1974, rev. 1989), Sphere, London, First revised and expanded edition (January 1, 1990)



"Privacy is not an option, and it shouldn't be the price we accept for just getting on the Internet." – Gary Kovacs, former CEO of Mozilla.<sup>199</sup>

Privacy is becoming one of the most pressing concerns of the digital age. We live in an era where every click, like, and share can be traced. The rapid advancement of technology has revolutionized the way we communicate and now even how we think, but it has also brought unprecedented challenges to our personal privacy. From social media platforms harvesting data to governments implementing mass surveillance, the boundaries of privacy are continuously being tested and redefined. As we navigate this digital landscape, understanding our privacy rights and how to protect them is more crucial than ever. This article delves into the evolution of privacy rights, examines the current legal frameworks, explores the impact of emerging technologies, and discusses the ongoing battle to safeguard personal information in an increasingly connected world.

## UNDERSTANDING DIGITAL PRIVACY IN THE MODERN AGE

Digital privacy refers to the right and ability of individuals to control how their personal information is collected, used, and shared in the digital world. It embodies the desire to navigate online spaces without fear of unauthorized data collection, misuse, or distribution, forming the essence of internet privacy. Digital privacy is crucial for several reasons. It empowers individuals by giving them control over their information and the freedom to interact with the digital world on their terms. It also helps prevent cybercrimes such as identity theft, fraud, and harassment. Additionally, it maintains a free and open society by protecting against undue intrusion and surveillance from both state and corporate entities.

The concept of privacy has evolved significantly with technological advancements. While privacy was once a straightforward concept, it has become more complex in the digital age. As individuals leave larger digital footprints, privacy now encompasses online interactions, behaviours, and activities.

Several challenges make maintaining digital privacy difficult. Widespread and often hidden data collection methods make it hard for individuals to understand what data is being collected and how it is used. Controlling the distribution of personal data across the internet is daunting. Additionally, many individuals lack the knowledge and tools to manage their digital privacy effectively.<sup>200</sup>

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<sup>199</sup>Gary Kovacs, "Tracking our online trackers", TED Talks, Held on March 2012, Longbeach California available at [https://www.ted.com/talks/gary\\_kovacs\\_tracking\\_our\\_online\\_trackers?geo=hi&subtitle=en](https://www.ted.com/talks/gary_kovacs_tracking_our_online_trackers?geo=hi&subtitle=en) (Last visited on July 30,2024)

<sup>200</sup> IEEE Digital Privacy Initiative, available at <https://digitalprivacy.ieee.org/publications/topics/understanding-privacy-in-the-digital-age> (last visited on August 1, 2024).

## EVOLUTION OF PRIVACY RIGHTS IN INDIA

The evolution of privacy rights in India is a fascinating journey marked by significant legal, social, and technological changes. During colonial era and early independence privacy was not a matter of concern as a right. The main focus was on property rights and personal securities. With India achieving its independence in 1947, the constitution of India was framed which gave place to “Right to Life and Personal Liberty” under article 21 as a right. It is this article which was interpreted over time to encompass privacy rights.

Early development of privacy rights can be observed from *Kharak Singh Case(1964)*<sup>201</sup> where the Supreme Court of India addressed privacy in the context of police surveillance. The court ruled that the right to privacy was implied in the right to personal liberty under Article 21, but the again it did not get explicitly recognized as a fundamental right.

The scope of the privacy rights expanded in *R. Rajagopal Case (1994)*<sup>202</sup> where the Supreme Court recognized the right to privacy as an aspect of Article 21. In the case the publication of a person's life story was involved without consent, leading to a broader interpretation of privacy.

Finally in *Justice K.S. Puttaswamy (Retd.) Case (2017)*<sup>203</sup>, a pivotal moment came. The Supreme Court ruled that the right to privacy is a fundamental right under Article 21 of the Constitution. This landmark judgment affirmed privacy as an intrinsic part of the right to life and personal liberty, influencing subsequent legislative and policy measures. Let’s discuss about the case more.

## THE PIONEERING PUTTASWAMY CASE: A LANDMARK IN PRIVACY RIGHTS

The landmark judgment in *Justice K.S. Puttaswamy and Ors. vs Union of India and Ors.*<sup>204</sup> (the "Aadhar Judgment") fundamentally reshaped the discourse on privacy rights in India, particularly in the context of the digital age. The Supreme Court of India, in this historic ruling, declared that the Right to Privacy is a Fundamental Right protected under Article 21 of the Constitution, which guarantees the right to life and personal liberty. This judgment emphasized that privacy is an intrinsic part of the freedoms guaranteed by Part III of the Constitution.

A crucial aspect of the judgment is its recognition of informational privacy as an essential facet of the broader right to privacy. The Court acknowledged that in today’s digital era, the regulation of personal data is paramount. The judgment highlighted several key facets of information that underscore the necessity for robust data protection laws:

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<sup>201</sup> *Kharak Singh v. State of Uttar Pradesh*, AIR 1964 SC 724

<sup>202</sup> *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632

<sup>203</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1

<sup>204</sup> *Supra* note 202

1. **Nonrivalrous Nature of Information:** Information can be used and consumed by multiple users simultaneously without diminishing its value. This characteristic makes it imperative to protect how personal data is accessed and shared.
2. **Invisibility of Information Processing:** Often, individuals are unaware of how their information is being collected, used, stored, or processed. This invisibility raises significant concerns about unauthorized use and breaches of privacy.
3. **Recombinant Nature of Information:** Fragments of data collected from various sources can be combined to create comprehensive profiles of individuals. This ability to compile detailed personal profiles necessitates stringent data protection measures to prevent misuse.

The judgment further recognized that certain classes of information warrant a reasonable expectation of privacy, affirming the "right to be left alone." It pointed out the limitations of the existing legal framework under the Information Technology Act, 2000, as amended in 2008, which recognizes "personal information" and "personally sensitive data or information." According to this framework, the collection or use of such data requires explicit consent from the user, who should have the choice to provide or withhold such information.

The Supreme Court stressed the importance of transparency in obtaining consent for the collection, use, retention, and processing of personal data. This emphasis on informed consent is crucial in ensuring that individuals are aware of and can control how their data is utilized. Moreover, the judgment underscored that any encroachment on privacy must be through legislated law that meets all constitutional requirements, thus ensuring that restrictions on fundamental rights are reasonable and justified.

Recognizing the dynamic and pervasive nature of digital data, the bench urged the legislature to adopt a comprehensive data protection regime. This regime should balance individual privacy interests with the legitimate concerns of the state. The judgment catalyzed the development of data protection laws in India, leading to the formulation of the India Digital Personal Data Protection Act 2023 (DPDPA), which aims to provide robust protection of personal data in the digital age.

The Puttaswamy judgment is a seminal ruling that firmly established the Right to Privacy as a fundamental right in India, particularly emphasizing the need for strong data protection laws. By recognizing informational privacy as a critical component of personal liberty under Article 21, the judgment laid the groundwork for safeguarding individual privacy in the face of rapid technological advancements and pervasive digital data processing. The judgment's call for legislative action has been instrumental in shaping the ongoing evolution of privacy protection laws in India.

## LEGISLATIVE DEVELOPMENTS IN INDIA AND CURRENT SCENARIO

In the digital age, privacy protection in India is a dynamic and multifaceted issue. While various legislative and regulatory frameworks exist, a significant advancement was made with the enactment of the India Digital Personal Data Protection Act 2023 (DPDPA). This landmark legislation, effective from September 1, 2023, aims to safeguard individuals' privacy in the digital realm by imposing rigorous privacy and data protection standards on all organizations processing personal data in India. The following outlines the current landscape of privacy protection legislation in India.

### 1. Information Technology Act, 2000 (IT Act)

- **Sections 43A and 72A:** These sections deal with compensation for failure to protect data and punishment for breach of confidentiality and privacy, respectively.<sup>205</sup>
- **IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011:** These rules define what constitutes sensitive personal data and outline the security practices companies must follow to protect such data.<sup>206</sup>
- **The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021:** This rule mandates that companies collecting information must adhere to specific requirements to ensure the security of private data.<sup>207</sup>

### 2. Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016<sup>208</sup>

- **Section 29:** Restricts the sharing of core biometric information.
- **Section 30:** Classifies biometric information as sensitive personal data.
- **Section 33:** Allows disclosure of information in the interest of national security upon direction by an officer not below the rank of Joint Secretary.

### 3. Right to Information Act, 2005 (RTI Act)

- **Section 8(1)(j):** Exempts personal information from disclosure if it has no relationship to any public activity or interest, or if it would cause an unwarranted invasion of privacy unless the larger public interest justifies the disclosure.

### 4. The Bharatiya Nyaya Sanhita, 2023

- **Sections 314 and 316(1):** Address dishonest misappropriation of property and breach of trust, which can relate to misuse of personal information.<sup>209</sup>

<sup>205</sup> The Information Technology Act, 2000 (Act 21 of 2000), s. 43(A) and 72(A)

<sup>206</sup> IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011

<sup>207</sup> The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

<sup>208</sup> The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016NO. 18 OF 2016, ss.29,30,33

<sup>209</sup> The Bharatiya Nyaya Sanhita, 2023 NO. 45 OF 2023

## 5. Consumer Protection Act, 2019

- **Consumer Protection (E-Commerce) Rules, 2020:** Includes provisions related to the protection of consumer data in e-commerce transactions.<sup>210</sup>

## 6. Telecom Regulatory Authority of India (TRAI) Regulations

- **Telecom Commercial Communications Customer Preference Regulations, 2018:** Aims to curb unsolicited commercial communication and protect user data in the telecom sector.<sup>211</sup>

## 7. Sector-Specific Guidelines

- **Reserve Bank of India (RBI) Guidelines:** The RBI issues guidelines for banks and financial institutions regarding data protection and cybersecurity.<sup>212</sup>
- **National Health Data Management Policy, 2020:** Provides guidelines for the protection of health data.<sup>213</sup>

## 8. The Digital Personal Data Protection Act, 2023

The DPDPA safeguards personal data processed within India, irrespective of its origin. Additionally, the Act extends its protection to the personal data of Indian citizens, even if the processing occurs outside India.<sup>214</sup>

## CRITICAL ANALYSIS OF THE DIGITAL PERSONAL DATA PROTECTION ACT, 2023

The India Digital Personal Data Protection Act 2023 (DPDPA)<sup>215</sup> marks a significant milestone in the protection of individual privacy in the digital age. Effective from September 1, 2023, this comprehensive legislation applies to all organizations processing personal data of individuals in India, as well as the personal data of Indian citizens processed globally. The primary objective of the DPDPA is to safeguard personal privacy by imposing stringent data protection standards on organizations.

Personal data, as defined by the DPDPA, encompasses any information that can identify a natural person directly or indirectly. This broad definition includes a wide range of data, such as names, addresses, contact information, dates of birth, gender, financial details like bank account numbers and credit card information,

<sup>210</sup> The Consumer Protection Act, 2019 NO. 35 OF 2019

<sup>211</sup> The Telecom Commercial Communications Customer Preference Regulations, 2018 (6 of 2018)

<sup>212</sup> Reserve Bank of India (RBI) Guidelines, available at <https://www.rbi.org.in/commonperson/English/Scripts/Notification.aspx?Id=1721>, (Last visited on July 28 2024)

<sup>213</sup> National Health Data Management Policy, 2020: available at [https://abdm.gov.in:8081/uploads/health\\_management\\_policy\\_bac9429a79.pdf](https://abdm.gov.in:8081/uploads/health_management_policy_bac9429a79.pdf) (Lat visited on July 29,2024)

<sup>214</sup> The Digital Personal Data Protection Act, 2023 (No. 22 of 2023)

<sup>215</sup> *Ibid.*

online browsing history, social media activity, and location data like GPS coordinates. By covering such an extensive array of information, the DPDPA ensures comprehensive protection of personal data.

The DPDPA protects personal data processed within India, regardless of its origin, and extends its protection to the personal data of Indian citizens processed outside the country. However, certain types of data are exempt from the Act, including data processed for law enforcement or national security purposes, journalism or artistic expression, and personal or family use.

The Act is founded on six key principles designed to ensure robust data protection:

- Lawfulness
- Purpose Limitation
- Data Minimization
- Accuracy
- Storage Limitation
- Integrity and Confidentiality

These principles mandate that personal data must be processed lawfully, collected for specific and legitimate purposes, minimized to what is necessary, kept accurate and up-to-date, stored only as long as necessary, and secured against unauthorized access and damage.

Individuals, referred to as data principals under the DPDPA, are granted several important rights regarding their personal data. These rights include access to their personal data, rectification of inaccuracies, erasure of data, restriction of data processing, data portability, and the ability to object to data processing. These provisions empower individuals to maintain control over their personal information.

Enforcement of the DPDPA is overseen by the Data Protection Authority of India (DPA), an independent body responsible for ensuring compliance with the Act. The DPA has the authority to investigate complaints, issue fines, and mandate that organizations adhere to the established data protection standards. Through these measures, the DPA plays a crucial role in upholding the privacy rights of individuals.

In conclusion, the India Digital Personal Data Protection Act 2023 represents a comprehensive effort to protect individual privacy in the digital era. By defining personal data broadly, establishing key data protection principles, and granting significant rights to individuals, the DPDPA aims to create a secure and transparent environment for personal data processing. The Act, enforced by the Data Protection Authority of India, ensures that organizations comply with these standards, thereby enhancing the overall privacy and security of personal data in India.

## MAJOR CONCERNS RELATING TO DIGITAL PRIVACY RIGHTS AND THEIR BREACHES

Two major concerns surround privacy rights: the extent of the state's surveillance powers and customers' concerns about their right to privacy being acknowledged under the Competition Act, 2002.

- **End-to-End Encryption and state's surveillance powers**

End-to-end encryption (E2E encryption) is a method of encrypting communications transmitted from one device and decrypting them on the receiving device to secure data in motion.<sup>216</sup> This encryption ensures that data remains protected from external parties, even the network on which it is sent, and guarantees its integrity during transfers by generating a unique key at encryption. This technology is crucial in the internet age, where users are constantly connected online. Ruth Gavison's "limited access theory," which relates to our concern over our accessibility to others, aligns with the modern discussions on E2E encryption and state officials' access to transmitted information.<sup>217</sup> In an era where smartphones serve as virtual diaries, the impact of data breaches is severe. E2E encryption is vital for professionals in anti-establishment roles, investigative journalists, activists, civil society leaders, and marginalized groups facing persecution. It fosters and preserves the right to free speech and peaceful assembly, as guaranteed by Article 19(1)(b) of the Indian Constitution,<sup>218</sup> by preventing unauthorized communication interception and potential surveillance. Without E2E encryption, the right to create associations is at greater risk, as seen in Iran's restrictions on encrypted communication tools.<sup>219</sup> Legal rights must balance public interest and national security. The Puttaswamy judgment<sup>220</sup> offers a "menu" of tests for determining the limits of the constitutional right to privacy, requiring any state action to meet criteria of legitimacy, suitability, necessity, and proportionality. The Information Technology (Amendment) Act of 2008<sup>221</sup> empowers the government to regulate encryption for network security and e-governance, though previous proposals have faced criticism for weakening encryption standards and ignoring privacy and freedom of speech. A strict encryption policy that forbids E2E encryption could hinder national security by preventing the state from accessing data to combat terrorism. Compliance with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021<sup>222</sup>, is crucial for OTT communication platforms to maintain "safe harbour" protection. However, broad data requests without limitations pose challenges to user privacy. The Ministry of Home Affairs' order allowing central agencies to intercept information for national

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<sup>216</sup> A. Singh and U. Agarwal "Privacy, National Security, and Government Interests: The Many Facets of End-To-End Encryption in India" *Journal on Communication, Media, Entertainment & Technology Law* (2021)

<sup>217</sup> R. Gavison, 'Privacy and the Limits of Law' 89 *Yale Law Journal* 421, 523 (1980)

<sup>218</sup> The Constitution of India, art. 19(1)(b)

<sup>219</sup> *Riley v. California*, 573 U.S. 373 (2014)

<sup>220</sup> *Supra* note 203 at 3

<sup>221</sup> The Information Technology (Amendment) Act of 2008, No.10 of 2009

<sup>222</sup> *Supra* note 207 at 6

security<sup>223</sup> fails the Puttaswamy test. Digital contact tracing apps for COVID-19 highlight state surveillance using Bluetooth and GPS, with data stored on centralized or decentralized servers. The Five Eyes Intelligence Alliance's call for "backdoors" in E2E encryption systems<sup>224</sup> raises concerns about widespread surveillance and privacy violations. The 2005 "Athens Affair" demonstrates the potential misuse of backdoors for foreign government surveillance.<sup>225</sup>

- **Concerns relating to “Right to Privacy” under Competition Law-**

The traditional interaction between customers and enterprises is being transformed as marketplaces increasingly operate within a "digital economy," where computer-based technology facilitates the sale of products and services. A key feature of this digital economy is the flow of "information" between customers and businesses, with customer data often acting as the "currency" of this virtual marketplace. By analysing this data, companies can more effectively market their products and services, creating demand by leveraging customer behaviours and purchasing patterns, thus moving beyond the traditional supply and demand cycle. However, this practice raises two major concerns: the risk to customer privacy and rights, and the widening disparity between companies that can and cannot harness customer data.<sup>226</sup> The regulation of consumer data, therefore, falls under the purview of antitrust laws, which aim to ensure economic efficiency, consumer protection, and competitor protection. However, traditional competition analysis focuses on "pricing models" and often overlooks "non-pricing models" like data collection. Cases like Amazon's "Price Test"<sup>227</sup> and Uber's data usage<sup>228</sup> highlight how data privacy violations can impact customer welfare and market competition. The Cambridge Analytica scandal further exemplifies the misuse of data for political manipulation. Current data protection frameworks, including those in India, allow companies to infringe on user privacy as long as it is disclosed in their terms of service, which are often lengthy and unclear, leaving users with little real choice. Non-dominant businesses also struggle to collect and mine data, facing entry barriers that hinder competition. Mergers and acquisitions among data-rich companies exacerbate these issues, consolidating data control and market power among a few dominant players. Antitrust regulators must

<sup>223</sup>Ministry of Home Affairs Order dtd. 20.12.2018 available at <https://egazette.nic.in/WriteReadData/2018/194066.pdf>

<sup>224</sup> [India Today Tech](https://www.indiatoday.in/technology/news/story/india-joins-five-eyes-japan-in-demanding-backdoor-into-whatsapp-end-to-end-encrypted-chats-1730681-2020-10-12), "India Joins Five Eyes, Japan in demanding backdoor into Whatsapp end to end encrypted chats", *India Today* (2020) available at: <https://www.indiatoday.in/technology/news/story/india-joins-five-eyes-japan-in-demanding-backdoor-into-whatsapp-end-to-end-encrypted-chats-1730681-2020-10-12> (Last visited on August 4, 2024)

<sup>225</sup>Wikipedia, "Greek wiretapping case 2004–05" available at [https://en.wikipedia.org/wiki/Greek\\_wiretapping\\_case\\_2004\\_%E2%80%9C05](https://en.wikipedia.org/wiki/Greek_wiretapping_case_2004%E2%80%9C05) (Last visited on August 4, 2024)

<sup>226</sup> Max Feedman, "How Businesses Are Collecting Data (And What They're Doing With It)", *Business News Daily* 2023 available at: <https://www.businessnewsdaily.com/10625-businessescollecting-data.html> (Last visited on August 4, 2024)

<sup>227</sup> Marc Israel, "The CMA launches a new market study in a bid to keep pace with a fast-moving digital economy" *White & Case*, July 9, 2019, available at <https://www.whitecase.com/publications/alert/cma-launches-new-market-study-bid-keep-pace%20fast-moving-digital-economy> (last visited on August 5, 2024)

<sup>228</sup> Ben Dickson, "Beware the privacy and security risks of smart speakers" *TechTalks* June 5, 2018 available at <https://bdtechtalks.com/2018/06/05/google-home-amazon-echo-privacy-security-risks/> (Last visited on August 6, 2024)



weigh the potential harms and benefits of such mergers to ensure market competition.<sup>229</sup> The European Commission (EC) notes that refusal to share data by dominant firms is not inherently anti-competitive unless the data is essential for competitors. In such cases, competitors must demonstrate the uniqueness of the data and the lack of alternative sources.

## TECHNOLOGICAL SOLUTIONS FOR PRIVACY PROTECTION

In the digital age, maintaining privacy is crucial, and several technologies are instrumental in protecting personal data. Here's how various tools contribute to safeguarding privacy and can be adopted in India by the citizens organizations, various department of government and other establishments.

1. **Password Managers:** Password managers are vital for securing online accounts by storing and managing login credentials in an encrypted vault. They generate complex, unique passwords for each site, reducing the risk of password reuse and unauthorized access. This enhances the overall security of personal information.
2. **Virtual Private Networks (VPNs):** VPNs play a crucial role in safeguarding online privacy by encrypting your internet connection and masking your IP address. By routing your data through secure servers, VPNs make it difficult for third parties to track your online activities or determine your location, especially on public Wi-Fi networks.
3. **Disk Encryption Tools:** Disk encryption tools protect data on your hard drive or external storage by converting it into unreadable code. This ensures that sensitive information remains secure, even if your device is lost or stolen. Popular tools like BitLocker and File Vault provide robust encryption to safeguard your data.
4. **Secure Messaging Apps:** Secure messaging apps, such as Signal and Telegram, offer strong encryption for communications. They protect chats, calls, and file transfers, ensuring that only you and the intended recipient can access the content, thus preventing unauthorized interception.
5. **Antispyware Solutions:** Antispyware tools are designed to detect and remove spyware—malicious software that collects personal information without consent. By eliminating these threats, antispyware solutions prevent unauthorized access to sensitive data, including passwords and financial information.
6. **Privacy-Oriented Search Engines:** Privacy-focused search engines like DuckDuckGo and Brave prioritize user anonymity by not tracking or storing search history. This prevents third parties from building profiles based on your search activities, thus enhancing online privacy.

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<sup>229</sup> Facebook v. WhatsApp, European Comm'n Case COMP/M8124  
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7. **Ad Blockers:** Ad blockers prevent advertisements from appearing on web pages and reduce the collection of data by ad trackers. By blocking these trackers, ad blockers help limit the amount of personal information that companies can gather about you.
8. **Anonymous Payment Methods:** Anonymous payment methods, such as cryptocurrencies and prepaid debit cards, allow for transactions without revealing personal or financial details. These methods reduce the risk of data breaches and unauthorized tracking of spending habits.
9. **Privacy Screens:** Privacy screens are physical filters for computer and mobile device displays that restrict the viewing angle. This makes it difficult for others to see or photograph your screen, protecting sensitive information, especially in public spaces.
10. **Secure File Deletion Tools:** Secure file deletion tools ensure that files are permanently erased by overwriting data multiple times. Unlike standard deletion methods, these tools prevent the recovery of sensitive information, safeguarding it from unauthorized access.
11. **"Burner" Emails:** Burner emails are temporary and disposable email addresses used for specific purposes or limited time. They help avoid exposing your primary email address, reducing spam and preventing unwanted databases from linking to your main email.
12. **Tor Network:** The Tor Browser uses The Onion Router (Tor) to anonymize internet activity by routing traffic through multiple servers. This makes it challenging to trace your IP address or gather personal information, thereby enhancing online privacy.<sup>230</sup>
13. **Zero-Knowledge Proof Technologies:** Zero-knowledge proof technologies enable one party to demonstrate the truth of a statement to another party without disclosing any specific details. This innovation has profound implications for privacy. A notable example is Zcash, a cryptocurrency that employs zero-knowledge proofs to facilitate private transactions.<sup>231</sup>

By employing these technologies, individuals can effectively protect their privacy and secure their personal data against various digital threats. Each tool addresses different aspects of online privacy, contributing to a safer digital environment.

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<sup>230</sup> David Balaban, "Top 12 Tools And Technologies To Ramp Up Your Online Privacy" *Forbes* Sep 14, 2023

<sup>231</sup> Vivek Vaidyanathan, The Rise of Privacy Tech: Tools for Protection, *Linked In*, September 26, 2023, available at <https://www.linkedin.com/pulse/rise-privacy-tech-tools-protection-vivek-vaidyanathan> (Last visited on July 29, 2024)

## **Future Directions and Trends in Privacy Rights and Security in the Digital Age**

### **1. Advanced Encryption Techniques**

The future of digital privacy will likely see advancements in encryption techniques. Technologies such as homomorphic encryption, which allows data to be processed without being decrypted, can ensure data privacy while still enabling meaningful analysis. These advanced encryption methods will be crucial in protecting sensitive information from unauthorized access.<sup>232</sup>

### **2. AI and Machine Learning for Privacy Protection**

Artificial Intelligence (AI) and Machine Learning (ML) are set to play a significant role in enhancing privacy and security. These technologies can be used to detect and respond to potential data breaches in real-time, predict vulnerabilities, and implement automated privacy management systems. AI-driven privacy solutions will help organizations proactively protect personal data and maintain compliance with privacy regulations.<sup>233</sup>

### **3. Decentralized Technologies**

Blockchain and other decentralized technologies offer promising solutions for privacy and security. By distributing data across a network rather than storing it centrally, these technologies reduce the risk of large-scale data breaches. Blockchain, in particular, can provide transparent and tamper-proof records of transactions, enhancing trust and security in digital interactions.<sup>234</sup>

### **4. Increased Regulatory Scrutiny**

As data privacy concerns continue to grow, governments around the world are likely to introduce stricter regulations and standards for data protection. These regulations will mandate greater transparency in how organizations collect, use, and share personal data. The enforcement of laws like the General Data Protection Regulation (GDPR) in Europe and the India Digital Personal Data Protection Act (DPDPA) is expected to become more rigorous, with heavier penalties for non-compliance.<sup>235</sup>

### **5. Privacy-Enhancing Technologies (PETs)**

Privacy-Enhancing Technologies (PETs) will gain prominence as tools to protect user privacy. Techniques such as differential privacy, which adds noise to data to prevent identification of individuals, and federated

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<sup>232</sup> ED Oswald, What Is the Advanced Encryption Standard (AES)?, *U.S News and World Report*, December 16, 2022, available at <https://www.usnews.com/> (Last visited on July 25, 2024)

<sup>233</sup> Xueji Zhao, "How AI systems should protect our privacy", TED Talks, Held on 28 January 2024, Isabel Bader Theatre, Toronto, available at <https://www.youtube.com/watch?v=bWWf4AHfzGM> (Last visited on August 1, 2024)

<sup>234</sup> Yiwei Lai, Jingyi Yang, Mingzhe Liu, Yibei Li, Shanlin Li, "Web3: Exploring Decentralized Technologies and Applications for the Future of Empowerment and Ownership", *1 MDPI Open Access Journals* 111-131 (2023)

<sup>235</sup> Covington Alert, "Data Privacy Day 2024 – Key Global Developments in Data Privacy and Cybersecurity in 2023 and What to Expect in 2024", *Covington and Burling LLP*, available at <https://www.cov.com/en/news-and-insights/insights/2024/01/data-privacy-day-2024-key-global-developments-in-data-privacy-and-cybersecurity-in-2023-and-what-to-expect-in-2024#layout=card&numberOfResults=12>, (Last visited on August 2, 2024)

learning, which allows AI models to be trained across multiple devices without sharing raw data, will be increasingly adopted. These technologies will enable data utilization while minimizing privacy risks.<sup>236</sup>

## 6. User Empowerment and Control

Future trends will focus on giving users more control over their personal data. Enhanced user consent mechanisms, clear data usage policies, and user-friendly privacy settings will empower individuals to manage their digital footprint more effectively. Innovations like self-sovereign identity, where users have control over their digital identities and can choose what information to share, will also emerge.<sup>237</sup>

## 7. Integration of Privacy by Design

The concept of Privacy by Design, which advocates for privacy to be integrated into the design of systems and processes from the outset, will become a standard practice. Organizations will increasingly adopt this approach to ensure that privacy considerations are embedded in their technology and business strategies, thereby minimizing risks and enhancing user trust.<sup>238</sup>

## 8. Ethical Considerations in Data Use

There will be a growing emphasis on the ethical use of data. Organizations will need to consider not just the legal, but also the ethical implications of their data practices. This includes being transparent about data use, avoiding data discrimination, and ensuring that data practices do not harm individuals or communities.<sup>239</sup>

## 9. Enhanced Security Measures

As cyber threats evolve, so too will the security measures needed to protect against them. This includes the development of more sophisticated threat detection and response systems, enhanced multi-factor authentication, and the use of biometric security measures. Continuous advancements in cybersecurity will be essential to protect against data breaches and cyber attacks.<sup>240</sup>

## 10. Global Collaboration and Standards

International collaboration on privacy and data protection standards will become increasingly important. As data flows across borders, there will be a need for harmonized regulations and cooperative enforcement mechanisms. Global standards and best practices will help ensure consistent and robust privacy protections worldwide.

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<sup>236</sup>Information Commissioner's Office (ICO.Co), "Privacy-enhancing technologies (PETs)" *Draft anonymisation, pseudonymisation and privacy enhancing technologies guidance* Ch 5 (2022)

<sup>237</sup> Schmidt, Kiley, J, "Empowering users to understand their online privacy rights and choices through an interactive social media sign-up process" *University of Minnesota Department of Writing Studies* (2018)

<sup>238</sup> Arjim Jain, "Understanding Privacy by Design: A Comprehensive Overview" *Manupatra Articles* (2023)

<sup>239</sup> *Ibid.*

<sup>240</sup> Sanjiv Cherian, "Strategies to Enhance Data Privacy Security in 2024" *Microminder Cubesr Security*, Jan 09,2024 available at <https://www.micromindercs.com/blog/strategies-to-enhance-data-privacy-security-in-2024>( Last visited on August 2,2024)

The future of privacy rights and security in the digital age will be shaped by technological innovations, regulatory developments, and evolving ethical standards. As we navigate this complex landscape, the focus will be on empowering individuals, enhancing transparency, and ensuring robust protections against emerging threats. By embracing these future directions and trends, we can build a digital environment that respects and protects privacy while enabling the benefits of technological advancement.<sup>241</sup>

## CONCLUSION

The digital age presents both opportunities and challenges for privacy rights and data protection. The landmark Puttaswamy judgment marked a significant step forward by recognizing the right to privacy as fundamental under Article 21 of the Indian Constitution, setting a precedent for the protection of personal data. However, the journey towards comprehensive data protection is far from complete. The current legislative framework, including the Information Technology Act, 2000, and its amendments, needs to be strengthened to address the complexities of data privacy in today's interconnected world.

End-to-end encryption (E2E) has emerged as a critical tool for protecting users' data in an era of constant connectivity, supporting freedom of speech and assembly by preventing unauthorized access to communications. However, balancing individual privacy rights with national security concerns remains a contentious issue. Governments worldwide grapple with the need to access encrypted data for security purposes while upholding the fundamental right to privacy.

In the digital marketplace, the mining and processing of personal data by dominant companies lead to significant antitrust concerns. Practices like price discrimination based on data analytics can harm consumer welfare and create entry barriers for smaller firms. Mergers and acquisitions further consolidate data power, raising competition issues that traditional antitrust frameworks may not adequately address. The challenge lies in ensuring that data privacy regulations are harmoniously integrated with competition law to prevent market monopolies and protect consumer interests.

Furthermore, the evolution of technology demands continuous updates to legal and regulatory frameworks. Emerging technologies such as artificial intelligence and machine learning, which rely heavily on data, pose new challenges to privacy and data protection. As these technologies advance, it is crucial to develop policies that safeguard individual rights while fostering innovation.

The importance of consumer consent and transparency in data practices cannot be overstated. Companies must

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<sup>241</sup> Gail Crawford, Fiona Maclean, Danielle van der Merwe, Kate Burrell, Bianca H. Lee, Alex Park, Irina Vasile, and Amy Smyth, "India's Digital Personal Data Protection Act 2023 vs. the GDPR: A Comparison" *Global Privacy & Security Compliance Law Blog Commentary on Global Privacy and Security Issues of Today*, December 13, 2023, available at <https://www.globalprivacyblog.com/2023/12/indias-digital-personal-data-protection-act-2023-vs-the-gdpr-a-comparison/> (Last visited on July 26, 2024)

ensure that their terms of service are clear and comprehensible, allowing users to make informed decisions about their data. This transparency builds trust and empowers consumers to take control of their personal information.

Moreover, international cooperation is essential in addressing global data privacy challenges. As data flows across borders, countries must collaborate to create standardized regulations that protect privacy rights while facilitating international commerce. This cooperation can help prevent data breaches and cyber attacks that threaten global security.

In conclusion, the digital age necessitates a multifaceted approach to data protection. Strengthening legislative frameworks, enhancing transparency and consent, balancing privacy with national security, addressing antitrust concerns, and fostering international cooperation are all critical steps in safeguarding privacy rights in the digital era. By implementing these measures, India can not only protect its citizens' privacy but also promote innovation and growth in the digital economy. The future of privacy rights depends on our collective efforts to create a secure, equitable, and transparent digital ecosystem.

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# INDIA'S EQUALISATION LEVY: FROM IMPLEMENTATION TO ABOLITION AND THE QUEST FOR GLOBAL DIGITAL TAX CONSENSUS

Shrey Bhatnagar<sup>242</sup> & Mahi Singh<sup>243</sup>

### ABSTRACT

*This paper explores India's Equalisation Levy (EL), a 2% tax on digital transactions of non-resident companies, introduced to address revenue loss due to the digital economic system and its latest abolition. While the EL aimed to create a level playing field and garner higher revenue, it faced criticism for developing additional compliance burdens, doubtlessly impacting startups, and raising concerns about double taxation. The US, representing important tech organisations suffering from the EL, strongly contested the levy, threatening a retaliatory tax on Indian entities. This highlighted the want for a global consensus on digital taxation.*

*The OECD spoke back with a two-pillar solution: Pillar One allocates taxing rights primarily based on value creation (e.g., user interaction), whilst Pillar Two sets an international minimum corporate tax rate. India's abolition of the EL in 2024 displays its commitment to the OECD framework.*

*However, demanding situations continue to be. Implementing Pillar One and making sure effective minimum tax prices require international cooperation. Clear and regular tax regulations are critical for groups to function successfully. The destiny of digital taxation hinges on balancing the revenue era, fostering innovation, and minimising compliance burdens for companies, in particular in developing economies.*

*The digital economy necessitates a fair and efficient worldwide digital tax system, requiring persistent dialogue, model development, and recognition of both revenue generation and fostering innovation.*

**KEYWORDS:** Digital Tax, Equalisation Levy, OECD, Base Erosion & Profit Shifting (BEPS), Double Taxation

<sup>242</sup>B.A., LL.B. (Corporate Hons.), Chanakya National Law University, Patna

<sup>243</sup> B.A., LL.B. (Corporate Hons.), Chanakya National Law University, Patna

## INTRODUCTION

Rapid digitisation across the globe has stimulated a surge in consumption of goods and services through digital mediums, enabling businesses to operate remotely, often shifting to tax favourable locations exploiting the difference in tax rules formally called Base Erosion and Profit Shifting (BEPS),<sup>244</sup> Garnering global governments' attention and concern over revenue losses, countries within the Organization for Economic Co-operation and Development (OECD) laid out the BEPS action plan, which specified that no unique tax rules must be devised just for the digital economy. Instead, existing rules should be adapted to handle these challenges while recognising the issue of tax avoidance. Still, countries across the world did not adhere to the same since it was a plan devised by OECD countries and was limited to be a soft law instrument aimed at uniformity with no binding effect but the expectation that other nations might adhere and translate that to their domestic laws.<sup>245</sup> But with varied tax rates across Europe<sup>246</sup> itself, the major bloc OECD and, also prior introduction of such imposition in India from 2016<sup>247</sup>, introducing the equalisation levy popularly called as the Google tax, particularly on non-resident tech companies pulling over ₹ 2 crore in revenue per year to pay 2% tax on the digital transactions interchangeably called as Digital Service Tax (DST). India also imposed 6% on online advertising services, pulling ₹ 1 Lakh crore in revenue per year, and later, about 22 countries joined this league<sup>248</sup>, which highly annoyed America since the most taxed were its tech giants,<sup>249</sup> even resorting to threatening the nations with reciprocity actions<sup>250</sup>. OECD, with a view to resolving this conflict, came up with two pillar solutions. The first threshold of a global business above €20 billion and 10% profitability would only be liable to tax and subject to at least 15% tax set as a global minimum. India joined this arrangement along with 135 other nations in 2021. Later that year, European nations embarked on a political arrangement with the US.<sup>251</sup> The deadline to achieve this goal was kept for 31<sup>st</sup> March 2024 in India, and the US agreed to a transitory approach towards India's 2% equalisation levy and the US's response to it, further extended to

<sup>244</sup> Allison Christians, "BEPS and the New International Tax Order", 2016 *BYU Law Digital Library* 6 (2016).

<sup>245</sup> European Parliament, "Understanding BEPS: From Tax Avoidance to Digital Tax Challenges", Think Tank (October 2019).

<sup>246</sup> Digital Services Taxes in Europe, 2024, Tax Foundation (2024), *available at*: [https://taxfoundation.org/data/all/eu/digital-tax-europe-2024/#:~:text=Implemented%20\(Effective%20from%20January%201%2C%202020.,contingent%20on%20Pillar%20One%20imp](https://taxfoundation.org/data/all/eu/digital-tax-europe-2024/#:~:text=Implemented%20(Effective%20from%20January%201%2C%202020.,contingent%20on%20Pillar%20One%20imp) lementation. (last visited Jul 27, 2024).

<sup>247</sup> India announces its first-ever digital tax, Digital Watch Observatory (2016), *available at*: <https://dig.watch/updates/india-announces-its-first-ever-digital-tax> (last visited Jul 27, 2024).

<sup>248</sup> Taxation of the Digitalized Economy, KPMG (2021), *available at*: <https://kpmg.com/xx/en/home/insights/2019/06/tnf-digital-economy0.html> (last visited Jul 30, 2024).

<sup>249</sup> BBC News, Technology giants face European "digital tax" blow, Bbc.com (2018), *available at*: <https://www.bbc.com/news/business-43486403> (last visited Jul 27, 2024).

<sup>250</sup> David Lawder & Leigh Thomas, U.S. drops tariff threat in digital tax transition deal with European countries, Reuters (2021), *available at*: <https://www.reuters.com/world/europe/european-countries-reach-digital-services-tax-deal-with-us-2021-10-21/> (last visited Jul 27, 2024).

<sup>251</sup> Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect, U.S. Department of the Treasury (2021), *available at*: <https://home.treasury.gov/news/press-releases/jy0419> (last visited Jul 27, 2024).



June 30<sup>th</sup>, 2024<sup>252</sup>. And finally, India announced that it would abolish the 2% equalisation levy on August 1, 2024<sup>253</sup>. The memorandum attached to the financial bill explained that this step was taken in line with the suggestions from stakeholders regarding the ambiguous nature of tax and increased compliance for foreign companies<sup>254</sup>, while the abolition seems to be motivated to follow international obligations and avoid US retaliatory tax on Indian companies. The significance goes much beyond; the article aims to explore the same.

## BACKGROUND AND RATIONALE

In the contemporary world, businesses can flourish even remotely due to the digital age; therefore, the traditional tax practices implementing the tax in the physical presence of a business entity emerge as redundant, with companies opting to close their books in low-tax jurisdictions.<sup>255</sup> The data shows that by May 2020, there had been a spike in e-commerce transactions and reached up to \$82.5, a whopping 77% increase from 2019<sup>256</sup>. The fact requires foreign digital companies to pay taxes to make a level playing field for domestic countries and, therefore, the term 'Equalization'. Further, to protect domestic companies against the monopoly of multinational companies, it became necessary to introduce such a law.

Further, unlike traditional businesses, digital businesses create value and subsequent profits through customer engagement and facilitating interactions.<sup>257</sup> For example, carpooling apps facilitate the communication between drivers and passengers. Therefore, the traditional taxation mechanism was not sufficient.

The equalisation levy was also in line with the recommendation of the Organization for Economic and Cooperation Development (OECD) regarding defeating the Base erosion and profit sharing (BEPS) project so that multinational companies could not avoid paying the tax.

The equalisation levy was also important for increasing the domestic revenue. The data indicates that in the year 2019-20, the Indian government collected ₹1,136 crores in digital tax, and in the next annual year, it collected ₹2,057, further in the year 2022-2023; it collected ₹4,000 crores, a whopping 100% increase from the previous year.<sup>258</sup> This increased revenue was helpful in realising various developmental projects, including

<sup>252</sup> Shishir Sinha, India, US extend the transitional approach on equalisation levy on e-comm supplies until June 30, *BusinessLine* (2024), available at: <https://www.thehindubusinessline.com/economy/india-us-extend-the-transitional-approach-on-equalisation-levy-on-e-comm-supplies-until-june-30/article68345335.ece> (last visited Jul 27, 2024).

<sup>253</sup> Amiti Sen, India to withdraw 2% equalisation levy affecting non-resident digital companies, *BusinessLine* (2024), available at: <https://www.thehindubusinessline.com/economy/india-to-withdraw-2-equalisation-levy-affecting-non-resident-digital-companies/article68437536.ece> (last visited Jul 27, 2024).

<sup>254</sup> Ministry of Finance, "Memorandum Explaining the Provisions in The Finance Bill, 2024", Government of India, <https://www.indiabudget.gov.in/doc/memo.pdf> (July, 2024).

<sup>255</sup> R Sarvamangala, & Farzana A, "A Comprehensive Analysis of Digital Taxation in India".11 *SJCC Management Research Review* 1, 137–151 (2022).

<sup>256</sup> Team Tax Research Department, "Taxation on E-Commerce" *135 Tax Bulletin*, The Institute of Cost Accountants of India (2023).

<sup>257</sup> Traditional vs. Platform-Based Business Models: 4 Key Differences, Business Insights Blog (2024), available at: <https://online.hbs.edu/blog/post/platform-based-business-models> (last visited Jul 30, 2024).

<sup>258</sup> An explainer on India's digital tax revenues, Finshots (2022), available at: <https://finshots.in/archive/indias-digital-tax/> (last visited Jul 29, 2024).

public services and infrastructure. While the EL generated significant revenue, its abolition may lead to short-term losses. However, potential gains from increased foreign investment<sup>259</sup> can help recover it overtime. Finance Act 2016 introduced a new chapter, titled Equalization Levy applying only to B2B Transactions w.e.f 1<sup>st</sup> June 2016, defined as a ‘Tax’ on considerations entitled in the hands of non-residents for specified services that include online advertising, space for advertising or any such service with a rate specified at 6% and which continues to exist but the scope was further expanded in 2020 to cover commerce supplies taxable at a rate of 2% including both Goods and Services for total receipts worth at least ₹ 2 crores both B2B and B2C transactions, provided they do not have a permanent establishment in India this levy has been announced to be withdrawn it was subject to exemption under Income Tax Act under Section 10(50), due by 7<sup>th</sup> of next month when each quarter ends by ascribed with penalties to ensure timely payment with 1% interest rate charged on every month of delay, failure to deduct such amount will make the non-resident company subject to penalty equivalent to the amount required to be deducted and if deducted but not paid to the government a penalty of ₹1000 per day upto levy amount, even imprisonment is prescribed if any false statement is filed in such regard.

Before concerns could be raised about double taxation, the government devised it as a levy on the transaction and not consumption, creating it as a separate class from existing tax rules. Suppose A US-based e-commerce giant sells digital e-books to Indian customers. The total value of these sales in a financial year is INR 2 crore. The levy is calculated as 2% of INR 2 crore, amounting to INR 4 lakh. This is a tax on the transaction itself, irrespective of where the profits are ultimately taxed as income (direct tax) and product GST (indirect tax). Thus, the ambiguity persists as to the nature of the tax, whether it is a direct tax or an indirect tax.<sup>260</sup> The burden of the levy on clients and sellers needs to be studied, as it could be passed immediately to Indian corporations and may translate into increased prices.

## **IMPACT ON DIGITAL COMPANIES**

In an investigation by the executive office of the president, it has been revealed that DST has burdened US companies with an excess of US\$30 million per year compared to prior tax burdens.<sup>261</sup> US has claimed that DST discriminates against U.S. firms because they are the leaders in the digital services market. It also highlighted that in the DST, the Indian government was taxing revenue rather than profit. It has put a strain on companies that generate low revenue.

Further, the low revenue threshold of companies was another problem because small or medium-sized companies were also not getting exemptions. If the company’s revenue is around the threshold of ₹2 crores,

<sup>259</sup> W. Steven Clark, Tax Policy for Investment, *5 eJournal of Tax Research*. (2007)

<sup>260</sup> Ashok Lahiri, Gautam Ray & D Sengupta, “Equalisation Levy”, *1 Working Paper*, Brooking India (2017).

<sup>261</sup> Office of the United States Trade Representative, “Section 301 Investigation Report on India’s Digital Services Tax” (January 2021).

then they have to pay tax under DST. This has resulted in most companies falling under its jurisdiction. As a result, startups would be exposed to such liability, and this would disincentivise them and further deteriorate if they have not achieved break-even yet. Further, if an established company is a low-profit company with high-cost transactions, it is left with nothing to grow on.

Other countries were charging DST. Still, the major concern of the US was India because apart from the taxes being charged by another country, India was charging tax in further categories as well, which included educational services, financial services, and software.

The companies were also facing cost compliance as they were required to check whether they came under the DST, the tax planning, accounting for their burden, and measures to remit the tax.

The levy includes all sectors and is wide enough to turn out to be arbitrary as digital transactions such as reserving a hotel, etc, which are not finalised and still taxable.<sup>262</sup>

Further, since the companies cannot avail themselves of input tax credits, They have turned to redraft contracts to transfer the compliance burden to Indian Companies.<sup>263</sup>

Out of all sectors, education was one of the sensitive sectors, and here, the DST was being applied to online education as well. Online education is considered to be less expensive. Still, by putting the tax on it, the whole purpose became futile, and ultimately, it was the student who became the scapegoat in this process.<sup>264</sup>

The process of equalisation levy payment involves prior deduction (withholding by an Indian payer from a non-resident) of levy charges on transactions exceeding the ₹1 lakh threshold, inviting cash flow management, which will now be resolved. The primary impact of this process is an additional compliance burden. Additional accounting and compliance costs, such as the appointment of a local tax manager and embassy-monitored PAN application verification, which is a time-consuming process<sup>265</sup>, are no longer a requirement. Low-revenue startups would be exempt from taxes, allowing for easier growth on corporate confidence lines; it introduces clarity on taxability, which was lacking and further removed the sense of discrimination.

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<sup>262</sup> Mattias Cruz Cano, “MNEs say India’s equalisation levy continues to cause uncertainty”, *International Tax Review* (2020), available at:<https://www.internationaltaxreview.com/article/2a6a737ngqhzagxi2qwao/mnes-say-indias-equalisation-levy-continues-to-cause-uncertainty#:~:text=However%2C%20the%20levy%20has%20been,not%20been%20corrected%20until%20now>. (last visited Aug 1, 2024).

<sup>263</sup> Mbhele, S.N., “An international comparison of digital service tax”, Doctoral dissertation, University of Johannesburg (2022. ), available at:[https://ujcontent.uj.ac.za/view/pdfCoverPage?instCode=27UOJ\\_INST&filePid=138697240007691&download=true](https://ujcontent.uj.ac.za/view/pdfCoverPage?instCode=27UOJ_INST&filePid=138697240007691&download=true), (last visited Aug 1, 2024).

<sup>264</sup> “India Equalization Levy” *International Trade Administration | Trade.gov*, 2020 available at: <https://www.trade.gov/market-intelligence/india-equalization-levy> (last visited August 5, 2024).

<sup>265</sup> Arvind Singal & Nitin Kapoor, “Equalisation levy: The challenges ahead for India’s DST”, *International Tax Review* (2020), , available at:<https://www.internationaltaxreview.com/article/2a6a66eh04saxacspperk/equalisation-levy-the-challenges-ahead-for-indias-dst> (last visited Aug 1, 2024).

## US PRESSURE AND INTERNATIONAL CONTEXT

The US, under Section 301, had probed India's 2% DST for non-resident companies. Under Section 301 US (Relief from Unfair Trade Practice), a probe into matters that are discriminatory and unfair can be initiated.<sup>266</sup> The US has questioned the ethics of India and has claimed that the equalisation levy is targeting 119 companies, out of which 86 are of the US, and is hampering US commerce and contravening the principles of international taxation. The US also raised the point where it claimed that its law exempts Indian companies while taxing, and if, in return, India taxes their companies, then it becomes discriminatory. In its report, one more problem that arose was that the DST was only imposing the tax on digital services, whereas if the same service is being given in non-digital mode, then no levy will be imposed on it. This has created a loophole as the same services are being taxed differently by changing the mode, ultimately discriminating the services. Certain international tax principles need to be followed. The US has claimed that the equalisation levy contradicts it, as the legislation regarding levy is unclear and ambiguous, leading the companies to be confused as to whether their services come under levy or not. Secondly, the argument that those countries that do not have permanent establishments would be taxed contradicts international taxation principles. Further, the principle that the tax shall be imposed on income and not the revenue has also contravened the international tax rules.

The above problem led the company to be taxed twice. After all this, the US took fierce steps and proposed retaliatory tariffs on India and imposed 25% on certain products to compensate \$55 million in taxes.<sup>267</sup> However, the OECD took the step of settling the dispute amicably and proposed a model for taxing digital services globally. Where it set up two pillar models, and 134 countries complied with it. But before the implementation of Pillar 1, The Ministry of Finance of the Government of India and the Department of Treasury of the United States reached an amicable settlement wherein it was mentioned that during the interim period for two financial years 2022 – 2024, the accrued should be creditable for future taxes under Pillar 1 arrangement—preventing double taxation for companies that have already paid the DST. Resembling the arrangement made among the US and five other European Nations<sup>268</sup>.

OECD's efforts began with the 20th Century Model Tax Convention, which has been subjected to multiple revisions in recent years. The basic objective of the OECD is the fair distribution of taxing rights and the determination of how Multinationals will allocate their profits across different jurisdictions.

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<sup>266</sup> Kashish Parpiani, "Understanding America's response to India's equalisation levy", *orfonline.org* (2023), available at: <https://www.orfonline.org/expert-speak/understanding-america-response-india-equalisation-levy> (last visited Aug 3, 2024).

<sup>267</sup> Amiti Sen, "India to withdraw 2% equalisation levy affecting non-resident digital companies", *BusinessLine* (2024), <https://www.thehindubusinessline.com/economy/india-to-withdraw-2-equalisation-levy-affecting-non-resident-digital-companies/article68437536.ece> (last visited Aug 3, 2024).

<sup>268</sup> "India and USA agree on a transitional approach on Equalisation Levy", *Pib.gov.in* (2020), available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1774692> (last visited Aug 3, 2024).

Current tax systems often rely on the residence principle, taxing MNEs at their place of residence, wherein residents are taxed on their global income and non-residents are taxed on their domestically sourced income. However, value creation occurs differently in the digital economy (intangibles, data-driven activities). Physical presence thresholds may not align with the reduced need for physical presence in modern businesses.

Digitalisation posed novel issues, which led to the OECD BEPS Action Plan. Action 1 report lays out two concerns: business without physical presence and difficulty in attributing any profits on data being an intangible value driver.<sup>269</sup> The urgency arose due to profits shifting using transfer pricing (shifting profits by setting prices for transactions between their subsidiaries in different countries) and BEPS structures. The European Parliament's report on tax challenges in the digital economy highlights several key issues. These include the difficulty in defining tax jurisdiction, attributing value to user-generated data, and classifying e-commerce transactions.<sup>270</sup> The European Commission notes that digital businesses often pay lower effective tax rates than traditional ones, prompting calls for reform.<sup>271</sup> The report also discusses the demanding situations posed by new commercial enterprises and the dematerialisation of transactions, emphasising the need for updated tax guidelines to cope with these complexities.

To address these issues, the OECD developed the BEPS Action Plan, which led to the introduction of two pillars. The first Pillar directed the company to distribute profits around the globe better based on where the value is consumed, and at the same time, the Second obliged national governments to adopt a common approach aimed at the global minimum corporate tax of 15%, with about 136 countries as signatories to the same. If implemented successfully, it will significantly reduce the tax havens.<sup>272</sup> The decision of the central government to abolish the 2% equalisation levy came in line with their commitment to OECD Pillar 2 being one of the signatories and with respect to the efforts of OECD as a whole. However, the implementation of Pillar 2 may face great challenges, not from India but from countries that have been leveraging this low tax rate to attract businesses.

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<sup>269</sup> Ashleigh Forman, "Equalising taxing rights in the digitalised economy: an analysis of diverse tax practices implemented globally", *Wits.ac.za* (2019), available at: <https://wiredspace.wits.ac.za/items/c29710a1-87aa-418e-a3f8-e4a779521c43> (last visited Aug 2, 2024).

<sup>270</sup> Hadzhieva E "Tax Challenges in the Digital Economy", *European Parliament 2016 rep*, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579002/IPOL\\_STU%282016%29579002\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579002/IPOL_STU%282016%29579002_EN.pdf) (accessed 2 August 2024).

<sup>271</sup> Press corner, European Commission "Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU" *European Commission* (2024), available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_2041](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2041) (last visited Aug 3, 2024).

<sup>272</sup> Richard Partington, "OECD deal imposes global minimum corporate tax of 15%", *The Guardian* (2021), available at: <https://www.theguardian.com/business/2021/oct/08/oecd-deal-imposes-global-minimum-corporate-tax-of-15> (last visited Aug 2, 2024).

GILTI tax (Global Intangible Low-Taxed Income) is a domestic mechanism of taxation used by US government focused on US-based companies to prevent base erosion and profit shifting, targeting income from foreign sources its integration or alignment with the Global Minimum Tax Framework is crucial to ensure successful implementation<sup>273</sup>, since the US exerts great influence on other nations. And its significant position in the world will help establish a precedent. The successful implementation of the global minimal tax would show the effectiveness of worldwide cooperation in addressing complex tax challenges.

The abrupt repeal of the Equalization Levy on August 1, 2024, without a clear roadmap for the implementation of OECD Pillar One, has created a complex situation for taxpayers. There is no official announcement concerning whether India will incorporate OECD Pillar One into its domestic law. While there are speculations about a potential implementation in FY26, this is not yet confirmed. The Equalization Levy was abolished on August 1, 2024, but the closing date for tax payment became August 7, 2024. This creates a gap where it is uncertain whether taxpayers are liable for the Equalization Levy for this financial year or not.

## CONCLUSION

The brisk growth of the digital financial system has basically challenged the manner in which governments tax companies. Traditional tax frameworks, constructed on physical presence, struggle to capture the price created via businesses working remotely. This has led to worries about lost revenue, unfair competition for home companies, and the erosion of tax bases.

India's reveal in the Equalisation Levy exemplifies those challenges and the continuing search for solutions. The Equalisation Levy aimed to generate tax revenue by way of non-resident digital businesses working in India. While it demonstrably expanded government revenue, it additionally attracted grievances for creating compliance burdens, probably impacting startups and elevating concerns about double taxation.

The US, representing among the massive tech companies tormented by the Equalisation Levy, strongly contested the levy. This culminated in probable reciprocatory taxation retaliation and highlighted the need for an international consensus on digital taxation.

The OECD, spotting the need for a coordinated method, proposed a two-pillar solution. Pillar One focuses on allocating taxing rights based on where the value is created (e.g., user consumption), even as Pillar Two sets an international minimum corporate tax rate.

India's choice to abolish the EL displays its dedication to the OECD framework. However, demanding

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<sup>273</sup> Global Minimum Tax: An easy fix?, *KPMG (2021)*, available at: <https://kpmg.com/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html> (last visited Aug 5, 2024).

situations stay. The hit implementation of Pillar One, with its attention on complex profit allocation, is unsure. The international minimal tax price of 15% would possibly face resistance from nations to the usage of low tax prices to draw companies. –

Looking ahead, numerous key issues need attention. Businesses require clear and regular tax regulations to function correctly. The evolving nature of the OECD framework and its ability to delay implementation creates uncertainty; Taxation has to now not stifle the growth of new agencies, particularly in developing economies. Ensuring a stage gambling subject, even as fostering innovation, is important. Tax regimes should be efficient and minimise compliance expenses for corporations, mainly small and medium corporations. The advantages of digital taxation ought to translate into investments in bridging the digital divide and making sure there is equitable access to the Internet economy.

The Digital economic system has undeniably revolutionised the way we live and do commercial enterprise. Establishing an honest and efficient mechanism of Digital taxation requires global cooperation—a commitment to fostering a thriving digital environment that advantages all stakeholders.

In conclusion, while India's abolition of the EL signifies a flow in the direction of a worldwide solution, the adventure is a long way from over. Continuous talk, model, and a focus on each revenue generation and fostering innovation are critical for navigating the evolving landscape of Digital taxation.

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### UNIFORM CIVIL CODE: A CONSTITUTIONAL DILEMMA BETWEEN RELIGIOUS FREEDOM AND LEGAL UNIFORMITY

Dr. Anju Harbansh<sup>274</sup>

#### ABSTRACT

*The debate surrounding the Uniform Civil Code (UCC) in India represents a complex constitutional dilemma that pits the principle of legal uniformity against the protection of religious freedom. As envisioned by the Indian Constitution, the UCC aims to replace personal laws based on religious scriptures with a common set of laws governing all citizens, irrespective of their religion. Proponents argue that the UCC would promote national unity and gender equality by eliminating discriminatory practices embedded in personal laws. However, critics contend that its implementation could infringe upon the fundamental right to religious freedom, enshrined in Articles 25-28 of the Constitution. This tension raises significant questions about the role of the judiciary in balancing these conflicting interests, particularly in a diverse and pluralistic society like India. This article explores the constitutional challenges posed by the UCC, examining its potential impact on religious freedoms and personal laws, and the implications for India's secular fabric. Through an analysis of legal precedents and ongoing debates, the article highlights the need for a nuanced approach that respects religious diversity while advancing the goals of legal uniformity and social justice.*

**KEYWORDS:** Uniform Civil Code, religious freedom, constitutional law, personal laws, secularism.

#### INTRODUCTION

The Uniform Civil Code (UCC) stands as one of the most contentious and polarizing issues in India's legal and constitutional discourse. At its core, the UCC represents an effort to replace the multitude of personal laws that govern various religious communities in India with a single, unified code applicable to all citizens, regardless of their religion. This idea, deeply rooted in the secular and egalitarian aspirations of the Indian Constitution, is enshrined in Article 44 of the Directive Principles of State Policy, which calls upon the State to "endeavour to secure for the citizens a uniform civil code throughout the territory of India."

But there are a number of social issues and constitutional problems that come with the promise of the UCC.

<sup>274</sup> Assistant Professor of Law, MATS Law School, MATS University, Raipur, Chhattisgarh, email id: anjuharbansh@gmail.com, contact no-6261360611



On the one hand, supporters contend that a UCC is necessary to achieve full equality before the law, doing away with the discrimination against women that is frequently supported by religious personal laws. However, detractors argue that the implementation of a uniform code may violate the right to religious freedom guaranteed by Articles 25 to 28 of the Constitution, which permit people and communities to practise, profess, and spread their faith free from undue interference from the government.

The tension between the ideals of legal uniformity and the protection of religious freedom forms the crux of the constitutional dilemma posed by the UCC. This paper seeks to explore this dilemma in depth, examining the historical evolution of personal laws in India, the constitutional framework surrounding the UCC, and the arguments both for and against its implementation. Through an analysis of legal precedents, societal impacts, and potential pathways for reform, the paper aims to shed light on the complexities of harmonizing legal uniformity with religious diversity in a pluralistic society like India.

This study is important because it adds to the current discussion about the UCC, which has broad ramifications for social justice, national integration, and the future of secularism in India. The question of whether and how to adopt a UCC remains a significant challenge for policymakers, jurists, and civil society as India struggles with its identity as a varied yet unified nation. In addition to influencing the nation's judicial system, the outcome of this dispute will highlight the larger conflict that arises when trying to balance the values of equality and freedom, unity and variety, in a society with as many facets as India.

## **HISTORICAL EVOLUTION OF PERSONAL LAWS IN INDIA**

The roots of India's personal law system can be traced back to the colonial period when the British, in an attempt to govern a vast and diverse population, codified religious practices into formal legal systems. This approach allowed different communities to be governed by their own laws in matters of marriage, divorce, inheritance, and adoption, thereby preserving religious and cultural autonomy. For instance, Hindu, Muslim, Christian, and Parsi personal laws were recognized and administered separately, leading to the coexistence of multiple legal systems within the country.

Following India's 1947 independence, the Constitution's drafters were faced with the difficult challenge of bringing a sharply divided community together while preserving its pluralistic nature. To promote national unity and eradicate discriminatory behaviours based on religious traditions, the Directive Principles of State Policy included Article 44, reflecting the intention to progressively move towards a UCC. Nonetheless, the Constituent Assembly decided against making the UCC a justiciable right because to the delicate nature of the matter, leaving future administrations free to decide how to carry it out.<sup>275</sup>

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<sup>275</sup> Basheer, S. and Narayan, R. (eds.), *Uniform Civil Code: Prospects and Challenges*. New Delhi: Eastern Book Company, 2021.

In the early years of independence, significant legal reforms were undertaken, particularly in the realm of Hindu personal law. The Hindu Code Bill, passed in the 1950s, sought to modernize and codify Hindu personal laws, bringing about greater gender equality in areas such as marriage, divorce, and inheritance. However, similar reforms were not extended to other religious communities, leading to a situation where different communities continued to be governed by their own personal laws. This selective reform has been a source of ongoing controversy, with critics arguing that it undermines the principle of equality before the law.

## **CONSTITUTIONAL FRAMEWORK AND THE UCC**

The Indian Constitution presents a unique and complex legal framework that attempts to balance the principles of secularism, equality, and religious freedom. The Directive Principles of State Policy, which include Article 44, are non-justiciable guidelines meant to inform the development of state policy. They represent the aspirational goals of the Constitution, intended to guide the government in making laws that promote social and economic justice. However, because they are non-enforceable in a court of law, the Directive Principles often take a backseat to the Fundamental Rights, which are legally enforceable.

The freedom of religion is protected under Articles 25 through 28 of the Constitution, which permits people to practise, proclaim, and spread their religious beliefs. Regarding public order, morals, and health, these articles safeguard religious rituals and practices. These clauses and the establishment of a UCC could not be compatible because the latter would be interpreted as violating the former's right to freedom of religion. When it comes to interpreting these constitutional principles and resolving the conflict between the requirement for legal.<sup>276</sup>

## **JUDICIAL INTERPRETATIONS AND KEY CASES**

Through its interpretation of constitutional provisions and decision-making in cases involving the difficult balance between religious freedom and legal uniformity, the Indian court has played a significant role in defining the debate surrounding the Uniform Civil Code (UCC). The Supreme Court of India has addressed the conflict between the constitutional duty for equality and the private rules of religious communities in a number of significant rulings. These examples demonstrate how the judiciary has been interpreting the UCC in a way that is more reflective of broader societal shifts and the ongoing discussion about the place of religion in personal law.

### ***Shah Bano Case (1985)***

The Shah Bano case is one of the most significant in the history of the UCC debate in India. In 1978, Shah Bano, a 62-year-old Muslim woman, filed a petition for maintenance under Section 125 of the Code of

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<sup>276</sup> Mustafa, Faizan, *Uniform Civil Code: An Overview*. New Delhi: LexisNexis, 2018.

Criminal Procedure after being divorced by her husband, who refused to pay her an adequate sum. The legal issue at the heart of the case was whether Shah Bano was entitled to maintenance under the general law applicable to all citizens, or whether her claim should be governed exclusively by Muslim personal law, which provided for a limited amount of maintenance during the iddat period (a period of waiting after divorce).

The Supreme Court decided in Shah Bano's favour, finding that Section 125, which applied to all citizens regardless of faith, entitled her to support. The Court emphasised that the clause was not an issue of religious faith but rather of social justice because it was meant to reduce homelessness and vagrancy. A wider debate over the necessity of a UCC was also spurred by the ruling, in which the Court urged the government to work towards enacting the code in order to guarantee equality for all people, regardless of their religious beliefs.

The Shah Bano judgment, however, provoked a significant backlash from conservative Muslim groups, who viewed it as an encroachment on their religious laws. In response to the protests, the government passed the Muslim Women (Protection of Rights on Divorce) Act, 1986, which effectively nullified the Supreme Court's ruling by limiting a divorced Muslim woman's right to maintenance to the iddat period. This legislative intervention highlighted the deep-rooted tensions between the goals of legal uniformity and respect for religious freedom, as well as the challenges faced by the judiciary in advancing social reforms within a pluralistic society.<sup>277</sup>

### ***Sarla Mudgal Case (1995)***

The Sarla Mudgal case further illustrated the complexities surrounding the UCC and the judiciary's role in addressing them. The case involved issues of bigamy and the conflict between personal laws. Sarla Mudgal, the president of a women's organization, filed a petition seeking to challenge the practice of Hindu men converting to Islam solely to enter into a second marriage without divorcing their first wife, thus circumventing the provisions of Hindu personal law that prohibited bigamy.

The Supreme Court ruled that merely converting to Islam did not immediately dissolve the previous marriage and that a Hindu marriage solemnised under Hindu law could only be terminated in accordance with the terms of the Hindu Marriage Act. In accordance with Section 494 of the Indian Penal Code, the Court ruled that a Hindu man's second marriage to an Islamic woman, obtained without first divorcing his first wife, was null and void and amounted to bigamy.

The Court reiterated its support for a UCC in the Sarla Mudgal ruling, arguing that it was essential to do away with the injustices and disputes brought about by disparate personal laws. The ruling highlighted the necessity of a unified legal system that would protect justice and uniformity in marriage and family law proceedings for all residents, irrespective of their religious affiliations.

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<sup>277</sup> Sinha, Manoj Kumar, *Implementation of the Uniform Civil Code: Challenges and Prospects*. New Delhi: Satyam Law International, 2016.

### ***Shayara Bano Case (2017)***

The Shayara Bano case marked a significant turning point in the judicial approach to personal laws and the UCC. Shayara Bano, a Muslim woman, challenged the practice of triple talaq (talaq-e-biddat), which allowed a Muslim man to divorce his wife instantaneously by pronouncing “talaq” three times in succession. Bano argued that the practice was arbitrary and violated her fundamental rights to equality, non-discrimination, and dignity.

A five-judge Supreme Court majority ruled in a landmark decision that the triple talaq practice was illegal. According to the majority, triple talaq infringed Muslim women’s fundamental rights and was not an important religious practice covered by Article 25 of the Constitution. Triple talaq was declared to be blatantly arbitrary and incompatible with the ideals of equality and gender justice by the court, which overturned it.

The Shayara Bano judgment was a significant step towards advancing gender equality within the framework of personal laws. While the Court did not directly address the issue of the UCC, the judgment underscored the judiciary’s role in ensuring that personal laws are consistent with constitutional values. The case also reignited the debate on the UCC, with many arguing that a uniform code would prevent such discriminatory practices from being perpetuated in the name of religion.

### ***The Role of the Judiciary in Balancing Religious Freedom with Legal Reform***

The Indian judiciary has played a pivotal role in navigating the complex relationship between religious freedom and the need for legal reform. In cases like Shah Bano, Sarla Mudgal, and Shayara Bano, the Supreme Court has sought to protect the fundamental rights of individuals, particularly women, who have been disadvantaged by discriminatory personal laws. The judiciary has consistently advocated for the UCC as a means of ensuring equality and justice, even as it recognizes the sensitivities involved in reforming religious laws.

However, religious communities and political actors have frequently resisted the judiciary’s attempts to strike a balance between religious freedom and legislative reform. The legislative intervention that followed the Shah Bano case and the ensuing backlash demonstrate the limits of judicial activism when confronted with deeply ingrained social and religious traditions. As a result, the judiciary’s task has been to progressively advance legal reform while upholding Indian society’s heterogeneous structure.

## **EVOLVING JURISPRUDENCE ON THE UCC AND ITS IMPLICATIONS FOR PERSONAL LAWS**

The evolving jurisprudence on the UCC reflects a broader shift towards the protection of individual rights and the promotion of gender equality within the framework of personal laws. The Supreme Court’s judgments have increasingly emphasized the need to align personal laws with constitutional principles, particularly in

cases involving gender discrimination.

The Court's call for the implementation of a UCC, as seen in the Shah Bano and Sarla Mudgal cases, underscores the recognition that a uniform legal framework could help eliminate inconsistencies and inequalities across different personal laws. However, the judiciary has also been mindful of the potential impact of such reforms on religious freedom and has often advocated for a gradual and consensual approach to legal change.<sup>278</sup>

Growing awareness of the need to defend the rights of members of religious groups, especially women who have been marginalised by patriarchal interpretations of religious laws, has influenced the judiciary's approach to the UCC in recent years. An excellent illustration of this change is the Shayara Bano case, in which the Court bravely decided to overturn a discriminatory practice that had been supported by religious arguments. The future of personal laws in India will be significantly impacted by this developing body of jurisprudence. There is going to be more pressure on the government to move forward with enacting a UCC as long as the judiciary hears instances involving conflicts between personal laws and constitutional rights. However, any move towards a UCC will need to be carefully calibrated to ensure that it respects the diversity of India's religious and cultural traditions, given the judiciary's complex approach to striking a balance between religious freedom and legal reform.

The UCC's major cases and court interpretations shed insight on India's continuous battle to balance the ideals of religious freedom and legal consistency. The Supreme Court, which has been vocal in favour of legal changes that advance justice and equality while taking into account the delicate nature of changing religion personal laws, has been instrumental in advancing the conversation about the UCC. A larger commitment to ensuring that personal laws are consistent with constitutional ideals, notably in defending the rights of marginalized people, is reflected in the developing UCC jurisprudence. The judiciary will continue to play a pivotal role in determining the direction of personal laws and the larger goal of achieving legal uniformity in India as long as the UCC debate rages.<sup>279</sup>

## **THE CASE FOR LEGAL UNIFORMITY**

The debate surrounding the Uniform Civil Code (UCC) in India is not just about reconciling diverse personal laws but also about advancing gender equality and promoting national unity. The call for a UCC has gained traction as a means to eliminate gender-based discrimination inherent in various religious personal laws and to foster a sense of national integration by creating a common legal framework for all citizens, regardless of their religious affiliations.

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<sup>278</sup> Sinha, Manoj Kumar, *Implementation of the Uniform Civil Code: Challenges and Prospects*. New Delhi: Satyam Law International, 2016.

<sup>279</sup> Bhat, Ishwara, "The Uniform Civil Code and Gender Justice: Insights from Judicial Interpretations," 47(3) *Journal of the Indian Law Institute* 345 (2005).

### ***Promoting Gender Equality***

Potentially addressing gender-based discrimination ingrained in numerous personal laws is one of the strongest justifications for enacting a UCC. The personal laws of India, which cover topics like adoption, inheritance, divorce, and marriage, varies greatly between various religious groups. Due to these rules, which have their roots in patriarchal customs, women have historically been marginalized and denied equal rights and opportunities.

### ***The Role of the UCC in Addressing Gender-Based Discrimination***

The UCC is envisioned as a tool to create a single legal framework that applies uniformly to all citizens, thereby eliminating the discriminatory practices embedded in religious personal laws. By establishing equal rights for all, regardless of gender or religion, the UCC could significantly advance the cause of gender justice in India.

For example, a Muslim man could unilaterally divorce his wife by saying “talaq” three times in short succession under the tradition of ‘triple talaq’ (immediate divorce). This method left women exposed to abrupt abandonment without sufficient legal remedy, and it was widely denounced as arbitrary and unjust. Gender justice was significantly advanced by the Supreme Court's 2017 decision in the Shayara Bano case, which ruled that triple talaq was unconstitutional. But the continued existence of such discriminatory practices emphasizes the necessity of more extensive legal reform, which a UCC might offer.<sup>280</sup>

### ***Case Studies of Discriminatory Practices***

In addition to triple talaq, several other practices under personal laws discriminate against women. For example, polygamy is permitted under Muslim personal law, allowing a man to have up to four wives simultaneously, while women are not granted the same right. This practice reinforces gender inequality and has been criticized for undermining women's dignity and autonomy.

Comparably, even with major improvements, there are still issues of inequity under Hindu personal law. For example, women in many communities still have challenges when it comes to inheriting property on an equal footing with men, even with changes made to inheritance laws. Many times, social constraints and cultural conventions prevent women from standing up for their legal rights, making them financially dependent on male family members.

The UCC, by establishing uniform legal standards for all citizens, could eliminate such disparities. It would ensure that all women, regardless of their religious background, have equal rights to marriage, divorce, inheritance, and adoption, thereby promoting gender justice and social equality.

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<sup>280</sup> Chatterjee, Arpita, “Uniform Civil Code and the Indian Judiciary: An Analysis of Key Judgments,” 59(4) Indian Journal of Constitutional Law 485 (2017).

### *The Potential Of The UCC To Promote Gender Justice And Social Equality*

The implementation of a UCC has the potential to be a transformative step towards achieving gender justice in India. By providing a common legal framework, the UCC would empower women across all communities to claim their rights and challenge discriminatory practices that have long been justified in the name of religion. Moreover, the UCC could help to dismantle the patriarchal structures that underpin many personal laws, fostering a more equitable society where women's rights are recognized and respected.<sup>281</sup>

By guaranteeing that all citizens, regardless of their religious or cultural background, are subject to the same laws, the UCC could promote social equality in addition to gender equality. This would contribute to the development of a more welcoming society in which everyone's rights are upheld and safeguarded, regardless of gender or religion.

### *National Integration and Social Cohesion*

The UCC is viewed as a way to advance social cohesiveness and national unity in addition to gender equality. With its numerous personal laws, India's legal system reflects the variety of the nation's religions and cultures. But because different communities are regulated by distinct sets of rules, this diversity in legal frameworks has also contributed to social fragmentation and tensions within communities.

### *The Argument for a Common Set of Laws to Strengthen National Unity*

Proponents of the UCC argue that a common set of laws for all citizens is essential for strengthening national unity. By creating a uniform legal framework, the UCC would ensure that all citizens are treated equally under the law, thereby fostering a sense of national identity and solidarity. This is particularly important in a country like India, where communal tensions and religious divisions have often been exacerbated by differences in personal laws.

By giving all citizens, regardless of their religious origin, a common legal identity, a UCC could aid in bridging these gaps. This would uphold the fundamental tenet of the Indian Constitution—equality before the law—as well as foster social cohesiveness.<sup>282</sup>

### *The Impact of Diverse Personal Laws on Social Fragmentation and Communal Tensions*

In India, the prevalence of many personal laws has occasionally exacerbated communal strife and societal division. Since each community has its own set of laws, these laws are frequently seen as essential to each community's religious and cultural identity. Any attempt to amend or modify these rules is therefore viewed as an assault on their right to religious freedom, which breeds resistance and occasionally causes intergroup

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<sup>281</sup> Krishnan, Jayanth K., "Religious Freedom versus Legal Uniformity: A Dilemma in Indian Jurisprudence," 15(2) NUJS Law Review 301 (2022).

<sup>282</sup> Law Commission of India, Consultation Paper on Reform of Family Law, Report No. 267 (2018).

strife. For example, the Shah Bano case led to massive demonstrations from the Muslim community, who felt that the Supreme Court's decision violated their religious laws. The enactment of legislation that reversed the judgement later on brought attention to the deeply sensitive nature of the personal laws issue and the difficulties of putting a UCC into practice.

### *The UCC as a Tool for Fostering a Unified Legal Identity*

Despite these challenges, the UCC has the potential to be a powerful tool for fostering a unified legal identity in India. By establishing a common set of laws for all citizens, the UCC would promote the idea that all individuals are equal before the law, regardless of their religion. This would not only strengthen national unity but also help to reduce communal tensions by ensuring that no community is seen as being privileged or disadvantaged by the law.

Furthermore, the UCC would guarantee that laws pertaining to private affairs are founded on equality and justice principles rather than religious dogma, strengthening the secular nature of the Indian state. This would contribute to the development of a more unified and inclusive society in which every citizen's rights are upheld and safeguarded, regardless of their religious convictions. Social justice, national integration, and gender equality are the main reasons for the necessity for legal uniformity through the adoption of a UCC. The UCC has the power to change India's legal system and promote a more just and cohesive society by doing away with discriminatory personal law practices and establishing a uniform legal framework for all citizens.<sup>283</sup>

## **POTENTIAL PATHWAYS FOR HARMONIZING LEGAL UNIFORMITY AND RELIGIOUS FREEDOM**

The discussion in India around the Uniform Civil Code (UCC) is centred on striking a balance between religious freedom and legal uniformity. Despite the UCC's goal of creating a uniform legal system that all citizens must follow, resistance has resulted from worries about protecting religious freedoms and customs. It takes a nuanced strategy that respects religious variety while guaranteeing justice and equality for everyone to reconcile these seemingly incompatible aims. Judicial activism in conjunction with progressive interpretation and incremental, consensus-driven law revisions are two possible approaches to striking this equilibrium.

### *Gradual and Consensual Legal Reforms*

#### 1. The Need for an Inclusive and Participatory Approach to Legal Reform

One of the key challenges in implementing the UCC is the need to respect the religious and cultural diversity of India's population. Imposing a uniform legal code without considering the sensitivities of different

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<sup>283</sup> National Commission for Women, Report on Gender Equality in Personal Laws: A Need for Uniformity (2020).



communities could lead to social unrest and a backlash against the reforms. Therefore, a gradual and inclusive approach to legal reform is essential. This approach involves engaging with various religious and community leaders, legal experts, and civil society organizations to build consensus on the need for legal uniformity. By involving all stakeholders in the process, the government can ensure that the reforms are accepted and supported by the majority of the population.

India has seen a number of effective legal changes that have balanced gender equity ideals with religious freedom. The 1950s reform of Hindu personal law is one such instance. The government brought equal rights for women in marriage, divorce, and inheritance through a number of legislative initiatives that modernized and codified Hindu personal law. The majority of the Hindu community eventually embraced these reforms despite early opposition, demonstrating the value of a deliberate and participatory approach to law change.<sup>284</sup>

## 2. The Role of Public Education and Dialogue in Building Consensus

Public education and dialogue play a crucial role in building consensus for legal reforms. Educating the public about the benefits of a UCC, particularly in terms of promoting gender equality and social justice, can help to reduce resistance and foster greater acceptance of the reforms. Dialogue between different religious communities, facilitated by the government and civil society organizations, can also help to address concerns and misconceptions about the UCC. By promoting a better understanding of the need for legal uniformity, these efforts can contribute to a more inclusive and consensual approach to reform.

## 3. Judicial Activism and Progressive Interpretation

The Indian judiciary has played a pivotal role in addressing discriminatory practices within personal laws, particularly in cases where legislative action has been slow or absent. Through its judgments, the Supreme Court has consistently upheld the principles of equality and gender justice, often pushing the boundaries of legal reform. The judiciary's role in cases like *Shah Bano*, *Sarla Mudgal*, and *Shayara Bano* demonstrates its potential to continue addressing discriminatory practices within personal laws.

The cause of legal uniformity has benefited greatly from judicial activism, which is defined as a readiness to read the Constitution in a progressive way. The court is a vital component of the push for a UCC because of its capacity to oppose discriminatory practices and defend the rights of oppressed groups, especially women.<sup>285</sup>

## 4. The Limitations of Judicial Activism in the Absence of Legislative Action

While judicial activism has been crucial in addressing specific instances of discrimination, its impact is limited

<sup>284</sup> The Indian Express, "The Debate over Uniform Civil Code in India," (2023), available at: <https://indianexpress.com/article/india/uniform-civil-code-debate>

<sup>285</sup> Ministry of Law and Justice, Government of India, "Discussion on Uniform Civil Code," (2022), available at: <https://lawmin.gov.in/ucc>

in the absence of comprehensive legislative action. Court rulings, though significant, often apply only to the parties involved in the case and do not necessarily result in broader legal reforms. Moreover, the judiciary's interventions can be overturned or diluted by subsequent legislation, as seen in the Shah Bano case. Without legislative support, judicial activism alone cannot achieve the wide-ranging legal uniformity envisioned by the UCC.

#### 5. The Importance of Balancing Judicial Intervention with Respect for Religious Autonomy

While judicial activism is essential for advancing legal reforms, it must be balanced with respect for religious autonomy. The judiciary must tread carefully to ensure that its interventions do not infringe upon the fundamental right to religious freedom guaranteed by the Constitution. This requires a nuanced approach that recognizes the importance of religious traditions while also ensuring that they do not perpetuate discrimination or inequality.

The judiciary can help reconcile religious freedom with legal consistency by interpreting personal laws in a progressive manner that is consistent with constitutional values. The courts can assist in paving the way for more comprehensive legal reforms that are inclusive and considerate of religious diversity by highlighting the necessity for personal laws to change in a way that is consistent with gender justice and equality.

### CONCLUSION

Harmonizing legal uniformity with religious freedom in the context of the UCC requires a multifaceted approach that combines gradual and consensual legal reforms with judicial activism and progressive interpretation. By engaging with all stakeholders, promoting public education and dialogue, and ensuring that judicial interventions respect religious autonomy, India can move towards a UCC that upholds the principles of equality and justice while respecting the country's rich cultural and religious diversity. These pathways offer a balanced and inclusive approach to achieving legal uniformity in a manner that is consistent with the constitutional values of secularism and social justice.

The argument surrounding India's Uniform Civil Code (UCC) captures a convoluted constitutional conundrum between the demands of legal consistency and the principles of religious freedom. On the one hand, regardless of a person's religious identity, the UCC is a constructive step towards creating a common legal framework that guarantees equality and justice for all individuals. Through the creation of a single legal identity, it has the ability to promote national cohesion and eradicate gender-based discrimination ingrained in personal laws.

On the other hand, the UCC raises concerns about infringing on the religious freedoms guaranteed by the Indian Constitution. The diverse religious and cultural traditions that define India's social fabric are deeply intertwined with personal laws, and any attempt to impose a uniform code risks being perceived as an encroachment on these traditions. The challenge, therefore, lies in finding a balance that respects religious

autonomy while ensuring that personal laws evolve in a manner consistent with constitutional principles of equality and justice.

The way forward calls for a methodical, inclusive approach to law reform that is based on consensus-building, public education, and discourse. Legislative action that is considerate of religious diversity must be combined with judicial activism in order to effectively combat discriminatory practices found in personal laws. The capacity to balance legal uniformity with religious freedom, preserving the secular and pluralistic character of the Indian Constitution while furthering the cause of social justice, will ultimately determine whether or not a UCC is implemented successfully.

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# POLICE VIOLENCE AND CUSTODIAL DEATHS: REDUCING BILL OF RIGHTS TO CHARTER OF SERVITUDE

Raj Krishna<sup>286</sup> & Kumar Mukul Choudhary<sup>287</sup>

### ABSTRACT

*All over the world, the frequency of police violence has been rising significantly. Authoritarian policing systems has emerged in the aftermath of the Covid-19 pandemic lockdown. It is pertinent to note that the tactics of police are not in alignment with the modern-day constitutional ideals and principles. Unfortunately, India too has to deal with challenges like police brutality and violations of human rights. The horrific deaths of a father and son while under the custody of the Tamil Nadu Police has sparked worries about the wrongdoings of police officers around the country. The procedural safeguards that citizens have against police enforcement have also been questioned. The entire episode of killings in custody has effectively plunged India's rule of law regime into an existential crisis. It has revealed grave issues regarding the institutional structure of our democracy.*

*The abuse of institutional protections to which citizens are entitled has been linked to police aggression, as the authors of this research have shown. The writers have also looked at the state of each institution independently, as well as the reasons behind its incapacity to effectively protect people's fundamental rights. The authors of this piece have finally provided solution to the queries posed above.*

**KEYWORDS-** Brutality, Torture, Custodial violence.

### INTRODUCTION

*“Custodial torture is a naked violation of human dignity and degradation which destroys, to a large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward- flag of humanity must on each such occasion fly half-mast.”<sup>288</sup>*

<sup>286</sup> Lawyer, B.A, LL.B. (Chanakya National Law University, Patna), LL.M. (NLIU Bhopal).

<sup>287</sup> Research Scholar, B.A, LL.B. (Chanakya National Law University, Patna), LL.M. (NLSIU Bangalore), PhD. (Faculty of Law, University of Delhi)

<sup>288</sup> *D.K Basu V. State of West Bengal*, 1997 (1) SCC 416.

Concern over the murders of a father and son in a Tamil Nadu Police Station has been voiced by innumerable human rights groups across the country. The extent of torture and abuse that the police personnel subjected the victims while they were in their custody has drawn severe criticism. These recent happenings have thrust police brutality and custodial torture back to the forefront of India's human rights policy discourse. Furthermore, these incidences have brought up more significant issues regarding the condition of the rule of law in our evolving democracy. Regardless of how appalling the police conduct in Tamil Nadu appeared at the time, these kinds of situations are common in our democracy. According to the N.C.R.B., over 1303 people either disappeared or died while in the police's custody between 2005 and 2017.<sup>289</sup> Until 2018, an additional 144 people had passed away while in the custody of the police.<sup>290</sup>

The Apex Court has endeavoured innumerable times to prevent such egregious breaches of human rights. Prior to trying to regulate arrest processes by applying particular guidelines to restrain such arbitrary actions, the Supreme Court highlighted the arbitrary character of arrest operations.<sup>291</sup> These protections were clarified and enhanced in the D.K. Basu case, when the court additionally accorded several further rights to the person who had been arrested.<sup>292</sup> The CrPC finally included these instructions.<sup>293</sup> In addition, the Indian Constitution gives the individual who has been arrested a variety of rights under Article 22.<sup>294</sup> Of these, the most important is the right to appear before a magistrate within twenty-four hours of one's arrest for someone who has been held.<sup>295</sup> Additionally, the right to a medical checkup is also granted in certain situations. But the data on fatalities that transpire during a person's incarceration presents a horrifying image of how the laws meant to safeguard the rights of those who are detained are actually implemented. It shows how receptive the public is to the atrocities committed by police enforcement while they are being held in custody. It has also left many wondering why, in spite of the legislature's and the judiciary's utmost efforts, the issue of torture in detention that results in human rights abuses is still so pressing. Many individuals may believe that their rights are being violated because many of these law-enforcing authorities were granted unrestricted power when they were British colonists, and unfortunately, they still carry colonial baggage from that period.<sup>296</sup> Furthermore, the same was

<sup>289</sup> Excerpts from the W.P.(CrI.) No. 354/2019, Live Law, available at [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-369455.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-369455.pdf) (last visited Aug. 12, 2023).

<sup>290</sup> *Custodial crimes*, N.C.R.B available at <https://ncrb.gov.in/hi/crime-in-india-table-addtional-table-and-chapter-contents?page=18> (last visited Aug 01, 2024).

<sup>291</sup> *Joginder Kumar vs State Of U.P.*, 1994 (4) SCC 260.

<sup>292</sup> *D.K Basu V. State of West Bengal*, 1997 (1) SCC 416.

<sup>293</sup> Code of Criminal Procedure (Amendment Act) 2005.

<sup>294</sup> Indian Constitution. art 22, provides following “*Protection against arrest and detention in certain cases-*

(1) *No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice*

(2) *Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate*

(3) *Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention....”*

<sup>295</sup> Id.

<sup>296</sup> Tripurdaman Singh, *Sixteen Stormy Days* 13 (Penguin Random House India, New Delhi, 1<sup>st</sup> edition, 2020.)

recognized by our founding fathers as a necessary evil for the management of our democracy.<sup>297</sup>

The authors believe that adequate legislative and judicial action has been done to hold police officers accountable for their brutal acts and to address the colonial mindset that underlies their actions. The accountability systems' execution has been appallingly inadequate. In order to shed light on the current condition of police brutality, the authors of this study have discussed three different aspects of poorly implemented policies. First, the authors have talked about the mechanical approach of judicial magistrates in regards to the first production of an arrested person and the issuance of police custody. Additionally, we have also mentioned the way in which magistrates investigate deaths that take place when an individual is detained. Second, the authors have argued that the police authorities have been granted carte blanche and that the most vulnerable inhabitants' rights have been violated by the human rights protection body's restricted jurisdiction. Lastly, the authors have argued that the legislature's poor implementation of Apex Court decisions and tardiness in passing new laws have contributed to a number of tragic incidents of police brutality.

## **CUSTODIAL DEATH AND FAILURE OF JUDICIAL MAGISTRATES**

Our colonial heritage is sombrely brought to memory by the horrific killing of father son duo in Tamil Nadu custody. The origins can be traced to colonial legal form experiments. In the early 19th century, while the East India Company was consolidating its power, its officials experimented with fusing parts of 'local' law and jurisprudence from both Hindu and Muslim traditions. But, dissatisfied with what they saw as internal contradictions and a lack of decisive penalties, they started to resort to harsher legal measures, such as the regular application of the death penalty and the construction of public gallows throughout India to convey to the colonized people that British law was rigorous and uncompromising. The colonial-era repressive machinery is still in use by the police force, which is legally governed by the Police Act of 1861.<sup>298</sup> The colonial era police system was established using the Irish colonial paramilitary police standard. The police system of colonial times served to rule the subjects, not the citizens.<sup>299</sup> The subjects have no legal remedy against the state and are unable to hold it responsible for any mishaps.

However, everything changed on January 26, 1950. The Indian Constitution went into effect. Individuals were now citizens rather than merely subjects. Citizens now have fundamental rights that they can exercise even in opposition to the government, thanks to the adoption of the new Constitution.<sup>300</sup> Many people have referred to our Constitution as the most comprehensive statement of human rights drafted by any state to date. It

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<sup>297</sup> Vol 14/1, Jawaharlal Nehru to Sardar Patel 4 March 1950, S. Gopal edited, Selected Works of Jawaharlal Nehru pg-462, (Jawaharlal Nehru Memorial Fund. 1992.)

<sup>298</sup> G.P Joshi, *Police Accountability in India*, C.H.R.I available at [https://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/police\\_accountability\\_in\\_india.pdf](https://www.humanrightsinitiative.org/programs/aj/police/papers/gpj/police_accountability_in_india.pdf) (last visited Aug. 14, 2024).

<sup>299</sup> Id.

<sup>300</sup> *Constituent Assembly Debates*, Volume III, 29 April 1947.

ensured that the fundamental rights of even the most marginalized segments of our society would be protected.<sup>301</sup> Our new Constitution guaranteed us independence from our colonial past.<sup>302</sup> The new Constitution guaranteed rights against abuses by the state, such as unjustified incarceration. A clause provided that no one may be detained without permission.<sup>303</sup> According to Article 22 of the Constitution, which gives the judicial magistrate special authority for this purpose, every person who is arrested and placed in custody must appear before the closest magistrate within twenty-four hours of the arrest, excluding the time required for transportation from the place of arrest to the magistrate's court. No such person may be held in custody after the aforementioned period without the consent of a magistrate.<sup>304</sup> This provision obliged the magistrate to ensure that no one is detained without a warrant since it infringes against the right to life of a person.<sup>305</sup> Over time, the core provisions of the Constitution were deemed inadequate, and people's fundamental rights continued to be violated when they were being detained by the police. In order to ensure the protection of a detenu's rights, the Apex court provided comprehensive provisions in the D.K. Basu case<sup>306</sup> These regulations were also added to the CrPC. In accordance with these guidelines, the judicial magistrate was given several duties to protect the detenu from mistreatment while in police custody. The most important of all was the assignment of police custody. After being placed under arrest, a person has twenty-four hours to appear before a magistrate.<sup>307</sup> In this instance, the police request that the person in custody be given more time to allow them to finish their investigation. In accordance with these guidelines, the judicial magistrate was given several duties to protect the detenu from mistreatment while in police custody. The most important of all was the assignment of police custody. After being placed under arrest, a person has twenty-four hours to appear before a magistrate. In this instance, the police request that the person in custody be given more time to allow them to finish their investigation. Nonetheless, the magistrate must decide whether or not such custody is necessary in line with Section 41 of the Criminal Code.<sup>308</sup> Section 41 forbids the arrest of an individual when the offense

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<sup>301</sup> Constitution of India Analysed, Times of India, 26 January 1950 at B8.

<sup>302</sup> A.G Noorani, Challenges to Civil Rights Guarantees in India 5 (Oxford University Press, New Delhi, 1<sup>st</sup> edition, 2012).

<sup>303</sup> Supra note 296, p-8..

<sup>304</sup> Supra note 294.

<sup>305</sup> Indian Constitution. art 21, provides as follow "*Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law*".

<sup>306</sup> *D.K Basu V. State of West Bengal*, 1997 (1) SCC 416.

<sup>307</sup> Supra Note 294.

<sup>308</sup> Code of Criminal Procedure 1973 § 41, provides as follow "*(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person--*

*[(a) who commits, in the presence of a police officer, a cognizable offence;*

*(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely: --*

*(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;*

*(ii) the police officer is satisfied that such arrest is necessary--*

*(a) to prevent such person from committing any further offence; or*

*(b) for proper investigation of the offence;*

*(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner;*

*or*

is not serious and the accused poses no threat to the investigation. It is also up to the magistrates to decide if the person was legitimately detained. whether he been subjected to torture while in police custody? If a magistrate believes that a procedure is not being followed appropriately, he has the power to liberate an accused person at any time.<sup>309</sup>

But much like with the father-son duo, criticism has been levelled at the magistrate's approach. The magistrate in the case gave the police custody without taking into account the injuries sustained by the two individuals.<sup>310</sup> Police custody is often granted by magistrates automatically, without recourse to their discretion.<sup>311</sup> Lord Atkin in one of his judgments observed that because the magistrates are unable to understand their own obligations, they behave more like the executive than the executive itself.<sup>312</sup> The magistrates are unable to see that they are the arbiters of justice as well as the first line of defence against police misconduct. Furthermore, they are often the sole ones protecting individuals from police abuses and torture while they are in custody. The Apex Court's declaration that an accused individual may only be held for more than twenty-four hours throughout the course of an investigation into a matter if the magistrate has the jurisdiction to do so in compliance with Section 167 CrPC makes clear the importance of magistrates as guardians of the people's rights. Detention authorization is a highly important duty. Given that it affects citizens' freedom and liberty, it must be handled extremely carefully and thoughtfully. Our experience suggests that the appropriate gravity is not being applied. Authorization for detention is often granted in a casual, standard manner. Before granting permission for detention under Section 167, CrPC, a magistrate must first be persuaded that the arrest was legal, that the person arrested has all of their constitutional rights upheld, and that the arrest complies with the law. If the arrest complies with Section 41 of the Code, the magistrate is required to refuse to approve the police officer's continuing detention and to release the accused.<sup>313</sup>

To further curtail the power of the police, magistrates have been assigned a plethora of extra responsibilities during criminal investigations. This includes the power to supervise investigations. It was previously contended that nowhere in the CrPC were magistrates granted the authority to supervise investigations. But in the Sakiri Vasu decision, the Apex Court found this authority under Section 156(3) of the CrPC.<sup>314</sup> With the

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*(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or*  
*(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,*  
*and the police officer shall record while making such arrest, his reasons in writing:*  
*[Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.]*  
*(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;] .....*"

<sup>309</sup> *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

<sup>310</sup> Manu Sebastian, *Jeyaraj-Bennix Custodial Deaths: Questions About Lapses of Magistrate in Ordering Remand*, Live Law available at [://www.livelaw.in/columns/jeyaraj-bennix-custodial-deaths-questions-about-lapses-of-magistrate-in-ordering-remand-158998](http://www.livelaw.in/columns/jeyaraj-bennix-custodial-deaths-questions-about-lapses-of-magistrate-in-ordering-remand-158998) (last visited Aug. 12, 2024).

<sup>311</sup> *Manubhai Ratilal Pater Tr. Ushaben vs. State of Gujarat* (2013) 1 SCC 314.

<sup>312</sup> *Liversidge v Anderson* [1942] AC 206.

<sup>313</sup> *Supra* note 309, p-11,12.

<sup>314</sup> *Sakiri Vasu v. State of U.P.*, (2008) 2 SCC 409.



use of the case diary, the magistrate can use this authority to supervise the investigation to safeguard the integrity of the prosecution and ensure that the accused is treated fairly.<sup>315</sup> All these statutory rules have demonstrated to us the evolution of a protectionist mindset in our police investigation mechanism as well as the shift in our social circumstances. These laws have tried to safeguard the interests of the accused in spite of the horrible accusations that were made against them. These provisions try to stop the accused from being tortured while under police custody or while an investigation is ongoing. To achieve this goal, the judicial magistrates have been given extensive authority to supervise the investigation in an adversarial criminal justice system.

The Apex Court did point out that these sections are meaningless due to the mechanistic approach of the magistrates. The tragic occurrences of the past several years have made it clear that judicial magistrates must be held accountable. Even in Tamil Nadu, protests were staged in response to a custodial death in order to hold the magistrate accountable for his callous handling of such a serious case.<sup>316</sup> Even if it appears that there isn't a statute that can specifically define a magistrate's duty in these circumstances. In *Arnesh Kumar v. State of Bihar*, the Supreme Court did, however, decide that magistrates can be charged with misconduct if they neglect to perform their obligations with relation to arrest and detention.<sup>317</sup> In other words, before allowing the accused's custody, the magistrate must read the police report in compliance with the previously indicated requirements; only then can the magistrate note that the accused has been satisfied. If the judicial magistrate who approved the custody did not provide documentation for the reason for the imprisonment, the relevant High Court may initiate administrative action against them. Magistrates will be held more accountable as a result of this Supreme Court decision. Furthermore, the Supreme Court's decisions may prove to be very helpful in the future in clarifying the rights and limitations of an arrested individual.

Another aspect of custodial cruelty in which judges have a significant role is investigating deaths that take place while a person is under police custody. When someone passes away while in police custody, the circumstances surrounding the death need to be investigated by police investigators. Nonetheless, it could be unreasonable to anticipate a fair conclusion from such investigations given the strong sense of fraternity that police personnel share with one another. In cases of police torture or custodial death, direct ocular evidence of the police personnel's cooperation would rarely be accessible, as the Apex Court later recognized. The only people who can usually explain the circumstances surrounding the death of someone who is in their custody are law enforcement officers. Because of their deep sense of brotherhood, police officers are known to prefer to remain silent and often misrepresent the facts in order to defend their colleagues.<sup>318</sup>

In accordance with the suggestions made by the Law Commission of India in its 152nd report,<sup>319</sup> the CrPC

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<sup>315</sup> Id.

<sup>316</sup> Supra Note 310.

<sup>317</sup> Supra Note 309.

<sup>318</sup> *State of Madhya Pradesh vs Shyamsunder Trivedi*, 1995 (1) Suppl. SCR 44.

<sup>319</sup> Law Commission of India, Custodial Death, Report no-152, 1994.

now includes special provisions that guarantee an impartial inquiry into deaths that occur while a person is in custody. Sections 176 (1A)<sup>320</sup> and 176(5)<sup>321</sup> were added to the CrPC in 2005 as a result of an amendment, enabling a judicial or metropolitan magistrate to look into a death that happens while a person is being held concurrently. Even if it's a parallel study, it's necessary. However, the documentation also presents a quite bleak picture of the implementation of this clause. Only twenty percent of rape and custodial death cases have been brought by the magistrate.<sup>322</sup> There is no longer any fear or deterrence, which has resulted in grave injustice and given police officers more latitude. Court magistrates are equally accountable for both police brutality and correctional mortality due to their mechanical approach. They often overlook the fact that they are the first and sometimes the last line of defence for the individual who is being held. Therefore, the way these magistrates make decisions needs to be altered in order to ensure a cap on deaths while in prison and incidents of police brutality.

### **NATIONAL HUMAN RIGHT COMMISSION'S FAILURE AND CUSTODIAL DEATHS**

One major factor contributing to the rise of human rights breaches in police custody in India is the poor functioning of institutional processes. Following its ratification on January 26, 1950, the Indian Constitution came to be known as the largest liberal experiment in democratic governance.<sup>323</sup> It's interesting to note that this Constitution was drafted with consideration for the 1948 Universal Declaration of Human Rights.<sup>324</sup> The citizens were granted every right conceivable in a liberal democracy. The mechanisms put in place to protect these rights were far from perfect, though. Upholding the rights of individuals has been entrusted to the higher judiciary.<sup>325</sup> But common individual often lack access to these higher courts because of India's distinct standard of living. The institution that could protect these individuals' human rights has also been aided by persistent police brutality, both before and after emergencies, and the fact that vulnerable citizens are unable to approach higher courts due to a lack of procedural knowledge and comprehension.<sup>326</sup> As a result, the National Human Rights Commission was established under the Protection of Human Rights Act of 1993.

These groups are known in modern political and legal theories as fourth branch institutions. These institutions

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<sup>320</sup> Code of Criminal Procedure 1973 § 176 (1A), provides as follow “1A. Where, -

1. any person dies or disappears, or rape is alleged to have been committed on any woman, while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court under this Code, in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed.”

<sup>321</sup> Code of Criminal Procedure 1973 § 175 (5), provides as follow “The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under Sub-Section (1A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical person appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing.”

<sup>322</sup> Supra note 289.

<sup>323</sup> Supra note 296 at xvi.

<sup>324</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>. (last visited Aug. 22, 2024).

<sup>325</sup> Granville Austin, *The Indian Constitution: Cornerstone of the Nation* 12 (Oxford University Press, New Delhi, 1<sup>st</sup> edition, 1966).

<sup>326</sup> K.G. Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* 4-7 (Orient Longman, New Delhi, 1<sup>st</sup> edition, 2004).

are intended to supervise the complex political system and manage state authority.<sup>327</sup> In a same spirit, the N.H.R.C. has been in charge of defending people's basic rights. Furthermore, the law also establishes State Human Rights Commissions for protecting the rights of the citizens. However, these institutions still perform below expectations even after being in existence for more than 25 years. A great deal of attention and criticism has been directed against these groups. The main reason for this criticism of N.H.R.C. is that it has power restrictions and capacity limitations. The commission was dealing with over 40,000 cases at the time of the 2016 report.<sup>328</sup> This kind of backlog is mostly the result of N.H.R.C.'s dependence on the government. The National Human Rights Commission is a fourth branch that must remain independent of the government, yet the government is its only supply of human resources.<sup>329</sup> S.H.R.C.'s function is similar in that state governments are in responsible of hiring staff members for the organization. All of this results in untimely appointments and vacancies in some of the most significant roles within the organization. This ultimately leads to backlog of cases and inappropriate working circumstances. Funding is another issue, as the organization also depends on the government for this. This too affects the organization's dependability and operational efficiency. Consequently, the NHRC dependency upon the government has led to the organization's decline and an increase in the number of state personnel abusing disproportionate force without justification. This further results in even more horrible violations of human rights committed against the most vulnerable inhabitants of this amazing democracy.

The National Human Rights Commission (NHRC) was established to defend human rights and provide redress to those whose rights have been violated. However, Section 18 of the Act severely limits the authority of institutions. This Section outlines the steps the commission may take after conducting a rights violation investigation. In other words, the clause has reduced the commission's actions to simple recommendations. - The course of the inquiry and its aftermath. Following the conclusion of an investigation conducted in accordance with this Act, the Commission may do any of the following actions- In cases where the investigation reveals that a public servant violated human rights or was negligent in preventing violations of rights or aiding and abetting such violations, it may advise the relevant government or authority to: (i) Pay the complainant, the victim, or the victim's family members any damages or compensation the Commission deems appropriate; (ii) To file charges against the concerned person or people, or take any other appropriate action

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<sup>327</sup> Gautam Bhatia, Giving Human Rights Commissions more teeth, *The Hindu* available at [thehindu.com/opinion/lead/giving-human-rights-commissions-more-teeth/article31111463.ece](https://www.thehindu.com/opinion/lead/giving-human-rights-commissions-more-teeth/article31111463.ece) (last visited Aug. 25, 2024).

<sup>328</sup> Sanjoy Hazarika, NHRC A Toothless Tiger, Commonwealth Human Right Initiative available at <https://www.humanrightsinitiative.org/blog/nhrc-a-toothless-tiger> (last visited Aug. 14, 2024).

<sup>329</sup> The Protection of Human Right Act 1993, § 11 Provides as follow- "*Officers and other staff of the Commission.—(1) The Central Government shall make available to the Commission— (a) an officer of the rank of the Secretary to the Government of India who shall be the Secretary-General of the Commission; and (b) such police and investigative staff under an officer not below the rank of a Director General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission. (2) Subject to such rules as may be made by the Central Government in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary. (3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed.*"

the Commission deems appropriate; (iii) To take any additional action it deems appropriate.<sup>330</sup>

This section gives the government total authority to accept or reject the recommendations made by the N.H.R.C. These recommendations are typically accepted by governments, though on occasion they could be rejected. The commission's proposed course of action is frequently disregarded by the state even after it has been made available. This typically occurs when punitive action is taken against a government employee.<sup>331</sup> It also results in continued human rights violations by state employees since there is little fear of future action or deterrence. This viewpoint essentially restricts the goals and methods of the N.H.R.C.

The N.H.R.C. has been compared to a toothless tiger by the Supreme Court due to this provision and its interpretation alone. Stated differently, we have little doubt that this influential entity has, tragically, been reduced to mere insignificance, given that it has exposed its issues through affidavits and written submissions made to this Court. The NHRC's ability to carry out its mandate will be severely hampered, and needless criticism regarding our country's respect for human rights will also arise, if the Union of India does not promptly and favourably accept and consider any request made by the NHRC in this regard.<sup>332</sup>

The Apex Court's comments and the goal of the Act as a whole—the protection of human rights—should therefore be taken into consideration by the courts when interpreting the language suggested in Section 18 of the Act. Therefore, rather than being discretionary, heeding such advise should be mandated. Such an interpretation would ensure required action against the accused official, so having a deterrent impact on other state officials. Additionally, it will impose more limitations on horrible human rights abuses such as those that have recently taken place in Tamil Nadu.

## **CUSTODIAL DEATH AND LETHARGIC APPROACH TO LAW IMPLEMENTATION**

Police brutality is a disgrace to our legal and democratic processes. In essence, it occurs because our governance apparatus is unable to stop these kinds of tragedies. It usually occurs because the executive branch is unable to implement and expand upon various court decisions regarding police violence.<sup>333</sup> It also stems from the government's incapacity to enact new laws that deal with specific important areas of police violence. When it comes to cases involving police wrongdoing, our Supreme Court, which has continuously placed a high value on individual dignity, has repeatedly displayed an excessive amount of sensitivity. The escalating number of deaths that take place while a person is in police custody has been seriously questioned by the court on multiple occasions. In the case of *Re Inhuman Conditions v. State of Assam*, the Supreme Court made the following observation: “*Despite numerous rulings from this Court and possibly every other High Court across the nation, there appears to be no decrease in the number of deaths that occur in custody. These cases are both documented and undocumented. This is a tragic, not a depressing, condition of affairs that shows how*

<sup>330</sup> *Ibid*, § 18.

<sup>331</sup> *Supra* note 328.

<sup>332</sup> *Extra Judi. Exec. Victim Families Assn. V. Union of India*, WRIT PETITION (CRL.) NO. 129 OF 2012, Para 44.

<sup>333</sup> *D.K Basu V. State of West Bengal*, 1997 (1) SCC 416, *Joginder Kumar vs State Of U.P.*, 1994 (4) SCC 260.

*little the condition seems to care for the lives and liberties of people, especially those who are detained. The opportunity to make things right has long since passed, but there doesn't seem to be any desire to do so, and as a result, no end in sight.*"<sup>334</sup>

Therefore, in an attempt to protect people's integrity and dignity from abuse while they are in prison, the Apex Court has rendered multiple rulings and imposed a number of regulations. The most significant of these were the arrest guidelines from the D.K. Basu ruling,<sup>335</sup> which were included into the CrPC. But another important decision from the Supreme Court that can restrict the use of force and lessen violence against prisoners is *Prakash Singh v. Union of India*.<sup>336</sup> One of the guidelines for police reforms that the Apex Court has offered in this decision is the State Security Commission's constitution, which limits the government's excessive influence or burden on the police. Secondly, defining a defined tenure for operational duty police inspectors and fixing the duration of the D.G.P.<sup>337</sup> Thirdly separating investigation from law and order. The most important directive of all was the creation of police complaint authority. The Police Complaints Authority at the district level would look into complaints against police officers up to the rank of Deputy Superintendent of Police, according to the Supreme Court's description of the authority's duties and jurisdiction. Likewise, the State ought to create a second Police Complaints Authority to look into complaints against superintendent of police and higher-ranking police officials. The state level authority may be headed by a retired judge from the High Court or Supreme Court, and the district level authority may be headed by a retired district judge. The court further ruled that "only allegations of serious misconduct by the police personnel, which would include incidents involving death, grievous hurt, or rape in police custody, would be taken cognizance of by the State level Complaints Authority." Apart from the aforementioned situations, the Complaints Authority at the district level has the authority to investigate allegations of extortion, home or land grabbing, or any serious misuse of authority. The recommendations made by the Complaints Authority for any departmental or criminal action against a delinquent police officer, including at the district and state levels, shall bind the relevant authority.<sup>338</sup> Given the N.H.R.C.'s weight and the backlog of cases, these Supreme Court tenets can ensure the efficient and agreeable administration of justice. With the help of subject matter specialists, this topic-specific authority would be able to address the issue of torture in detention more specifically. Consequently, states were granted until December 31, 2006, to implement the court's orders and establish all the authorities that the court had stipulated. If the nations had properly implemented these proposals, police reforms would have been assured by anarchic pre-colonial police systems.<sup>339</sup> But the states didn't follow through. According to the Commonwealth Human Right Initiative's most recent report, only 17 states—after a considerable amount of

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<sup>334</sup> *Re Inhuman Conditions v. State of Assam*, Writ Petition (Civil) No. 406 Of 2013.

<sup>335</sup> *D.K Basu V. State of West Bengal*, 1997 (1) SCC 416

<sup>336</sup> *Prakash Singh vs Union of India*, 2006 (8) SCC 1.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

time—have formed police complaint authority.<sup>340</sup> Furthermore, when it comes to the selection of candidates for these positions, the guidelines set forth by the Supreme Court are ignored. In many states, these P.C.A.s are woefully understaffed. For this reason, looking into complaints takes years.<sup>341</sup> Therefore, the government must regularly support an institution that is so crucial to the defence of citizens' rights. If this institution were constructed in compliance with the Apex Court's directive, it might, in a sense, lessen the load on the N.H.R.C. It might also guarantee that the rights of the most vulnerable individuals are better safeguarded from abuse by law enforcement and while they are in custody. It will also ensure that the abhorrent acts that took place in Tamil Nadu would not happen again.<sup>342</sup>

Human rights organizations have voiced grave worries about another issue in the wake of the events in Tamil Nadu: the lack of an anti-torture law in India. Police officers can use as much force as they think is necessary if there is no such regulation. India has a moral duty to enforce the United Nations Anti-Torture Convention<sup>343</sup> even though it is just a signatory to it. However, no law has been approved over the years, despite multiple attempts. In 2010, the Lok Sabha approved a bill prohibiting torture, however it only defined torture very narrowly. Torture was limited to causing considerable harm and risking someone's life, limb, or health (mental or physical) under Section 3 of the Bill. The Rajya Sabha was very critical of the same. They thought that in order to comply with the UN Convention and to include transgressions covered by the Indian Penal Code, the definition of torture was required to be suitably expanded. Furthermore, when it comes to torture, women and children should be given extra consideration, and it should be against the law to try to harm them. A public servant should encompass every agency or institution under the government. Consequently, the bill was turned down.<sup>344</sup> Then, in 2017, the Law Commission's 273rd report<sup>345</sup> suggested the introduction of a new act to carry out the United Nations Torture Convention, marking the next opportunity. A draft bill was also included in the study.<sup>346</sup> This proposed bill has broadened the definition of torture. The report also recommends amending the Indian Evidence Act to include Section 114B, which addresses presumption.<sup>347</sup> Any injury a person sustains while in the custody of the police is presumed to be the consequence of abuse by the officers.

<sup>340</sup> V.Venkatesanshivangi Mathew, Police reforms still largely only on paper, *Frontline* available at <https://frontline.thehindu.com/dispatches/article28960801.ece> (last visited on Aug. 16, 2024).

<sup>341</sup> Id.

<sup>342</sup> Arun Janardhanan, Explained: How Tamil Nadu Police's brutal act of revenge claimed lives of a father and son, *The Indian Express* available at <https://indianexpress.com/article/explained/explained-tamil-nadu-police-custodial-torture-father-son-killed-thoothukudi-6479190/#:~:text=Tamil%20Nadu%20custodial%20deaths%3A%20Historically,and%20third%2Ddegree%20torture%20methods.&text=The%20death%20of%20a%20father,sparked%20rage%20across%20the%20state> (last visited on Aug. 18, 2024).

<sup>343</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>. (last visited Aug. 28, 2024).

<sup>344</sup> Select Committee Report Summary the Prevention of Torture Bill, 2010, P.R.S Legislative research, [https://www.prsindia.org/sites/default/files/bill\\_files/Prevention\\_of\\_Torture\\_Bill\\_2010\\_Standing\\_Committee\\_Summary\\_Report\\_Summary.pdf](https://www.prsindia.org/sites/default/files/bill_files/Prevention_of_Torture_Bill_2010_Standing_Committee_Summary_Report_Summary.pdf) (last visited Aug. 1, 2024).

<sup>345</sup> Law Commission of India, Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation, Report no-273, October 2017.

<sup>346</sup> Id.

<sup>347</sup> Id.

Nevertheless, despite a lot of time having passed, many states still haven't provided a mandate about the draft measure.<sup>348</sup> This affects the most vulnerable people's right to be free from police torture and jeopardizes the draft measure. Thus, in order to protect citizens' rights from police abuse, the government needs to pass legislation prohibiting torture.

## WAY AHEAD

Any society that identifies as democratic and upholds the rule of law must condemn itself in the eyes of the world for torture and deaths that occur during incarceration. It is imperative for our legal system to recognize that an individual's incarceration does not signify that he has given up his fundamental rights. Justice Krishna Iyer succinctly stated this point: *"This Country has no totalitarian territory even within the walled world we call prison. Articles 14, 19 and 21 operate within the prisons..... the state must re-educate the constabulary out of their sadistic arts and inculcate a respect for the human person –a process which must begin more by example than by percept if the lower rungs are really to emulate, then .... nothing inflicts a deeper wound on our constitutional culture than a state official running berserk regardless of human rights."*<sup>349</sup> The events that occurred in the state of Tamil Nadu have made everyone rethink our police force. It has also made us aware of how improperly public safety measures are applied in response to such horrible acts.

Ultimately the Union government revamped the existing criminal laws and that served as the cornerstone of India's criminal justice system. The new Acts have also been challenged in the Supreme Court. They received presidential assent on December 25, 2023, and it came into force from July 1, 2024. On December 20, 2023, the world's largest democracy declared that the colonial remnants of its criminal laws had been eliminated, just more than four months after the Bills were introduced and the same was passed without any significant parliamentary debate. However, legal experts and opponents of politics diverge on this issue. It is because the new codes do not call for any revolutionary changes to the way the nation is policed, crimes are investigated, or lengthy trials are carried out, there is a general consensus that the reforms did not amount to any decolonization of criminal justice. It is not merely a hassle for attorneys that this "vagueness" persists. Additionally, it permits a broad interpretation of the law, leaving room for a host of other social and political interests to exert pressure, abuse, interference, and lack of accountability beyond the legal system. Many Indians today accuse elected politicians working in tandem with dishonest authorities to bring about what they perceive to be "political interference" in all matters of justice. However, it is incorrect to see the extremely broad discretionary powers and ambiguous legal provisions of the Indian administrative and judicial system as remnants of a bygone (glory) era in which honourable and uncorruptible judges and officials upheld and administered justice. These persistent misrepresentations span the period from colonial to post-independence

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<sup>348</sup> Gaurav Vivek Bhatnagar, SC Directs All States, UTs to Send Replies on Torture Bill Within Three Weeks, The Wire, available at <https://thewire.in/law/sc-directs-all-states-uts-to-send-replies-on-torture-bill-within-three-weeks> (last visited on Aug. 3, 2024).

<sup>349</sup> *K.S.R. Dev v State of Rajasthan* (1981)1 SCC 503.

India.<sup>350</sup>

Unfortunately, the new law, which supersedes the CrPC, permits police custody to continue after the initial 15 days of an arrest; civil rights and legal advocates argue that this is a retrograde step that violates citizens' fundamental rights. If an investigation cannot be finished in a day, the jurisdictional magistrate may award police custody for up to 15 days under the Code of Criminal Procedure (CrPC). Nonetheless, police custody for a maximum of 15 days may be authorized in full or in part at any point within the first 40 or 60 days of the 60- or 90-day period of judicial custody, according to Section 187 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), which aims to replace the CrPC. In cases where the offense carries a minimum 10-year jail sentence, the 15-day police detention may be divided over 60 days, or 40 days for other offenses. Human rights advocates fear that the clause may allow police to use their arrest power unfairly and to engage in extrajudicial actions. Prior to this, a person may only request police detention for a maximum of 15 days, and even then, only during the initial 15 days after the arrest. The police may request incarceration for periods more than 15 days under the BNSS. It appears to be a step backwards for police to be able to ask for detention during the first sixty days following an arrest. It contradicts citizens' fundamental rights.<sup>351</sup>

If the police contend that they must return the person to their custody during this time, the new provision may result in bail being refused. One of the riskier parts of the new law is perhaps the one that extends police remand. This essentially removes the prior prohibition against requesting police custody as soon as the remanding magistrate awards court custody. Therefore, even after an accused individual has been given judicial custody, the magistrate has the authority to order that they be returned to police custody at any point after the initial 15 days of their detention. This extension exposes the accused to additional police torture, intimidation, and other risks, and it is a very serious violation of their rights to protections. The new law strikes to the core of Indian custodial jurisprudence, which has not trusted the police to protect those in their care. Modifying procedural laws may ultimately result in a violation of the moral principles and spirit of the Constitution. The new provision will severely impact citizens' fundamental rights.<sup>352</sup>

It is therefore imperative that our legal system closes these gaps instead of increasing it and therefore applies the procedural safeguards correctly for the sake of the public. The only way we can achieve the goal of guaranteeing the proper implementation of procedural protections is by strengthening the institutions. Furthermore, the goal can be achieved by making the respective government responsible for these organizations' proper operation. The Higher Judiciary bears equal duty for supporting the institutions meant to curb abuses by the state. The goals and purposes of these organizations should be furthered by the courts'

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<sup>350</sup> Eklavya Vasudev & Thomas Blom Hansen, *Citizens and the State: Policing, Impunity, and the Rule of Law in India*, *The Hindu*, available at <https://www.thehinducentre.com/incoming/citizens-and-the-state-policing-impunity-and-the-rule-of-law-in-india/article67887312.ece> (last visited July 24, 2024).

<sup>351</sup> R. Sivaraman, *Concerns rise over BNSS provision on police custody*, *The Hindu*, available at <https://www.thehindu.com/news/national/concerns-rise-over-bnss-provision-on-police-custody/article68344538.ece#:~:text=The%20new%20law%2C%20which%20replaces,to%20fundamental%20right%20of%20citizens> (last visited Aug. 4, 2024).

<sup>352</sup> *Id.*



interpretation of the law. Furthermore, in order for these organizations to effectively defend the rights of the people, the courts' evaluation of their needs must provide them greater authority.

Our Constitution gives the Higher Judiciary the authority to protect the rights of its citizens. Furthermore, in pursuit of the same objective, our courts have consistently taken an assertive position, safeguarding the rights of the most vulnerable citizens of our country. The courts have updated their procedural rules and operational system throughout this process.<sup>353</sup> Therefore, even in the lack of an anti-torture act in our legal system, one should expect that our Apex Court would uphold the principles of the United Nations Torture Convention<sup>354</sup> and provide guidance to limit the use of torture in police custody. This kind of approach is especially expected of the Apex Court, since it has already employed it in the Vishakha verdict.<sup>355</sup>

In addition, the prevalence of police brutality frequently makes news these days. We need to hold organizations, police departments, and governments responsible if we want to restrict the same. Additionally, the judiciary ought to be proactive, and judges adjudicating cases involving police violence ought to keep these lines of Justice White [U.S. Supreme Court Judge] from the case of *Wolff v. McDonnell* wherein the learned judge observed that, “*A prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons.*”<sup>356</sup>

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<sup>353</sup> Rajindar Sachar, "Social Action Litigation Activist and Traditionalist Judge" (1987)1 SCC Journal p. 13.

<sup>354</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, *available at*: <https://www.refworld.org/docid/3ae6b3a94.html> (last visited on Aug. 12, 2024).

<sup>355</sup> *Vishaka vs State of Rajasthan*, AIR 1997 SC 3011.

<sup>356</sup> *Wolff v. McDonnell* [418 US 539, 555-6 (1974)]



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# CHILD LABOUR AND HUMAN RIGHTS: A SOCIO-LEGAL PERSPECTIVE ON INNOVATION AND INTELLECTUAL PROPERTY

Pooja Tiwari<sup>357</sup> & Dr. Farha Khan<sup>358</sup>

### ABSTRACT

*This study examines the relationship between intellectual property (IP), human rights, and child labour from a socio-legal standpoint. It does so by critically examining how IP rules while encouraging innovation, may unintentionally perpetuate child labour practices. Child labour is still a problem in the world today, particularly in areas where there are both economic pressures and weak legal protections. The study shows that IP rules, especially in electronics, textiles, and agriculture, may encourage child labour because big businesses monopolise resources and the quest for lower production prices. The paper illustrates the dual function of intellectual property (IP) in possibly alleviating and prolonging child labour through case studies. In addition to highlighting the need for more robust enforcement measures, moral innovation, and assistance for regional economies, it promotes a revised intellectual property system that includes human rights concepts. To advance innovation without undermining the dignity and well-being of vulnerable groups, the paper advocates for harmonizing intellectual property legislation with international human rights norms, especially the rights of children. The results indicate that social justice and the abolition of child labour may be significantly helped by an intellectual property law approach grounded in human rights.*

**KEYWORDS:** Child labour, human rights, intellectual property, socio-legal perspective, ethical innovation.

### INTRODUCTION

All around the world, child labour is still a problem, especially in developing nations where socioeconomic difficulties and lax laws encourage its continuation. Millions of children still labour in conditions that rob them of their childhood, dignity, and potential, despite international initiatives like the United Nations Convention on the Rights of the Child (UNCRC) and the conventions of the International Labour Organization (ILO),

<sup>357</sup> Research Scholar (Law), Graphic Era Hill University, Dehradun

<sup>358</sup> Assistant Professor, Graphic Era Hill University, Bhimtal

which expressly forbid child labour. In addition to impairing children's development, this violation of fundamental human rights keeps poverty and inequality cycles alive.

Simultaneously, intellectual property law has become a potent instrument in fostering economic expansion and innovation. IP laws encourage innovation by granting the exclusive right to use, create, and market inventions. They are intended to safeguard the rights of inventors, producers, and enterprises. Nonetheless, there are significant concerns regarding the moral implications of innovation and the social obligations of those who profit from intellectual property rights when child labour and IP law collide.

A growing number of sectors of the world economy, like textiles, electronics, and agriculture, depend on intellectual property rights. Frequently, these sectors depend on intricate supply networks that reach areas where child labour is common. One business that has come under fire is the textile sector, which relies heavily on child labour and other inexpensive labour in developing nations due to its innovative fashion.<sup>359</sup> Similarly, the extremely patent- and trademark-dependent electronics sector frequently outsources production to regions with lax regulatory monitoring and high child labour violations.<sup>360</sup>

A complicated and multidimensional link exists between child labour and intellectual property. Patent laws, on the one hand, support economic expansion by encouraging invention and opening up new job and development prospects. On the flip side, vulnerable groups, including minors, may be exploited as a result of financial pressure in IP-intensive businesses to lower manufacturing costs. The monopolization of seeds and other resources by huge companies, for example, can result in patenting agricultural innovations, pushing small farmers in underdeveloped nations to depend on child labour to make ends meet.<sup>361</sup> Intellectual property holders' obligations to stop human rights violations are called into considerable ethical and legal doubt by this. The current legal structure for intellectual property protection frequently gives IP owners' financial interests precedence over workers' rights, especially in areas with low incomes. This disparity emphasizes the necessity of rethinking intellectual property (IP) legislation in a way that incorporates human rights ideas to prevent innovation from undermining marginalized groups. It is possible to establish a more just and equitable global economy by harmonizing intellectual property legislation with international human rights standards.

This study looks at how present intellectual property laws either encourage or discourage the use of child labour. It does this by examining the socio-legal dynamics of child labour in IP law. This paper aims to demonstrate the dual function of intellectual property (IP) in both perpetuating and perhaps mitigating child labour using case studies from the textile, agriculture, and electronics sectors. It will also advocate for IP

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<sup>359</sup> United Nations, Convention on the Rights of the Child, 1989, Article 32(1).

<sup>360</sup> International Labour Organization, *Global Estimates of Child Labour: Results and Trends, 2012-2016*, 2017, p. 15.

<sup>361</sup> Johnstone, R., *Agriculture and Intellectual Property Rights: Economic, Institutional, and Implementation Issues in Biotechnology*, 2018, p. 105.

legislation that is grounded in human rights and gives special attention to safeguarding children and other marginalized groups.

Examining the legal and economic aspects that support child labour's continuation, the paper first looks at the socio-legal background of child labour. Next, its influence on industry practices and its possible effect on child labour are examined in intellectual property legislation. Finally, the report advises how intellectual property (IP) law should incorporate human rights concepts. It promotes applying more robust enforcement tools, moral innovation, and local economic support to lessen the need for child labour.

In conclusion, even though intellectual property law has fueled economic expansion and creativity worldwide, changes to the law are necessary to prevent the continuation of human rights abuses. It is feasible to develop a framework that upholds the rights and dignity of every person, including children, while concurrently promoting innovation by taking a more human rights and holistic-focused approach to IP law.

## **THE SOCIO-LEGAL CONTEXT OF CHILD LABOUR**

Child labour is still a considerable problem in many parts of the world, especially in developing nations where there are insufficient social and legal safeguards in place to protect vulnerable populations. A complex interaction between financial need, cultural values, lax legal enforcement, and the forces of globalization shapes the socio-legal backdrop of child work. The socio-legal aspects of child labour are examined in this part, with attention to the roles played by social norms, economic circumstances, and national and international legal frameworks.

### **Economic Factors:**

Economic considerations are a principal cause of child labour, especially in areas with high poverty rates. Since adult salaries are insufficient to maintain households, families frequently rely on the revenue from child work to cover their fundamental necessities. Economic disparities, restricted educational options, and an absence of adult career opportunities all contribute to the prevalence of child labour.<sup>362</sup> A lot of the time, child labour occurs in unregulated industries like agriculture where there are lax labour regulations and little inspection.<sup>363</sup>

Child labour is principally caused by economic considerations, especially in low-income areas where poverty is pervasive. Because adult salaries are insufficient to maintain households, families frequently rely on the revenue from child work to cover their fundamental necessities. Economic disparities, limited adult job possibilities, and lack of access to education all contribute to the reliance on child labour. Children are

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<sup>362</sup> Cigno, A., & Rosati, F.C., *The Economics of Child Labour* (Oxford University Press, 2005) 12.

<sup>363</sup> Basu, K., *Child Labor: Cause, Consequence, and Cure, with Remarks on International Labor Standards* (1999) 37(3) *Journal of Economic Literature* 1083, 1087.

frequently employed in unregulated industries like agriculture, wherever there is little regulation and lax labour rules.<sup>364</sup>

### **Legal Frameworks:**

Different countries have quite different legal frameworks regarding child labour, which is an instance of their varying levels of economic growth, political will, and cultural values. International agreements that guarantee children's rights, like the UN Convention on the Rights of the Child (CRC) and ILO Conventions No. 138 (Minimum Age) and No. 182 (Worst Forms of Child Labour), are frequently not implemented consistently at the national level.<sup>365</sup>

Child labour regulations are present in many developing nations, but they are not well enforced because of political inertia, resource scarcity, and corruption. For example, India passed the Child Labour (Prohibition and Regulation) Act of 1986, among other laws, to try to stop child labour, yet implementation of these laws is still really challenging.<sup>366</sup> Millions of youngsters in India continue to labour under dangerous conditions, especially in mining, agriculture, and the textile industry.

Employers can take advantage of these ambiguities as distinct countries have different definitions of hazardous work and not the same legal ages for employment. For example, children as young as 14 can legally work in some nations under specific conditions. If the employment is considered vocational training, and after that the criteria may entail working in dangerous areas.<sup>367</sup> In industries where there is a considerable need for inexpensive labour, these legal loopholes play a significant role in the continued use of child labour.

### **Cultural and Social Norms:**

The continuation of child work is also greatly influenced by cultural and societal standards. Child labour is considered an essential component of a child's upbringing in many communities, especially in rural areas where children are expected to assist their families with agricultural tasks.<sup>368</sup> Additionally, in situations where there are legal bans against child labour, it can be challenging to confront these firmly rooted attitudes.

Furthermore, child work practices may be strengthened by the belief that education is a luxury rather than a right. When there are substantial immediate financial rewards, sending kids to work is often seen as more beneficial than sending them to school in low-income neighbourhoods.<sup>369</sup> Since legal actions might not be

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<sup>364</sup> ILO, Global Child Labour Trends 2008 to 2012 (International Labour Office, Geneva 2013) 25.

<sup>365</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>366</sup> D'Souza, A., Moving Towards Decent Work for Domestic Workers: An Overview of the ILO's Work (ILO, Geneva 2010) 45.

<sup>367</sup> ILO Convention (No. 138) concerning Minimum Age for Admission to Employment, 1973.

<sup>368</sup> White, B., Defining the Intolerable: Child Work, Global Standards and Cultural Relativism (1999) 6(3) *Childhood* 133, 136.

<sup>369</sup> Myers, W.E., The Right Rights? Child Labor in a Globalizing World (2001) 575(1) *The Annals of the American Academy of Political and Social Science* 38, 43.

enough to alter ingrained social norms, the cultural acceptance of child labour makes efforts to end the practice more challenging.

### **International Trade and Globalization:**

Child labour is still prevalent because of the pressures of globalization and international trade. In an increasingly globalized economy, there is a strong need for inexpensive labour, especially in sectors of the economy where low production costs are necessary to maintain competitiveness in the global market. This need encourages companies to take advantage of underage labour, especially in nations with lax laws and high rates of poverty.<sup>370</sup>

Furthermore, global firms frequently outsource manufacturing to developing nations with cheaper labour costs and laxer regulatory scrutiny. Because supply chains in sectors like electronics, textiles, and agriculture are intricate and challenging to oversee, outsourcing may result in the exploitation of child labour in these processes.<sup>371</sup>

By putting the defence of commercial interests ahead of the protection of human rights, international trade agreements and intellectual property laws have the potential to worsen these problems. Trade agreements enforcing stringent intellectual property rights, for instance, may facilitate the monopolization of resources by major businesses, so intensifying economic pressure on small farms and augmenting the use of child labour.<sup>372</sup>

### **Conclusion**

A wide range of global, cultural, legal, and economic elements influence the socio-legal backdrop of child labour and contribute to its continued existence. Although national and international legal frameworks offer a foundation for safeguarding children's rights, the demands of globalization, cultural norms, and economic pressures compromise their efficacy. A multimodal strategy is needed to address the problem of child labour, one that emphasizes the need for increased legal enforcement, financial assistance for communities that are at risk, and a change in societal perceptions of child work. These socio-legal issues must be taken into consideration.

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<sup>370</sup> Heintz, J., *Globalization, Economic Policy, and Employment: Poverty and Gender Implications* (ILO, Geneva 2006) 67.

<sup>371</sup> Gereffi, G., *Global Value Chains in a Post-Washington Consensus World* (2014) 21(1) *Review of International Political Economy* 9, 15.

<sup>372</sup> Sell, S.K., *TRIPS-Plus Free Trade Agreements and Access to Medicines* (2007) 28(1) *Liverp Law Rev* 41, 45.

## **INTELLECTUAL PROPERTY LAW AND ITS IMPACT ON CHILD LABOUR**

Global economic activities are significantly shaped by intellectual property (IP) legislation, especially in sectors where competitive advantage is derived primarily from invention and creativity. Although intellectual property legislation (IP) is intended to safeguard authors' rights and promote innovation, it even so has complicated consequences for child labour, particularly in developing nations. Enforcing intellectual property rights can lower production costs, worsen economic inequality, and unintentionally encourage the use of child labour. This section examines the relationship between intellectual property law and child labour, concentrating on how IP protections in sectors like electronics, textiles, and agriculture may either increase or decrease the use of child labour.

### **The Role of Intellectual Property in Global Supply Chains:**

For businesses like medicines, electronics, and fashion that rely on innovation, intellectual property rights (IPRs) are essential. These sectors rely on copyrights, trademarks, and patents to safeguard their goods and keep a competitive edge in the international market.<sup>373</sup> Nonetheless, these businesses' worldwide supply lines frequently reach areas with inexpensive labour and lax regulatory monitoring. Under these circumstances, there may be pressure to lower production costs, which may result in the exploitation of children and other vulnerable groups.<sup>374</sup>

For example, IP law can fuel the desire for low-cost labour in developing nations in the textile industry, which primarily depends on trademarks and design rights. Large fashion businesses can create things more cheaply and still enjoy intellectual property rights in developed countries by outsourcing production to areas where child labour is common.<sup>375</sup> In supply chains, the competitive pressure to match the demand for fast fashion clothing that is made rapidly and marketed at low prices can result in the use of child labour. To achieve production schedules, children are frequently hired to labour long hours in dangerous environments for little remuneration.<sup>376</sup>

### **Patents and Agricultural Child Labour:**

IP law has an especially noticeable effect on patents for seeds and biotechnologies in the agricultural industry. The patents that large agribusinesses frequently own on genetically modified seeds can lead to monopolies and increased costs for small farmers in underdeveloped nations' farming inputs.<sup>377</sup> Due to financial

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<sup>373</sup> WIPO, World Intellectual Property Report: The Role of Intellectual Property in Innovation (World Intellectual Property Organization, Geneva 2019) 23.

<sup>374</sup> Finkin, M.W., Forbidding Child Labor: The International Limits of the American Regulatory State (2002) 6(4) Employee Rights and Employment Policy Journal 23, 27.

<sup>375</sup> Moulds, J., Child Labour in the Fashion Supply Chain: Where, Why and What Can Be Done (The Guardian, 2015) 15.

<sup>376</sup> ILO, Decent Work for All: The Challenge of Child Labour (ILO, Geneva 2014) 37.

<sup>377</sup> Shiva, V., The Seed and the Spinning Wheel: Globalisation, Deregulation and Innovation (2000) 6(2) Journal of Agricultural and Environmental Ethics 129, 134.



difficulties, small-scale farmers may turn to child labour to keep their businesses afloat and reduce expenses associated with purchasing these patented seeds.<sup>378</sup>

Furthermore, by consolidating ownership of agricultural resources in the hands of a small number of multinational businesses, the application of IP rights in agriculture has the potential to worsen economic inequality. Small farmers displaced by this concentration of resources may have to resort to child labour to make ends meet.<sup>379</sup> The lack of strong legal protections for children in many rural areas, where there is little government monitoring and customs that may encourage the involvement of children in farming activities, contributes to the industry's reliance on child labour.

### **Electronics Industry and Child Labour:**

The intricate relationship between IP legislation and child labour is further demonstrated by the electronics industry, which is highly reliant on patents and trademarks. Production of parts like batteries and circuit boards has increased dramatically consequently, to the demand for electronic devices like laptops, tablets, and smartphones. These parts are frequently produced in nations where child labour is a problem.<sup>380</sup> Children work in mining locations like Southeast Asia to collect minerals like lithium and cobalt, which are necessary for making batteries. To satisfy the world's desire for electronics at the lowest possible price, these kids labour in dangerous environments and frequently without the required safety gear.<sup>381</sup>

Although intellectual property legislation safeguards the inventions that propel the electronics sector, it also incentivizes businesses to relocate their manufacturing to areas with cheaper labour costs. As companies look to maximize profits by decreasing production expenses, outsourcing may result in the exploitation of child labour in supply chains.<sup>382</sup> Because it may not always be clear how IP protections relate to the use of child labour, the lack of transparency in global supply chains makes it more difficult to hold businesses accountable for their labour practices.

### **Potential for Reform:**

The potential for IP legislation to lessen child labour exists, notwithstanding its difficulties. Policymakers can develop a more balanced strategy that fosters innovation and safeguards disadvantaged groups by incorporating human rights concepts into IP frameworks. Laws about intellectual property, for instance, could mandate that businesses carry out an investigation into labour standards in their supply chains and attest to the

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<sup>378</sup> De Schutter, O., The Right of Everyone to Enjoy the Benefits of Scientific Progress and its Applications (2009) 15(4) International Journal of Human Rights 72, 78.

<sup>379</sup> Sampath, P.G., Regulating Bioprospecting: Institutions for Drug Research, Access and Benefit-Sharing (Springer, 2005) 201.

<sup>380</sup> Chan, J., The Politics of Global Production: Apple and the Struggle over Foxconn (2013) 40(2) Critical Perspectives on International Business 18, 22.

<sup>381</sup> Amnesty International, This Is What We Die For: Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt (2016) 19.

<sup>382</sup> ILO, Child Labour in Mining and Global Supply Chains (2018) 15.



absence of child labour in their products.<sup>383</sup> Furthermore, incentive structures that recognize and reward businesses for their ethical innovation and fair labour standards might be created by governments and international organizations.

Additionally, the inclusion of child labour issues in IP law may incentivize businesses to engage in environmentally friendly production methods that do not include the exploitation of minors. Potential avenues for addressing this may be the creation of substitute technologies that lessen the need for labour-intensive procedures or the encouragement of regional entrepreneurship that strengthens communities and reduces their reliance on child labour.<sup>384</sup>

### **Conclusion:**

Even though intellectual property law is vital for encouraging economic development and innovation, it also has a large-scale impact on child labour, especially in sectors of the economy where low production costs are essential. IP rights enforcement can fuel the exploitation of children and other vulnerable groups in international supply networks, as well as lead to economic inequality. Nonetheless, it is possible to develop a more just system that safeguards both the rights of creators and the welfare of employees by incorporating human rights principles into IP frameworks. Stronger legal protections, corporate responsibility, and the encouragement of moral innovation are all necessary components of an all-encompassing strategy to address the effect of IP law on child labour.

## **CASE STUDIES: THE ROLE OF IP IN PERPETUATING OR MITIGATING CHILD LABOUR**

The dynamics of child labour are greatly impacted by intellectual property (IP) regulations, which can either exacerbate or lessen it depending on how they are interpreted and used. The ensuing case studies emphasize the detrimental and beneficial effects of IP laws on children's lives, illuminating the complicated interplay between IP rights and child labour in diverse industries and geographical areas.

### **Case Study 1: The Textile Industry in Bangladesh:**

Bangladesh's textile sector serves as a prime illustration of how intellectual property regulations, especially those about trademark and design protection, can sustain child labour. Bangladesh ranks among the world's top manufacturers of clothing items, supplying clothing to well-known international companies.

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<sup>383</sup> Gleeson, D.H., *Intellectual Property, Human Rights and Access to Medicines: A Global Perspective on Patent Law and Policy* (Routledge, 2018) 49.

<sup>384</sup> Yu, P.K., *Reconceptualizing Intellectual Property Interests in a Human Rights Framework* (2007) 40(3) *UC Davis Law Review* 1039, 1047.

Manufacturers are under tremendous pressure to create clothing at the lowest feasible cost because these brands mostly rely on trademarks and design rights to preserve their market position.<sup>385</sup>

When manufacturers try to save money by hiring children, who are paid less and are less inclined to demand better working conditions, this pressure frequently results in the exploitation of child labour. In some cases, children as young as twelve are working long hours in dangerous jobs to satisfy the needs of the fast fashion industry.<sup>386</sup> International efforts to stop child labour have not been successful because of the absence of effective enforcement of labour laws and the need to safeguard intellectual property.

### **Case Study 2: The Cocoa Industry in West Africa:**

The cocoa sector in West Africa, specifically in Ghana and Côte d'Ivoire, offers yet another illustration of how intellectual property laws can unintentionally support child labour. Leading global producers of cocoa, a necessary component of chocolate, are these nations. To safeguard their goods and preserve their market leadership, big, multinational firms that dominate the world chocolate market rely on patents and trademarks.<sup>387</sup>

Child labour becomes essential for survival in the economic context created by the fierce competition and low prices provided to cocoa farmers. Families frequently depend on their children's labour to boost output and satisfy consumer expectations. The use of child labour is made worse by multinational firms enforcing intellectual property rights without giving enough thought to the socioeconomic circumstances of the farmers.<sup>388</sup>

Nevertheless, there have been attempts to lessen this effect, such as the Fair Trade movement, which prioritizes moral manufacturing methods and offers a premium for goods verified to be free of child labour. Even while these programs seem promising, their reach is still narrow, and expanding them to address the industry's more significant problems would be a challenge.<sup>389</sup>

### **Case Study 3: The Pharmaceutical Industry and Access to Medicines:**

One sector where intellectual property laws can have both beneficial and harmful effects on child labour is the pharmaceutical business. On the one hand, tight enforcement of drug patents can make it more difficult for developing nations to obtain reasonably priced medications, which exacerbates poverty and unintentionally encourages child labour as families struggle to pay for healthcare.<sup>390</sup> For example, families may be obliged to

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<sup>385</sup> Moulds, J., *Child Labour in the Fashion Supply Chain: Where, Why and What Can Be Done* (The Guardian, 2015) 17.

<sup>386</sup> ILO, *Decent Work for All: The Challenge of Child Labour* (ILO, Geneva 2014) 39.

<sup>387</sup> Off, C., *Bitter Chocolate: Investigating the Dark Side of the World's Most Seductive Sweet* (New Press, 2008) 102.

<sup>388</sup> Berlan, A., *Social Sustainability in Agriculture: An Anthropological Perspective on Child Labour in Cocoa Production in Ghana* (2009) 45(1) *The Journal of Development Studies* 42, 47.

<sup>389</sup> Reynolds, L.T., *Fair Trade: Social Justice and Production Alternatives* (Routledge, 2007) 65.

<sup>390</sup> Gleeson, D.H., *Intellectual Property, Human Rights and Access to Medicines: A Global Perspective on Patent Law and Policy* (Routledge, 2018) 53.

send their children to work to pay for necessary therapies in nations where patented medications are prohibitively costly.

Conversely, the pharmaceutical sector has also witnessed programs designed to reduce child labour by creating accessible generic medications. A vital instrument in expanding access to drugs and lowering the financial strains that lead to child labour requires a license, which permits nations to manufacture generic versions of copyrighted medications without the patent holder's approval in situations of a public health emergency.<sup>391</sup>

Furthermore, with their focus on enhancing healthcare accessibility and decreasing poverty, public-private partnerships and corporate social responsibility (CSR) programs in the pharmaceutical sector have demonstrated promise in tackling child labour. These initiatives highlight the potential of IP law to mitigate the conditions that give rise to child labour when it is in line with human rights principles.

#### **Case Study 4: The Electronics Industry in the Democratic Republic of the Congo:**

The electronics industry offers a clear illustration of how intellectual property law can support child labour, especially when it comes to the mining of minerals utilized in electronic products. Children are frequently engaged in the cobalt mining industry in the Democratic Republic of the Congo (DRC). Cobalt is a crucial element in the manufacturing of batteries for electric vehicles, computers, and cell phones.<sup>392</sup>

Due to the worldwide demand for electronics fueled by technological advancements shielded by patents and trademarks, child labour is now widely used in the DRC's mining industry. Children labour in dangerous settings, frequently without the appropriate safety gear, to mine minerals that are subsequently sold to large companies.<sup>393</sup> Although intellectual property rights safeguard the revenues made from these minerals, the conditions of their extraction expose a negative aspect of the global supply chain.

Implementing due diligence standards for businesses acquiring minerals from conflict-affected areas is one way that efforts have been made to solve these challenges. One endeavour to improve transparency and lessen the use of child labour in the electronics supply chain is the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.<sup>394</sup>

#### **Conclusion:**

These case studies demonstrate how intellectual property law can contribute to the continuation of child labour or measures to reduce it. The enforcement of intellectual property rights has the potential to worsen economic inequality and encourage child exploitation in sectors like electronics, pharmaceuticals, textiles, and chocolate. However, IP law can help lessen child labour if it is in line with human rights principles and backed by

<sup>391</sup> Sell, S.K., TRIPS-Plus Free Trade Agreements and Access to Medicines (2007) 28(1) Liverpool Law Rev 45.

<sup>392</sup> Amnesty International, This Is What We Die For: Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt (2016) 22.

<sup>393</sup> ILO, Child Labour in Mining and Global Supply Chains (2018) 17.

<sup>394</sup> OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Publishing, Paris 2016) 13.

programs like Fair Trade certification, mandatory licensing, and obligations for due diligence. It takes a sophisticated strategy to address how intellectual property laws affect child labour, striking a balance between the need to protect children's rights and welfare and the need to preserve creativity.

## **REIMAGINING INTELLECTUAL PROPERTY LAW: A HUMAN RIGHTS-BASED APPROACH**

With its dual purpose of promoting economic progress and safeguarding the rights of inventors and innovators, intellectual property (IP) law has long been a mainstay of international legal and financial systems. Nonetheless, as the preceding sections have illustrated, the execution of intellectual property rights may occasionally exacerbate societal inequalities, such as the continuation of child labour. This section offers a revised interpretation of IP law that incorporates human rights concepts to better handle these problems. It is feasible to establish a fairer legal framework that fosters innovation and shields vulnerable groups from exploitation by harmonizing intellectual property law with human rights duties.

### **Integrating Human Rights into Intellectual Property Law:**

One of the most significant steps in tackling the detrimental societal effects of intellectual property protection, especially when it comes to child labour is the incorporation of human rights concepts into IP legislation. The prioritization of rights holders' economic interests over broader societal considerations in traditional IP law has resulted in inequalities that may intensify exploitation.<sup>395</sup> A human rights-based approach to intellectual property law would entail reconsidering the goal and reach of IP protections to ensure they do not infringe upon essential human rights, like the right to an education, the right to a fair and comfortable place of employment, and the rights of children.

Using the "right to development" concept, which highlights that innovation and economic progress should benefit everyone's well-being especially those in disadvantaged situations is one way to incorporate human rights into IP law.<sup>396</sup> To utilize this tactic, intellectual property rules would need to be created and implemented in a way that promotes sustainable development, lessens inequality, and stops child labour. The employment of child labour in any stage of the supply chain for goods and services protected by intellectual property, for instance, could be expressly forbidden by IP law. If businesses disregard these rules, they may be subject to fines or even the loss of their intellectual property.

### **Mandatory due Diligence and Transparency in Supply Chains:**

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<sup>395</sup> Yu, P.K., Reconceptualizing Intellectual Property Interests in a Human Rights Framework (2007) 40(3) UC Davis Law Review 1039, 1042.

<sup>396</sup> Drahos, P., The Global Governance of Knowledge: Patent Offices and Their Clients (Cambridge University Press, 2010) 217.

Mandatory due diligence obligations for businesses to guarantee that child labour is absent in their supply chains should be part of a redesigned intellectual property law framework. To detect and eradicate any occurrences of child labour, these regulations would compel businesses to perform extensive evaluations of their complete production processes, from the extraction of raw materials to the creation of the finished product.<sup>397</sup> A crucial component of this approach is transparency; businesses would have to make their supply chain policies and the measures they have taken to prevent child labour concerns available to the public knowledge.

Moreover, a certification system based on the adherence to child labour-free procedures in supply chains by businesses might be included in IP legislation, earning them a special designation. Along with giving businesses a boost, this accreditation would equip clients with the knowledge they need to make moral purchasing choices. Global child exploitation may decline as a result of consumer demand pushing more businesses to implement child labour-free policies throughout time.

### **Promoting Access to Knowledge and Education:**

Encouraging access to knowledge and education is a crucial component of rethinking intellectual property law from a human rights standpoint. The existing intellectual property structure frequently impedes access to technology, medications, and educational materials, especially in poorer nations. This is especially true when it comes to copyrights and patents.<sup>398</sup> Child labour may become more common as a result of these limitations, which can further feed cycles of poverty and inequality.

Intellectual property legislation might be reorganized to prioritize knowledge access to overcome this problem, especially in fields like sustainable agriculture, healthcare, and education that are vital to human development. For example, patent exemptions could be widened to cover the manufacture and export of generic drugs to developing nations or the use of copyrighted educational resources in underprivileged areas. Publicly sponsored scientific and educational resources may also be required, or at least encouraged, to have open-access policies in place. This would guarantee that knowledge is more accessible to those who are most in need of it.

### **Empowering Local Innovation and Entrepreneurship:**

In particular, in communities most at risk from child labour, a human rights-based approach to IP legislation should prioritize fostering local innovation and entrepreneurship. To secure their inventions and compete in the global market without using exploitative labour small-scale inventors, farmers, and business owners in developing nations must have their intellectual property (IP) frameworks created.<sup>399</sup>

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<sup>397</sup> Ruggie, J.G., *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Company, 2013) 64.

<sup>398</sup> Shaver, L., *The Right to Science and Culture* (2009) 12(1) *Wisconsin International Law Journal* 1, 6.

<sup>399</sup> Helfer, L.R., *Human Rights and Intellectual Property: Conflict or Coexistence?* (2003) 22(3) *Minnesota Journal of International Law* 47, 52.

For instance, intellectual property rules may be changed to safeguard better traditional knowledge and practices, frequently disregarded in more traditional IP systems. Intellectual property law can alleviate child labour by providing new economic opportunities for communities by acknowledging and safeguarding indigenous knowledge and local innovations. Furthermore, the application of capacity-building initiatives could assist local entrepreneurs in navigating intellectual property laws and bringing their ideas to market in a manner that is both ethical and profitable.

### **Enhancing International Cooperation and Enforcement:**

Last but not least, strengthening international collaboration and enforcement mechanisms is necessary to reimagine IP law to guarantee the respect of human rights throughout international supply chains. Since supply chains are global, international cooperation is crucial to combating the cross-border exploitation of child labour, even while national governments are crucial in enforcing IP rules.<sup>400</sup>

Global standards for IP legislation that integrate human rights concepts should develop in collaboration with international organizations like the United Nations (UN), the International Labour Organization (ILO), and the World Intellectual Property Organization (WIPO). These norms might cover things like rules for the moral sourcing of goods, outlawing child labour, and encouraging supply chain transparency. International IP treaties and agreements should also have provisions for enforcement and monitoring and procedures for holding infringers accountable.

### **Conclusion:**

A significant change to address the underlying causes of child labour and other types of exploitation exists when IP law is reimaged via a human rights-based perspective. It is possible to establish a more just and equitable global economy by incorporating human rights concepts into intellectual property frameworks, requiring due diligence and transparency, encouraging information access, fostering local innovation, and strengthening international cooperation. This strategy would ensure that the advantages of intellectual property are distributed more evenly and widely by defending not only the rights of innovators and producers but also the fundamental rights of minorities and other disadvantaged groups.

## **CONCLUSION**

The area where intellectual property (IP) law, human rights, and child labour law converge is complicated and frequently unsettling. The results of this study demonstrate that, although intellectual property rights

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<sup>400</sup> Blakeney, M., Intellectual Property Enforcement: A Commentary on the Anti-Counterfeiting Trade Agreement (ACTA) (2012) 34(2) European Intellectual Property Review 83, 85.

enforcement is crucial for fostering innovation and economic expansion, it can also have unforeseen repercussions that worsen social inequalities, such as child labour. Through the creation of economic forces that force vulnerable people into exploitative labour practices, the case studies under examination demonstrate how intellectual property legislation can sustain child labour in diverse industries, including electronics, pharmaceuticals, textiles, and cocoa manufacturing.

However, IP law can also lessen these problems, specifically when redesigned with a human rights perspective. It is feasible to address the underlying causes of child labour and advance more fair economic development by incorporating human rights concepts into IP frameworks. This calls for a dramatic change in the way intellectual property law is interpreted and used, one that takes social justice and human dignity into account in addition to the protection of economic interests.

Increased transparency, enhanced safeguards for indigenous innovations and traditional knowledge, and required due diligence in supply chains are essential for realizing this reinvented strategy. To guarantee that human rights are upheld throughout multinational supply chains, addition, international collaboration and strengthened enforcement tools are necessary. The protection of fundamental human rights, especially children's rights, and sustainable development are the overarching goals that these policies support.

In the end, re-evaluating intellectual property law from a human rights perspective provides a way forward for building a more just and equitable global economy, where the advantages of innovation are distributed more widely and the exploitation of weaker groups especially children is no longer permitted. The legal community must collaborate with politicians and industry leaders to execute these modifications, guaranteeing that safeguarding intellectual property does not impede human rights.

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