Vol. 04 **2024** **No. 01**

MAHAMANA

STUDENT LAW JOURNAL

Faculty of Law
Banaras Hindu University, Varanasi-221005, India

MAHAMANA
STUDENT LAW JOURNAL
(A Peer-Reviewed Journal)

MAHAMANA STUDENT LAW JOURNAL

Cite This Issue

as

MSLJ Vol. 04 No. 1 (2024)

The *Mahamana Student Law Journal* (*MSLJ*) is published biannually by the Faculty of Law, Banaras Hindu University since 2021. The Articles and other contributions for possible publication are welcomed by the Faculty. Students and Research Scholars of the faculty only should address the Editor-in-Chief, *Mahamana Student Law Journal*, Faculty of Law, Banaras Hindu University, Varanasi-221005, India, and email to <dean.lawschool@bhu.ac.in>. Views expressed in the Articles, published in this Journal are those of the respective contributors and do not necessarily reflect the views of the Board of Editors of the *Mahamana Student Law Journal*.

In spite of our best care and caution, errors and omissions may creep in, for which our patrons will please bear with us and any discrepancy noticed may kindly be brought to our knowlede which will improve our Journal. Articles in this peer-reviewed journal are published only after rigorous scrutiny, evaluation and review by the distinguished scholars of law. Further, it is to be noted that the Journal is published with the understanding that Authors, Editors, Printers and Publishers are not responsible for any damages or loss accruing to any body. The piety of plagiarism of the published articles is fully upon the authors.

In exchange for The *Mahamana Student Law Journal*, the Law School, Banaras Hindu University would appreciate receiving Journals, Books and monographs, etc. which can be of interest to Indian specialists and readers.

© Law School, B.H.U., Varanasi- 221005

Printed by LUMINOUS BOOKS INDIA, Sarnath, Varanasi-221007

MAHAMANA STUDENT LAW JOURNAL

Pandit Madan Mohan Malaviya Ji

(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

MAHAMANA

STUDENT LAW JOURNAL

EDITORIAL COMMITTEE

Prof. C.P. Upadhyay	**Editor-in-Chief, Head & Dean**
Prof. D.K. Mishra	**Executive Editor**
Dr. A.K. Maurya	**Student Advisor**
Prof. P.K. Singh	Senior Article Editor
Prof. V.S. Mishra	Senior Article Editor
Prof. R.K. Murali	Senior Article Editor
Prof. A.K. Pandey	Senior Article Editor
Prof. Ajendra Srivastava	Senior Article Editor
Prof. S.K. Gupta	Senior Article Editor
Prof. Bibha Tripathi	Managing Editor
Prof. M.K. Padhy	Managing Editor
Prof. J.P. Rai	Managing Editor
Prof. R.K. Patel	Managing Editor
Prof. G.P. Sahoo	Managing Editor
Dr. V.K. Saroj	Associate Editor
Dr. R.K. Singh	Associate Editor
Dr. K.M. Tripathi	Associate Editor
Dr. Raju Majhi	Associate Editor
Dr. V.K. Pathak	Assistant Editor
Dr. N.K. Mishra	Assistant Editor

EDITORIAL NOTE

The Faculty of Law, Banaras Hindu University holds a distinguished place in the history of legal education in India. Started in the year 1924, it emerged during a time, when pursuing legal studies was an arduous endeavour, especially for Indians under British colonial rule. At that time, aspiring Indian legal professionals were often compelled to travel abroad primarily to England to undertake legal education and qualify as Barristers. Recognizing the pressing need for a premier institution within India that could provide quality legal education to its own citizens, the visionary, educationist and revered national leader, Bharat-Ratna Mahamana Pandit Madan Mohan Malaviya ji, laid the foundation of the Law College under the aegis of the Banaras Hindu University. His foresight and commitment to nation-building through education led to the establishment of this illustrious institution, which aimed at cultivating a generation of learned, principled, and dedicated legal minds. The Faculty of Law was, thus, conceived not merely as an academic department, but as a crucible for nurturing legal thought, ethical jurisprudence, and a profound sense of duty toward justice and public service. This centenary year (Academic Session 2023-2024) marks not merely a milestone of years, but a celebration of the enduring values, vision, and mission that have guided the Faculty of Law since its inception. It is a moment of pride, reflection, and renewed resolve to continue upholding the highest standards of legal education in India for generations to come.

In the year 2024, the Faculty proudly commemorates its centenary a hundred years of unwavering dedication to excellence in

legal education, research, and public service. The centenary celebrations not only honour the legacy of its founder but also serve as a testament to the institution's enduring contribution to the legal fraternity in India. Over the decades, the Faculty of Law has grown into a premier Centre of legal scholarship, producing jurists, judges, academicians, policymakers, and advocates who have served the nation with distinction. As part of the centenary year celebrations, a special initiative has been undertaken to provide a platform for the current generation of students those pursuing undergraduate LL.B.(Hons) Three-Year / B.A. LL.B. (Hons) Integrated Five-Year and postgraduate LL.M. (Two-Year / One-Year) & LLM in HRDE degrees, as well as Research Scholars pursuing PhD to express their legal insights and scholarly reflections. To this end, the Faculty has proudly introduced the *Mahamana Student Law Journal*, a dedicated publication intended to amplify the voices of students and showcase their academic contributions in the realm of law. The inaugural issue of this journal, was released in 2021 under the guidance of the then Vice-Chancellor Prof. Rakesh Bhatnagar, a renowned scientist in the field of biotechnology.

Now, the fourth volume (2024 issue-1) is particularly significant, as it is dedicated to the centennial year of the Faculty's establishment. It not only reflects the academic vigour and intellectual curiosity of our students but also symbolizes the Faculty's commitment to holistic student development encouraging research, writing, and critical engagement with contemporary legal issues.

Prof. Dharmendra Kumar Mishra
Executive Editor

Prof. C. P. Upadhyay
Editor - in-Chief
Head & Dean

MAHAMANA
STUDENT LAW JOURNAL

Vol. 04	No. 01	Jan - Jun 2024

CYBERCRIME, DIGITAL FORENSIC CRIMINOLOGY AND THE NEW PENAL LANDSCAPE IN INDIA: AN APPRAISAL

SUBRAT BAJPAI *9*

RIGHT TO SHELTER *VIS-A-VIS* RIGHT TO FOREST: RECONCILING ARTICLE 21 WITH ARTICLE 48A IN THE ZUDPI JUNGLE CASE

ABHISHEK SHARMA *29*

COMMUNITY SERVICE SENTENCES UNDER THE BHARATIYA NYAYA SANHITA 2023: A SHIFT IN PENAL POLICY

KAPIL SHARMA *49*

IMPACT OF ARTIFICIAL INTELLIGENCE ON HUMAN RIGHTS: A FACILITATOR OR A DESTROYER?

BHAVYA SOM GARG *64*

CRITICAL APPRAISAL OF RAWLS'S CONCEPT OF DUTIES: DUTIES DERIVED FROM CONSENT AND RATIONALITY

JAGRITI SINGH
KRISHNA KUMAR *80*

MARITAL RAPE IN INDIA: THE LEGAL PARADOX OF CONSENT WITHIN MARRIAGE

JUGAL KISHOR DWIVEDI *94*

ODD NUMBERS OF ARBITRATORS AS ORDAINED, OR PARTY AUTONOMY AS SOVEREIGN? RECONCILING ARBITRATION'S FOUNDATIONAL TENSIONS

ABHISHEK GUPTA *105*

INSIDE THE WEB OF DECEIT UNDERSTANDING CYBER CRIME AND ITS MANY FACES

AMAN MISHRA *120*

OPAQUE OVERSIGHT: JUDICIAL IN-HOUSE INQUIRIES AND THE PROBLEM OF INSTITUTIONAL BIAS IN INDIA

HARSH VARDHAN MISHRA *138*

INFLATED COST OF JUSTICE IN INDIA

ANKIT SHUBHAM *153*

CYBERCRIME, DIGITAL FORENSIC CRIMINOLOGY AND THE NEW PENAL LANDSCAPE IN INDIA: AN APPRAISAL

SUBRAT BAJPAI*

ABSTRACT : India's accelerated digitalisation has produced complex, deterritorialised forms of criminality that challenge doctrinal assumptions of the Indian Penal Code (IPC) and the procedural orientation of the Information Technology Act, 2000. This article advances the argument that statutory reform, including the Bharatiya Nyaya Sanhita (BNS), 2023, is necessary but insufficient unless integrated with digital forensic criminology: an approach that couples doctrinal analysis with offender psychology, victimology, and robust evidentiary practices. The paper outlines the conceptual foundations, compares the IPC, BNS, and IT Act frameworks, synthesises Indian case law, and proposes evidence-based reforms tailored to India's institutional realities.

KEY WORDS : Cybercrime; Digital Forensics; Criminology; IPC 1860; Bharatiya Nyaya Sanhita 2023; IT Act 2000.

I. INTRODUCTION

There are moments in legal evolution when technological transformation outpaces the normative, regulatory, and procedural capacities of criminal law. India is presently situated at such a juncture. The rapid digitalisation of administrative governance, financial transactions, interpersonal communication, and private life has created a social environment where the boundary between the physical and the virtual is no longer meaningful. Crime, once understood

* Research Scholar, Faculty of Law, B.H.U., Email: *subratbajpai99@gmail.com*

primarily as a corporeal encounter in time and space, now proliferates in deterritorialized, anonymised, and algorithmically mediated environments. Cybercrime operates in a domain where identity is often masked, traceability is complex, and evidence exists in volatile digital forms. The challenges it poses are not merely technological; they are deeply criminological and jurisprudential. India's tryst with digital criminality has accelerated, particularly in the last decade. With more than 880 million active internet users and one of the world's largest digital payment ecosystems, the country has become a fertile ground for offences involving data theft, phishing, ransomware, financial fraud, cyberstalking, identity manipulation, and algorithmic misinformation networks. The architecture of cybercrime is increasingly systemic rather than incidental, involving coordinated organisational structures, exploit markets, and transnational offender networks operating across encrypted platforms and the dark web[1]

Traditional legal doctrines developed under the Indian Penal Code, 1860 (IPC), drafted within a colonial legal consciousness that assumed visible physical harm, identifiable offenders, and territorially bounded crime scenes, are structurally inadequate to address these new harms.[2] The Information Technology Act, 2000, enacted as a special legislation, filled certain statutory gaps, especially concerning unauthorised access, data manipulation, and computer-related offences. In 2023, the Government of India introduced a significant penal reform by replacing the IPC with the Bharatiya Nyaya Sanhita (BNS), 2023. One of the major claims surrounding the BNS is its responsiveness to cyber offences and digital evidence, with the aim of modernising Indian criminal law. Yet, a closer doctrinal examination reveals a mixed landscape: new provisions

1 Prashant Mali, Cyber Crime & Cyber Law Simplified (Snow White Publications, 2nd edn., 2021) 14.

2 Ajay Kumar, "Digital Transformation and Criminal Justice in India", 63 Journal of Indian Law and Society 88 (2020).

exist, but conceptual ambiguities and enforcement gaps persist. Understanding this transition requires not only legal analysis but also the integration of forensic criminology, which examines offender behaviour, victim vulnerability, digital forensic evidence, and the socio-technological environment that enables cybercrime.

Cybercrime cannot be effectively addressed solely through statutory amendment. It requires a criminological framework grounded in digital forensic analysis, behavioural understanding, and procedural integration across policing, adjudication, and evidence-handling systems.

To substantiate this thesis, the paper undertakes four simultaneous inquiries: (1) conceptual, examining the evolving nature, typologies, and motives of cyber offenders; (2) doctrinal, through a comparative analysis of the IPC, BNS 2023, and the IT Act; (3) forensic, on the role of digital forensics in evidence acquisition, chain of custody, and trial integrity; and (4) policy-oriented, addressing the structural challenges of investigation, jurisdiction, and victim redress in India.

II. CONCEPTUAL FOUNDATIONS OF CYBERCRIME AND DIGITAL FORENSICS CRIMINOLOGY

The conceptual foundations of cybercrime must be situated within the broader analytical terrain of criminology, sociology, and digital systems theory. Unlike traditional offences where actus reus is materially embodied, cybercrime occurs in a computational environment, mediated by networks, code-based infrastructures, and identity abstraction. This demands a theoretical framework that goes beyond classical paradigms of criminal law, which presuppose physical presence, observable conduct, and tangible harm.

a. ***Routine Activity Theory and Digital Opportunity Structures :*** Routine activity theory posits that crime occurs when a motivated offender, a suitable target, and the absence of capable guardianship converge. In the digital realm, this

convergence is amplified. Targets are plentiful due to mass digitization, while capable guardianship, in the form of digital literacy, institutional monitoring, and cyber hygiene, is often insufficient. Attack surfaces expand continuously as individuals and organizations increasingly depend on interconnected systems.

However, unlike physical space, cyberspace removes spatial proximity constraints. The offender and the target may reside in different jurisdictions, separated by thousands of miles, and yet interact instantaneously. This transforms cybercrime from a situational deviation to an environment-enabled behaviour.[3]

b. ***Rational Choice Model and Offender Calculation :*** Cyber offenders generally exhibit rational calculation. The cost–benefit equation favours them due to:

- low probability of identification due to encryption and anonymisation tools;
- low resource expenditure in executing scalable attacks;
- high potential monetary or psychological gain;
- procedural and jurisdictional delays in investigation.

Thus, the offender often perceives cybercrime as a low-risk, high-reward enterprise. The digital ecosystem reduces friction: malware kits, social engineering scripts, and dark web credential markets allow offenders to execute sophisticated crimes with relatively modest expertise.[4]

c. ***Differential Association and Online Subculture Learning:*** Cybercrime is also shaped by peer-to-peer learning networks. Techniques, scripts, zero-day exploits,

3 Marcus Felson and Lawrence E Cohen, “Human Ecology and Crime: A Routine Activity Approach”, 18 Human Ecology 1 (1989).

4 Ronald V Clarke and Derek B Cornish, The Reasoning Criminal: Rational Choice Perspectives on Offending (Springer, 1986) 22.

and evasion strategies are shared in online forums, darknet marketplaces, and encrypted messaging groups. This resonates with Sutherland's differential association theory: individuals learn criminal behaviour by interacting with deviant peers and internalising both the techniques and the justifications narratives. Online subcultures often provide ideological reinforcement. Offenders may view institutions as exploitative or users as careless, thus morally neutralising their conduct. The anonymity of digital identity facilitates experimentation, desensitisation, and escalation of offending patterns.[5]

d. ***Strain Theory and Socio-Economic Pressures :*** Strain theory explains offending in terms of structural disjunction between goals and means. In contemporary India, cybercrime has emerged as a perceived avenue for socio-economic mobility in marginalised contexts. Reports of engineering students, gig workers, and technologically literate youth engaging in phishing or financial fraud reflect a context in which legitimate economic opportunities are perceived as limited compared to the readily accessible rewards of cybercrime. This does not excuse criminality; rather, it highlights that cybercrime operates as a structure-mediated adaptation to perceived inequality.[6]

e. ***Digital Forensic Criminology: Integrating Behaviour with Trace Evidence :*** Digital forensic criminology extends traditional criminology by linking offender motivation and method with traceable artefacts such as log data, metadata, device signatures, behavioural time-stamps, hash trails, and transactional patterns. This approach enables investigators to reconstruct events not merely as discrete acts, but as

5 Edwin H Sutherland, Principles of Criminology (J. B. Lippincott, 4th edn., 1947) 87.

6 Robert K Merton, "Social Structure and Anomie", 3 American Sociological Review 672 (1938).

behavioural sequences. Digital forensic criminology treats evidence not only as proof of guilt but as a behavioural signature that can:

- identify offender typologies;
- predict escalation or recidivism;
- map organisational or networked criminal structures;
- support judicial reasoning regarding mens rea.

By connecting rational choice, opportunity structures, subcultural learning, and socio-economic strains with forensically traceable behaviour, this section establishes the theoretical scaffolding for the doctrinal and evidentiary analysis that follows.

III. OFFENDER PSYCHOLOGY AND VICTIMOLOGY IN INDIAN CYBERCRIME

Understanding cybercrime requires examining the psychological, cognitive, and behavioural dimensions of offender conduct and victim vulnerability. Cyber offenders operate in an environment shaped by anonymity, reduced social cues, and a perception of detachment from physical harm. These elements alter traditional criminogenic pathways and generate forms of behaviour that are unique to digital offending.

a. ***Anonymity and the Disinhibition Effect :*** Research demonstrates that perceived anonymity lowers empathy thresholds and increases aggression or exploitative tendencies. In cyberspace, the offender is shielded from the victim's emotional reactions, facial expressions, and physical presence. This fosters what psychologists describe as the online disinhibition effect. It allows individuals to commit acts they would likely avoid in face-to-face interactions, including harassment, identity violation, and financial exploitation.

The offender's sense of diffused responsibility is heightened by technical tools such as virtual private networks, Tor

routing, disposable accounts, script automation, and botnets. These create a cognitive buffer between action and consequence, weakening moral restraint.[7]

b. ***Cognitive Neutralisation and Moral Justification :*** Offenders frequently rely on neutralisation narratives to justify their conduct. These narratives include:

- denial of injury, for example, the claim that no real harm is done because it is only data;
- denial of victim, in which the victim is portrayed as a corporation or wealthy person who can afford the loss;
- appeal to higher loyalty, such as offending to survive or support family;
- condemnation of condemners, where offenders invoke perceived systemic corruption.

Such rationalisations weaken internal moral policing and sustain repeat offending.[8]

c. ***Predatory Behaviour and Grooming Mechanics :*** In offences such as cyberstalking or sextortion, offenders often exhibit traits consistent with predatory behavioral models. They identify vulnerable individuals, personalise communication, build emotional dependence, and use shame or fear as leverage. Digital platforms, especially social media and messaging applications, enable continuous surveillance and psychological conditioning without physical presence.[9]

This behaviour is often characterised by:

---

7 John Suler, "The Online Disinhibition Effect", 7 Cyberpsychology & Behaviour 321 (2004).

8 Gresham M Sykes and David Matza, "Techniques of Neutralization: A Theory of Delinquency", 22 Ameri- can Sociological Review 664 (1957).

9 Asha Bajpai, Child Rights in India: Law, Policy and Practice (Oxford University Press, 3rd edn., 2018) 212.

- target profiling based on loneliness, age, or insecurity;
- progressive boundary testing to normalise trust;
- sudden coercive inversion, converting trust into control.

d. ***Victimology: Digital Vulnerability and Structural Risk Factors :*** Victim vulnerability in cybercrime is shaped by socio-psychological and infrastructural factors. These include:

- low digital literacy and awareness;
- emotional susceptibility and social isolation;
- economic desperation in fraud targeting;
- gendered risks in online harassment and image-based abuse.

Victimisation often involves repeated harm due to:

- stigma preventing reporting;
- slow institutional response;
- data permanence in digital environments.

Cyber victimisation is therefore not a singular event but a prolonged harm continuum.

e. ***The Feedback Loop: Offender Behaviour and Forensic Detection :*** Offenders adapt as law enforcement develops new forensic methods. When investigators rely on Internet Protocol tracing, offenders adopt virtual private network chaining. When device seizures become routine, offenders shift to cloud-based, disposable storage. This adaptive feedback loop means offender psychology must be understood dynamically, rather than as a static profile.

Digital forensic criminology provides the framework to track behavioural evolution through:

- log correlation;
- time-pattern analysis;

- device fingerprinting;
- linguistic and interactional pattern profiling.

By linking psychological motivation to behavioural trace evidence, law enforcement can develop offender typologies that support profiling, prediction, and targeted intervention.

IV. DOCTRINAL COMPARISON: IPC 1860, BNS 2023 AND THE IT ACT 2000

The Bharatiya Nyaya Sanhita, 2023 (BNS) does not replace the existing legal framework governing core cyber offences. Matters such as unauthorised entry into computer systems, interference with data, disruption of networks, and manipulation of digital information continue to fall under the Information Technology Act, 2000. What the BNS does is broaden the application of traditional criminal provisions to cover conduct carried out through electronic means. Thus, the statute explicitly acknowledges electronic records and digital environments within offences that were historically associated with physical or documentary contexts.

In this regard, section 316 addresses cheating by personation carried out through online or digital identity, sections 336 to 338 concern the creation, use, and possession of forged electronic records, section 318 applies to fraudulent inducement and financial deception executed through electronic communication, section 85 addresses the destruction or alteration of electronic evidence, and section 113 deals with situations in which computer systems are used in furtherance of terrorism. These provisions illustrate that the statute is attentive to the contemporary reality in which crime frequently manifests through technological interfaces.

However, the substantive criminal liability for acts targeting computer systems remains under the Information Technology Act, 2000. Offences such as unauthorised access, data extraction, system interference, identity theft, phishing-based deception, and cyber-

terrorism are addressed under sections 43, 65, 66, 66C, 66D, and 66F of the IT Act. Accordingly, the BNS and the IT Act operate in a complementary relationship. The BNS regulates cyber-enabled forms of traditionally recognised offences, while the IT Act continues to regulate offences inherently linked to the use of computer resources and digital infrastructure. The legal approach in India, therefore, remains a dual-framework model, in which each statute retains its doctrinal domain without overlap or repeal.

a. ***Cheating, Personation and Fraud in Digital Environments :***

- IPC sections 415, 417 and 420 define cheating, which hinges on deception causing delivery of property and has historically been read in physical exchange settings.
- BNS sections 316 to 318 retain the cheating architecture and acknowledge electronic deception pathways.
- Section 66D of the IT Act targets cheating by personation using computer resources and is aimed at online impersonation fraud.

Although the BNS recognises digital modalities, personation-centric frauds remain anchored in section 66D of the IT Act. This duality invites forum-shopping and inconsistent sentencing, especially in large-volume phishing rings where charges under BNS sections 316 to 318 and section 66D of the IT Act are cumulatively framed without a clear doctrinal hierarchy [10]

b. ***Identity Theft, Forgery and Credential Misuse :***

- IPC sections 419, 468 and 471 address impersonation and forgery premised on paper instruments or physical identity tokens.

10 C.B.I. v Arif Azim, 2003 Cri LJ 2121 (Del) (among the earliest Indian prosecutions involving computer-related cheating).

- BNS sections 338 and 339 extend to electronic identifiers, digital signatures, and credential misuse within a broader fraud ecology.
- Sections 66C, 66D and 72 of the IT Act criminalise identity theft, personation, and breach of confidentiality or privacy.

The BNS improves semantic reach but does not resolve the act–identity–intent triad in distributed attacks such as credential stuffing and bot-driven harvesting. Courts still grapple with whether automated scraping of identifiers satisfies dishonest intention in the absence of direct victim targeting.[11]

c. *Online Harassment, Image-Based Abuse and Stalking:*

- IPC sections 292, 354A and 506 have historically applied to obscene material, sexual harassment, and criminal intimidation, but their digital application was uneven.
- BNS sections 294, 351 and 75 acknowledge electronic means for harassment, stalking, and sexual intimidation, tightening coverage of platform-mediated abuse.
- Sections 67, 67A and 67B of the IT Act penalise publication and transmission of obscene or sexually explicit content in electronic form, including child sexual abuse material.

The BNS strengthens recognition of gendered harms, yet it still relies on the IT Act for platform obligations and takedown architecture. Following the decision in Shreya Singhal, safe harbour doctrine narrows coercive leverage against intermediaries, slowing relief. A unified statutory takedown and preservation protocol is still missing.[12]

---

11 K. M. Mehrotra, "Impersonation in Digital Contexts", 45 Indian Bar Review 76 (2021).

12 Shreya Singhal v Union of India, (2015) 5 SCC 1.

d. ***Electronic Evidence and Procedural Admissibility :***

- The IPC contains no digital evidence framework.
- The BNS is a substantive code and refers to the Indian Evidence Act, 1872, for electronic records.
- Sections 65A and 65B of the Evidence Act provide special rules for electronic records, and the section 65B (4) certificate is generally mandatory for admissibility.

Despite authoritative clarification in Arjun Panditrao, practice remains uneven. Field officers may delay hash creation, fail to segregate working images from master images, or rely on screenshots without provenance metadata. BNS modernisation is therefore procedurally underpowered without codified chain-of-custody standards.[13]

e. ***Jurisdiction, Investigation Rank and Sentencing Coherence :***

- Under the IPC and BNS, general territoriality rules apply; the BNS does not create cyber-specific extra-territorial hooks beyond general criminal law.
- Section 75 of the IT Act provides extra-territorial application when a computer resource in India is involved; section 78 requires investigation by officers of a notified rank.

Parallel jurisdictional hooks in the BNS and the IT Act complicate charge-framing when cross-border elements are present. Sentencing under the BNS and the IT Act for the same factual matrix can diverge, undermining proportionality and predictability in plea bargaining.[14]

---

13 Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.

14 N. S. Nappinai, Technology Laws Decoded (2nd edn., OakBridge, 2022) 143.

V. INDIAN CASE LAW ON CYBERCRIME AND ELECTRONIC EVIDENCE

The jurisprudence of cybercrime in India has evolved through judicial interpretation rather than a comprehensive legislative architecture. Courts have been required to determine the admissibility of electronic records, define the threshold of identity in digital impersonation, and balance freedom of expression with state interest in preventing harm. This section examines leading Indian case law shaping cybercrime doctrine and the handling of digital evidence.

a. ***Admissibility of Electronic Evidence: Section 65B Jurisprudence :*** The Supreme Court in Anvar P.V. v P.K. Basheer[15] held that section 65B of the Indian Evidence Act establishes a complete code for the admissibility of electronic evidence, requiring a certificate to authenticate the origin, integrity, and chain of custody of digital records. This overruled earlier positions that allowed secondary evidence under sections 63 and 65. Subsequently, in Shafhi Mohammad v State of Himachal Pradesh[16], a two-judge Bench diluted this requirement by permitting exceptions where the party could not produce the certificate. However, the Supreme Court, in a three-judge Bench, in Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal[17], reaffirmed the mandatory nature of the certificate, restoring procedural clarity.

b. ***Video Testimony and Digital Presence :*** In State of Maharashtra v Dr Praful B. Desai, the Supreme Court recognised that presence during testimony under section 273 of the Code of Criminal Procedure may be satisfied by video conferencing, enabling remote witness examination

15 Anvar P.V. v P.K. Basheer, (2014) 10 SCC 473.

16 Shafhi Mohammad v State of Himachal Pradesh, (2018) 2 SCC 801.

17 Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.

in cybercrime trials. This judgment operationalised digital participation in judicial proceedings and anticipated the contemporary development of electronic courts.[18]

c. ***Intermediary Liability and Online Speech :*** The Supreme Court's decision in Shreya Singhal v Union of India struck down section 66A of the IT Act for vagueness and potential chilling effects on free expression. The Court also narrowed intermediary liability under section 79, holding that platforms must remove content only upon receipt of lawful orders. This redefined the enforcement landscape for online harassment, misinformation, and content-based offences.[19]

d. ***Search, Seizure, Forensics and Privacy Balancing :*** The High Courts have repeatedly emphasised the proper application of forensic procedure. The Delhi High Court in Vikas Yadav v State (NCT of Delhi) underscored the necessity of hash verification and forensic imaging during device seizure. The Kerala High Court, in Faheema Shirin R.K. v State of Kerala, acknowledged the rights to digital autonomy and privacy in technology-mediated environments.

   These decisions balance investigatory accountability and rights protection.[20]

e. ***Bail, Sentencing and Judicial Attitude in Cybercrime Trials :*** Courts have demonstrated caution in granting bail in organised cyber-fraud cases due to systemic impact and the continuing threat of recidivism. However, sentencing has remained inconsistent due to inconsistent application of the IPC, the BNS, and the IT Act. The absence

---

18 State of Maharashtra v Dr. Praful B. Desai, (2003) 4 SCC 601.

19 Shreya Singhal v Union of India, (2015) 5 SCC 1.

20 Vikas Yadav v State (NCT of Delhi), 2019 SCC OnLine Del 10764; Faheema Shirin R.K. v State of Kerala, 2019 SCC OnLine Ker 1730.

of a unified cybercrime sentencing framework contributes to unpredictability in plea bargaining and trial outcomes.

VI. CONTEMPORARY CYBERCRIME INCIDENTS IN INDIA

This section presents selected cybercrime incidents reported in national newspapers, summarised in a concise legal-factual format. These cases illustrate operational structures, offender tactics, victim profiles, and investigative shortcomings in India's cyber-enforcement landscape.

a. ***Jamtara Phishing Syndicates (Jharkhand, 2015–Present) :*** Phishing operations originating from Jamtara district involved systematic impersonation of bank officials to obtain one-time passwords and access victims' accounts. The offences demonstrated coordinated offender networks, use of disposable subscriber identity module cards, and rapid fund diversion through mule accounts. Despite repeated raids, the operational structure evolved to adopt voice over internet protocol masking and encrypted messaging.[21]

b. ***Delhi Fake Loan Application Extortion Rackets (2021–2022) :*** Loan applications distributed through application stores collected sensitive data and subsequently engaged in coercive extortion, including the release of morphed images. The model relied on psychological pressure rather than technical sophistication, demonstrating how data access itself constitutes power leverage. Police investigations were impeded by foreign server hosting and multi-jurisdictional routing.[22]

c. ***Hyderabad Cryptocurrency Investment Fraud (2023) :*** Fraudulent cryptocurrency schemes offered artificially high returns, inducing victims to transfer funds to wallets that were subsequently laundered through exchanges. The scheme

21 The Indian Express (New Delhi), 14 January 2020.

22 The Hindu (New Delhi), 6 June 2022.

highlighted challenges in tracing transactions on decentralised ledgers and securing timely cooperation from virtual asset service providers.[23]

d. ***Bengaluru Information Technology Company Data Breach Incident (2022) :*** A targeted intrusion into a corporate server resulted in exfiltration of proprietary source code and confidential client data. The attackers demanded a ransom in cryptocurrency for non-disclosure. Forensic examination identified spear-phishing entry vectors and lateral movement within internal networks. The incident revealed gaps in organisational cyber hygiene and breach response readiness.[24]

VII. DIGITAL FORENSICS: ADMISSIBILITY, CHAIN OF CUSTODY AND INTEGRITY

Digital forensics is central to cybercrime adjudication because the evidentiary artefacts involved, including log files, metadata, chat histories, browser artefacts, volatile memory captures, and device images, are inherently mutable. Unlike physical evidence, digital evidence can be altered without visible traces unless integrity-preserving protocols are rigorously followed. Thus, the credibility of cybercrime prosecution depends on forensic precision from seizure to courtroom presentation.

a. ***Volatile and Non-Volatile Evidence :*** Digital evidence is commonly categorised into:

- volatile evidence, such as data residing in random-access memory, network buffers, and temporary memory, which may disappear upon system shutdown;
- non-volatile evidence, stored on persistent media such

23 Deccan Chronicle (Hyderabad), 21 September 2023.

24 The Times of India (Bengaluru), 3 March 2022.

as solid state drives, hard disk drives, removable drives, and cloud archives.[25]

Proper seizure requires prioritising volatile evidence through live acquisition tools before powering down a device. Failure to do so can result in the loss of session keys, encryption states, and active command traces, all of which are essential for attribution.

b. ***Forensic Imaging and Hash Verification :*** Upon seizure, a bit-for-bit forensic image must be created using write blockers to prevent tampering. The original device is sealed, and analysis is conducted on the forensic image. A cryptographic hash using the Secure Hash Algorithm (SHA-256) is commonly preferred and is computed both before and after imaging to verify integrity.[26]

If the hash of the original and the image match, the evidence is authenticated. Screenshots and screen recordings, when presented without provenance metadata and hash verification, are susceptible to challenge under section 65B of the Evidence Act.

c. ***Chain of Custody Protocol :*** A valid chain of custody normally requires:

1. documentation of every officer handling the evidence;
2. timestamps of transfer, storage, and analysis;
3. sealing and tamper-evident packaging;
4. Separate master image and working copy preservation.

The absence of chain-of-custody documentation invites judicial doubt about authenticity, which may render electronic evidence

---

25 Eoghan Casey, Digital Evidence and Computer Crime (Elsevier, 4th edn., 2020) 112.

26 Niranjan Raval, "Integrity Verification in Digital Seizures", 61 Journal of Indian Evidence Law 202 (2022).

inadmissible despite its technical correctness.[27]

d. ***Metadata, Logs and Behavioural Pattern Reconstruction:*** Metadata, including timestamps, device identifiers, network headers, and system logs, enable reconstruction of offender behaviour. Temporal sequence analysis can link:

- login events to internet protocol addresses;
- file access to user accounts;
- message timestamps to suspect activity patterns.

Behavioural correlation strengthens inference of mens rea, especially where offenders claim accidental access or system compromise.

e. ***Cloud Evidence and Cross-Border Requests :*** Cloud-hosted data often resides in foreign jurisdictions, requiring Mutual Legal Assistance Treaty requests. Delays in executing such requests undermine evidence volatility, leading to lost logs and overwritten memory states. The absence of expedited cyber-specific channels for mutual legal assistance remains a major challenge in Indian cybercrime adjudication.[28]

VIII. CHALLENGES, GOVERNANCE GAPS AND POLICY OPTIONS

The fragmented governance of cybercrime enforcement in India reflects the separation of substantive offences under the BNS, technological regulation under the IT Act, and evidentiary doctrine under the Evidence Act. This division results in overlapping jurisdiction, inconsistent charge framing, and procedural inefficiency. A forward-looking policy framework must therefore shift from incremental statutory amendment to structural institutional design.

a. ***Institutional Fragmentation :*** Multiple agencies, including local police cyber cells, state cyber bureaus, the Indian

27 Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.

28 N. S. Nappinai, Technology Laws Decoded (2nd edn., OakBridge, 2022) 289.

Computer Emergency Response Team, and central intelligence units, operate without unified coordination or a standardised forensic workflow. The absence of shared technical repositories and real-time intelligence exchange impedes a scalable response to organised cybercrime networks.

b. ***Capacity Constraints and Training :*** Cyber forensics requires specialised skill sets in log analysis, memory acquisition, malware reverse engineering, blockchain tracing, and metadata interpretation. Current training programmes are uneven across states, resulting in significant variation in investigation quality and evidentiary reliability.

c. ***Need for a Unified Cybercrime Procedural Code :*** A consolidated procedural framework should integrate:

- standardised seizure and imaging protocols;
- mandatory chain-of-custody documentation formats;
- cloud-data preservation and request procedures;
- cross-border evidence cooperation workflows;
- digital evidence audit trails.

d. ***Establishment of Specialised Cybercrime Courts and Forensic Authority :*** Creation of cybercrime special courts with trained judicial officers would help ensure consistent interpretation of digital evidence standards. A national digital forensics authority could oversee forensic laboratory accreditation, issue evidentiary guidelines, and maintain hash registries and trusted timestamping infrastructure.

e. ***Policy Direction :*** The core policy shift required is from reactive, offence-based enforcement to proactive ecosystem governance. This entails coordination among regulators, law enforcement, financial institutions and digital platforms to detect, disrupt, and deter cybercrime in real time.

IX. CONCLUSION AND REFORM RECOMMENDATIONS

Cybercrime reshapes foundational legal assumptions regarding identity, harm, intention, and jurisdiction. The transition from the IPC to the BNS reflects partial doctrinal modernisation but does not fully accommodate the complexity of networked criminality. Effective enforcement requires alignment of substantive law, procedural safeguards, forensic integrity, and institutional capacity. The proposed integrated cybercrime code, specialised courts, and national forensic authority offer a structural path toward coherent governance and resilient digital justice administration.

RIGHT TO SHELTER *VIS-A-VIS* RIGHT TO FOREST: RECONCILING ARTICLE 21 WITH ARTICLE 48A IN THE ZUDPI JUNGLE CASE

*ABHISHEK SHARMA**

ABSTRACT : Supreme Court judgment in *In Re: Zudpi Jungle Lands* marked a pivotal juncture in Indian constitutional jurisprudence by harmonizing the right to shelter under Article 21 with the State's obligation to protect forests under Article 48A. The case involved the proposed declassification of over 86,000 hectares of Zudpi Jungle lands in Maharashtra, which, though recorded as forest in revenue records, were long used for public purposes such as housing, schools, and health centres. This paper explores how the Court reconciled these competing mandates using the doctrines of proportionality, sustainable development, and harmonious construction. Drawing on precedent, statutory frameworks, and field reports from the Central Empowered Committee, the judgment emphasized that environmental protection must not undermine the constitutional guarantee of dignified living. By conditionally allowing land use conversion while safeguarding ecological mandates, the Court redefined forest governance through a rights-based lens. This decision sets a precedent for balancing ecological integrity with socio-economic justice and represents a significant evolution in India's environmental and constitutional law.

KEY WORDS : Right to Shelter, Article 21, Article 48A, Forest Conservation, Zudpi Jungle Lands

* Ph.D. Research Scholar, Faculty of Law, Banaras Hindu University, Varanasi, Email: abhishek.llm.au@gmail.com

I. INTRODUCTION

The Supreme Court decision in *In Re: Zudpi Jungle Lands*[1] addressed a fundamental constitutional tension between the right to shelter, derived from Article 21, and the State's duty to protect forests, enshrined in Article 48A.[2] The dispute revolved around whether lands classified as "Zudpi Jungle" in revenue records but long used for non-forest purposes such as rural housing, burial grounds, and public infrastructure, could be released for development despite their formal classification as forest pursuand to the the interpretation laid down in *T.N. Godavarman Thirumulpad v. Union of India*[3]. The judgment comes at a time when Indian cities and rural districts alike face growing housing insecurity, land scarcity, and overlapping environmental mandates. Shelter is increasingly understood not merely as a roof over one's head, but as part of a bundle of rights central to a dignified existence. As recognized in *Olga Tellis v. Bombay Municipal Corporation*[4] and *Chameli Singh v. State of U.P.*[5], the right to shelter is intrinsic to the right to life under Article 21. On the other hand, the judiciary has consistently expanded the scope of environmental rights under Article 48A, treating ecological preservation as part of inter-generational justice, notably in *M.C. Mehta v. Kamal Nath*[6] and *Narmada Bachao Andolan v. Union of India*[7]. In the *Zudpi Jungle* case, the Court was confronted with the challenge of reconciling developmental needs for rural and tribal populations with statutory environmental mandates under the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 [Ealier known as the Forest

---

1 2024 SCC On Line SC 1227.

2 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India*, 2nd edn., Oxford University Press, New Delhi (2001).

3 (1997) 2 SCC 267.

4 (1985) 3 SCC 545.

5 (1996) 2 SCC 549.

6 (1997) 1 SCC 388.

7 (2000) 10 SCC 664.

(Conservation) Act, 1980]. The State of Maharashtra argued that over 86,000 hectares of Zudpi lands were not forest in the ecological sense and had been used for essential public functions even prior to the *Godavarman* judgment. The Central Empowered Committee (CEC), after site assessments, agreed that many of these lands were "unfit for forest management" and could be conditionally released.[8] The Court's approach marked a shift towards contextual constitutionalism, treating environmental protection and socio-economic rights not as opposing forces, but as complementary constitutional duties. It recognized that laws protecting the environment must not operate as instruments of exclusion or deprivation, especially when applied to populations historically excluded from land ownership and public services. In this way, the judgment reflects an important evolution in Indian constitutional law, from doctrinal rigidity to rights-based proportionality.

II. CONSTITUTIONAL FRAMEWORK: ARTICLE 21 AND ARTICLE 48A

The Indian Constitution embodies both civil-political rights and socio-environmental responsibilities, and this duality becomes particularly visible when analysing the interaction between Article 21 and Article 48A.

i. **Article 21: The Expanding Right to Shelter -** Article 21 states: *"No person shall be deprived of his life or personal liberty except according to procedure established by law."* Initially interpreted narrowly in *A.K. Gopalan v. State of Madras*[9], the scope of Article 21 has since undergone judicial transformation to include a wide range of socio-economic entitlements.[10] The right to

8 Central Empowered Committee, *Report filed in I.A. No. 12465 of 2019*, in W.P. (C) No. 202 of 1995 (2024)

9 (1950) SCR 88.

10 M.P. Jain, *Indian Constitutional Law*, 7th edn., LexisNexis, Gurgaon (2014).

shelter as a component of Article 21 was explicitly recognized in *Olga Tellis v. Bombay Municipal Corporation*[11], where the Supreme Court held that eviction of pavement dwellers without alternate housing would violate the right to life. Y V Chandrachud, CJ famously observed that the right to life includes the right to livelihood, and consequently, to shelter. Further reinforcement came in *Chameli Singh v. State of U.P.*[12], where the Court held that shelter encompasses not just physical space, but access to water, sanitation, light, ventilation, and safety. Similarly, in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[13], the right to life was interpreted to include "the right to live with human dignity." In the *Zudpi Jungle* case, the Court built on this jurisprudence by holding that the denial of access to land for public services, housing, and basic infrastructure for rural and tribal populations effectively obstructs the realization of Article 21.[14]

ii. **Article 48A: Constitutional Duty to Protect the Environment -** Article 48A, introduced by the 42nd Constitutional Amendment in 1976, directs the State to *"protect and improve the environment and to safeguard the forests and wildlife of the country."* While part of the Directive Principles of State Policy and hence non-justiciable, it has been read alongside Article 21 to impose enforceable environmental duties. In *T.N. Godavarman Thirumulpad v. Union of India*[15], the Supreme Court interpreted "forest" broadly, covering all lands recorded as forest in any government record regardless of ecological

11 (1985) 3 SCC 545.

12 (1996) 2 SCC 549.

13 (1981) 1 SCC 608.

14 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, paras. 55–58.

15 (1997) 2 SCC 267.

content. This led to the inclusion of Zudpi Jungle lands under the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980, despite their lack of dense forest cover.

In *M.C. Mehta v. Union of India*[16] and *M.C. Mehta v. Kamal Nath*[17], the Court evolved doctrines such as the Public Trust Doctrine[18], emphasizing that natural resources, including forests, are held in trust by the State for public use and cannot be alienated without compelling justification. Thus, any move to declassify forest land even if degraded or used for public purposes must pass the test of ecological necessity and constitutional legitimacy under Article 48A. In *Zudpi Jungle*, the Court walked this tightrope, emphasizing that while Article 48A remains vital, its interpretation must not result in bureaucratic or ecological absolutism that undermines human dignity.

iii. **Harmonizing the Two Provisions -** The *Zudpi Jungle* judgment does not treat Article 21 and Article 48A as antagonistic. Instead, it relies on the doctrine of harmonious construction, holding that constitutional rights and duties must be interpreted to give effect to both values. The Court stated that environmental protection should not come at the cost of shelter, just as housing should not come at the cost of biodiversity[19] This approach reflects earlier reasoning in *Narmada Bachao Andolan v. Union of India*[20], where the principle of sustainable development[21] was affirmed,

16 (1987) 1 SCC 395.

17 (1997) 1 SCC 388.

18 Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", *68 Michigan Law Review* 471–566 (1970).

19 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, para 60.

20 (2000) 10 SCC 664.

21 Thomas M. Parris & Robert W. Kates, "Characterizing and Measuring Sustainable Development", *28(1) Annual Review of Environment and Resources* 559–586 (2003).

and courts were directed to weigh developmental imperatives against environmental protection. The *Zudpi* decision is thus an extension of the Court's environmental jurisprudence, where proportionality, equity, and rights-consciousness shape how statutory duties are interpreted in real-world settings.

III. FACTUAL BACKGROUND: THE ZUDPI JUNGLE LANDS DISPUTE

The legal conflict concerning Zudpi Jungle lands represents a complex intersection of forest governance, land use policy, and constitutional rights. The dispute arose from the classification of approximately 86,409 hectares of land in six districts of Eastern Vidarbha in Maharashtra—Nagpur, Wardha, Bhandara, Gondia, Chandrapur, and Gadchiroli as "Zudpi Jungle" in government records.

i. **Historical and Administrative Context -** The term "*Zudpi*" originates from local usage and refers to lands covered with scrub vegetation or barren bushland. These lands were historically categorized in revenue records for administrative convenience rather than ecological value. Though marked as "forest" in some government documents, they were neither notified under the Indian Forest Act, 1927 nor possessed the ecological features typical of classified forests. Over decades, these lands were used for essential public and community purposes such as schools, primary health centers, cremation grounds, roads, grazing, and village infrastructure. Various government departments had sanctioned such uses without requiring forest clearance. However, following the Supreme Court's decision in *T.N. Godavarman Thirumulpad v. Union of India*[22], all lands recorded as forest, regardless of their actual status, were brought under the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980, triggering a complete halt to developmental activities on these lands.

22 (1997) 2 SCC 267.

ii. **Legal Complications After Godavarman -** The *Godavarman* decision significantly expanded the interpretation of "forest" to include any land recorded as such in government documents. As a result, even degraded scrublands or lands long repurposed for village needs became subject to forest conservation rules. No construction whether of a hand pump, school, or electricity pole could proceed without prior approval from the Ministry of Environment, Forest and Climate Change, often leading to paralysis in public service delivery in affected areas. This unintended consequence prompted the State of Maharashtra to move before the Supreme Court[23] in 2019, seeking permission to release the Zudpi Jungle lands from forest status under the Act. The State argued that these lands had been in non-forest use well before 1996, the cutoff date set in *Godavarman*, and were essential for implementing schemes for rural housing, drinking water, electrification, and sanitation.

iii. **Central Empowered Committee Reports -** The Court initially directed the Central Empowered Committee to conduct an independent verification. In its 2023 reports, the CEC observed that a significant portion of the Zudpi Jungle lands were fragmented, encroached upon, and unfit for forestry management, and thus could be released for non-forest use subject to safeguards. The CEC recommended:

- Retaining ecologically sensitive portions as forest,
- Requiring forest clearance and compensatory afforestation for post-1996 encroachments,
- Allowing conditional declassification for pre-1996 public utility uses.[24]

---

23 Through *I.A. No. 12465 of 2019* in *W.P. (C) No. 202 of 1995*.

24 Central Empowered Committee, *Report No. 08 of 2024*, filed in I.A. No. 12465 of 2019 in *W.P. (C) No. 202 of 1995*.

The Court found this middle path consistent with constitutional principles and environmental jurisprudence, noting that inflexible application of forest law was disrupting essential governance and denying rural populations the right to shelter and services.

iv. **Objections and Intervenors -** Many Environmentalists opposed the State's request, citing the risk of creating a precedent for large-scale forest land diversion. They pointed out discrepancies in the area figures presented by the State and alleged non-compliance with earlier forest conservation guidelines. However, the Court noted that these objections were more procedural than ecological and did not outweigh the evidence of long-standing public use and the CEC's findings.

IV. JUDICIAL ANALYSIS: RECONCILING ARTICLES 21 AND 48A

In *In Re: Zudpi Jungle Lands*[25], the Supreme Court resolved a conflict between two significant constitutional mandates *i.e.* the right to shelter under Article 21 and the duty to protect forests under Article 48A. Rather than adopting a binary approach, the Court pursued a doctrine of constitutional harmony[26], aiming to uphold both rights through nuanced reasoning and contextual application.

i. **Article 21 and the Human Right to Shelter -** The Court affirmed that the right to life under Article 21 is not confined to mere animal existence but includes the right to shelter, dignity, and access to essential infrastructure. Citing its earlier holdings in *Chameli Singh v. State of*

25 2024 SCC OnLine SC 1227.

26 Gururaj D. Devarhubli & Bushra Sarfaraj Patel, "Doctrine of Harmonious Construction: A Critical Analysis", *3 Indian Journal of Law & Legal Research* 1 (2021).

U.P.[27] and *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[28], the Court noted that:

> *"Shelter is not a luxury; it is a necessity, integral to living with dignity and security."*

The Court observed that Zudpi Jungle lands had been in continuous public and communal use for decades, long before the judicial expansion of forest definitions in *T.N. Godavarman*[29]. The absence of infrastructure in these regions due to forest clearance requirements had led to gross violations of Article 21, especially for vulnerable and tribal populations.

ii. **Article 48A and Environmental Stewardship -** While affirming the sanctity of Article 21, the Court did not downplay the importance of Article 48A, which mandates the State to "*protect and improve the environment and safeguard the forests and wildlife of the country*." The Court cited *M.C. Mehta v. Kamal Nath*[30] and *Narmada Bachao Andolan v. Union of India*[31] to reiterate that forests and natural resources are held in trust by the State, and cannot be alienated at will.[32] However, the Court clarified that the intent of Article 48A must be read in tandem with socio-economic justice particularly in regions where forest land is indistinguishable from degraded scrubland and vital public services are withheld due to rigid interpretation. It stated[33]:

27 (1996) 2 SCC 549.

28 (1981) 1 SCC 608.

29 *T.N. Godavarman Thirumulpad v. Union of India*, (1997) 2 SCC 267.

30 (1997) 1 SCC 388.

31 (2000) 10 SCC 664.

32 Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", *68 Michigan Law Review* 471–566 (1970).

33 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, para 60.

"While the environment must be protected, constitutional obligations cannot become a pretext for administrative paralysis or the exclusion of the poor from their basic entitlements."

iii. **Harmonizing Competing Constitutional Values -** The Court employed the doctrine of proportionality[34] and harmonious construction, often used in constitutional law to balance overlapping rights. Drawing upon *Minerva Mills Ltd. v. Union of India*[35], it reiterated that Fundamental Rights and Directive Principles must be read together as components of the basic structure of the Constitution. It held that forest protection, while essential, must not override the right to shelter where:

- The land is degraded or fragmented,
- It has been under long-term public use,
- It does not qualify for forest management,
- And conditional safeguards are available, such as afforestation and environmental clearance[36]

iv. **Significance of the Central Empowered Committee (CEC) Findings -** The Court gave significant weight to the report of the Central Empowered Committee, which found that a substantial portion of the 86,000 hectares was "unfit for forest management" and had been in use for schools, roads, water facilities, and healthcare. Accepting these findings, the Court stated that a blanket application of forest status to all Zudpi lands would amount to arbitrary exclusion of poor communities from constitutional entitlements.

34 Dimitrios Kyritsis, "Whatever works: proportionality as a constitutional doctrine." *Oxford Journal of Legal Studies* 34.2 (2014): 395-415.

35 (1980) 3 SCC 625.

36 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, paras. 63–65.

V. THE RIGHT TO SHELTER AS A DERIVATIVE OF ARTICLE 21

The recognition of the right to shelter as a fundamental right under Article 21 of the Indian Constitution is a product of the Indian judiciary's progressive interpretation of the right to life.[37] The *Zudpi Jungle Lands* judgment reaffirmed this approach by holding that denying communities access to land for housing and basic amenities such as schools, clinics, and drinking water violates not only development goals but also constitutional rights to live with dignity.

i. **Evolution of the Right to Shelter in Indian Jurisprudence-** The jurisprudential evolution of the right to shelter began in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[38], where the Supreme Court emphasized that life under Article 21 includes the right to live with human dignity and not just animal existence. This idea was reaffirmed and broadened in *Shantistar Builders v. Narayan Khimalal Totame*[39], where the Court observed that:

> "A reasonable residence is an indispensable necessity for fulfillment of the constitutional guarantee of life and personal liberty."

This trajectory culminated in *Chameli Singh v. State of U.P.*[40], in which the Court unequivocally held that the right to shelter is a fundamental right as it is essential for a meaningful life. The judgment clarified that shelter is more than mere housing, it includes safe drinking water,

---

37 Muffliha Sadaf, "Right to Live with Dignity under Article 21 of the Constitution of India: A Detailed Study", 4(1) Indian Journal of Law & Legal Research 1 (2022).

38 (1981) 1 SCC 608.

39 (1990) 1 SCC 520.

40 (1996) 2 SCC 549.

sanitation, electricity, and livelihood opportunities. Similarly, in *U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd.*[41], the Court emphasized that providing affordable housing is not merely a policy concern, but a constitutional obligation flowing from Article 21 read with Directive Principles like Article 38 and 39.

ii. **The Zudpi Jungle Context: Shelter and Rural Marginalization -** In *Zudpi Jungle*, the Supreme Court applied this rich jurisprudence to the rural and tribal context of Eastern Vidarbha, where a significant portion of the population lives in informal, state-dependent arrangements without formal land titles or secure infrastructure.

The Court found that the inability to utilize land for rural housing due to its technical classification as "forest" under *Godavarman* had effectively deprived lakhs of villagers of the right to shelter. The Court acknowledged that while forest protection is vital, delays in land access for construction of health centers, schools, and homes were violating the core of Article 21.[42] It further recognized that tribal and backward communities often face systemic barriers in accessing land and justice, making formalistic classifications deeply inequitable.

iii. **Shelter as a Precondition for Socio-Economic Rights-** Shelter is not merely a standalone right but a precondition for the enjoyment of other fundamental rights. For example, the absence of shelter:

- Inhibits access to education (as families move frequently),
- Impedes access to health care and sanitation,

41 (1996) 1 SCC 751.

42 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, paras. 56–58

- Results in a lack of security, particularly for women and children,
- Undermines political participation due to lack of voter registration linked to residential status.

The Supreme Court in *Zudpi Jungle* rightly observed that these intersecting deprivations disproportionately affect the weakest sections of society, and must be redressed through affirmative constitutional interpretation.

iv. **Administrative Inaction and Judicial Mandate -** The Court was also critical of administrative inaction pointing out that even after decades of public use, the State had failed to formally reclassify Zudpi lands or enact appropriate legislative measures. In such a situation, the Court took upon itself the duty to issue directions that preserved the right to shelter while ensuring environmental compliance. By invoking Article 21, the judgment effectively constitutionalized access to land for housing and essential infrastructure, thereby affirming the judiciary's role in transforming the promise of socio-economic justice into practical reality.

VI. INTERPRETING ARTICLE 48A IN CONTEXT OF THIS CASE

While the right to shelter under Article 21 formed the fulcrum of the *Zudpi Jungle Lands* judgment, the Supreme Court remained equally attentive to the constitutional responsibility imposed by Article 48A, which directs the State to "protect and improve the environment and to safeguard the forests and wildlife of the country." This section analyzes how the Court reconciled Article 48A with evolving socio-economic realities, and how it crafted a doctrine of contextual environmentalism[43].

---

43 N. Madaoui, "Evolving Jurisprudence of Environmental Law: A Doctrinal Analysis", *6 Analytical and Comparative Jurisprudence* 386–396 (2023).

i. **The Constitutional Mandate of Article 48A -** Article 48A, introduced through the 42nd Constitutional Amendment in 1976, forms part of the Directive Principles of State Policy. Though non-justiciable, the judiciary has often elevated its interpretive status when read with Article 21. In *M.C. Mehta v. Union of India*[44], the Court recognized the right to a clean and healthy environment as part of the fundamental right to life. Later, in *Subhash Kumar v. State of Bihar*[45], the Court held that the right to clean water and air is essential to Article 21 and must be read along with Article 48A. The *Zudpi Jungle* litigation thus brought to the forefront a recurring constitutional dilemma: whether environmental protection, especially of lands marked as forest in official records but devoid of ecological value, should override developmental and human rights considerations. The State's plea in *Zudpi Jungle* was not to negate forest protection but to release those lands demonstrably unfit for forestry and long used for essential public services.

ii. **Scrubland vs. Ecological Forests: Drawing a Constitutional Distinction -**

The Court distinguished between lands that are:

1. Ecologically sensitive and contain significant biodiversity; and
2. Scrub or bush lands (like many Zudpi lands) that lack any present or future forest utility.

This distinction was critical. The Court clarified that lands with forest-like character would continue to be protected under the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980 and Article 48A, but blanket inclusion of all lands labeled "forest" in revenue records even if barren or

44 (1987) 1 SCC 395.

45 (1991) 1 SCC 598.

encroached would amount to constitutional overreach.[46] This differentiation reflects an earlier precedent in *Lafarge Umiam Mining Pvt. Ltd. v. Union of India*[47], where the Court held that environmental protection must be balanced with economic and developmental needs through the principle of sustainable development.

iii. **Sustainable Development and Judicial Balance -** The principle of sustainable development, accepted globally and adopted by Indian courts, requires a balanced approach to environmental and developmental goals. In *Vellore Citizens' Welfare Forum v. Union of India*[48], the Court introduced the precautionary principle[49] and the polluter pays principle[50], marking a shift from reactive to proactive environmental governance. In *Zudpi Jungle*, the Court expanded this logic to land governance by holding that environmental protection must not result in administrative paralysis. It observed that lands without forest characteristics, already used for public welfare before the cutoff date of 12.12.1996, could be released without undermining Article 48A, especially when compensatory afforestation, biodiversity assessments, and environmental safeguards were in place[51]

iv. **The Role of the Central Empowered Committee (CEC)-** The Court's interpretation of Article 48A was shaped significantly by the findings of the Central Empowered Committee, which conducted field inspections and concluded

46 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, paras. 61-64.

47 (2011) 7 SCC 338.

48 (1996) 5 SCC 647.

49 *See also* United Nations, "Rio Declaration on Environment and Development", *UN Doc. A/CONF.151/26 (Vol. I)*, Principle 15 (1992).

50 *See also* United Nations, "Rio Declaration on Environment and Development", *UN Doc. A/CONF.151/26 (Vol. I)*, Principle 16 (1992).

51 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, para 70.

that a substantial portion of Zudpi lands were "fragmented, degraded, and not viable for forest management." It also confirmed that these lands had been used for public utilities long before the *Godavarman* ruling. Importantly, the Court noted that such a recommendation, grounded in field data and ecological logic, satisfied the demands of Article 48A more faithfully than a formalistic interpretation of forest status.

v. **Article 48A as a Dynamic Obligation -** The judgment redefined Article 48A as a dynamic and situational obligation one that must adapt to the complexities of land use, forest viability, and social equity. The Court observed[52]:

"The constitutional obligation to protect the environment must be implemented with sensitivity to demographic pressures, historical land use, and socio-economic rights"

Thus, the Court elevated human-centered environmentalism[53] over rigid formalism and called for policies that serve both ecological integrity and distributive justice.

VII. CRITICAL REFLECTIONS AND IMPLICATIONS

The *Zudpi Jungle Lands* judgment is emblematic of a judicial turn toward context-sensitive constitutionalism, where overlapping values such as the right to shelter and environmental protection are harmonized rather than hierarchically arranged. While the decision represents a progressive alignment of Article 21 and Article 48A, it also raises concerns about the judicial approach

52 *Ibid at* para 64.

53 Elizabeth Phillips, Brittany Sellers & Stephen M. Fiore, "Human Centric Environmentalism: Opportunities for the Human Factors Community to Contribute to Global Environmental Solutions", *54(11) Proceedings of the Human Factors and Ergonomics Society Annual Meeting* (SAGE Publications, Los Angeles, CA) (2010).

to forest classification, governance accountability, and future precedential risks.

i. **Precedent for Decentralized Land Reclassification-** The judgment, by allowing the release of over 86,000 hectares of Zudpi lands for public purposes, establishes a judicial precedent for declassification of certain recorded forests. Although the Court emphasized that only lands deemed unfit for forest management would be exempted and that safeguards such as environmental clearance and compensatory afforestation were mandatory, critics fear that this may encourage state governments to push for similar exemptions across other regions under political or developmental pressure.[54] Environmental law scholars have long cautioned against dilution of forest protection regimes through administrative convenience. *K.M. Chinnappa v. Union of India*[55] serves as a warning, the Court there refused to permit the diversion of forest land for mining despite economic arguments, emphasizing irreversible ecological damage as a constitutional concern.

ii. **Bureaucratic Inertia and the Cost of Delay -** The judgment also highlights systemic bureaucratic inertia. Many of the Zudpi lands had been in non-forest public use since before 1996, yet they remained classified as forests due to administrative delays and failure to update revenue records. This stagnation impeded the rollout of government welfare schemes like the Pradhan Mantri Awas Yojana, rural sanitation missions, and electrification programs. The judgment underlines the importance of timely executive action in forest classification and land-use planning, especially in regions where human development indicators remain low.[56]

54 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, paras 70-72.

55 (2002) 10 SCC 606.

56 *In Re: Zudpi Jungle Lands*, 2024 SCC OnLine SC 1227, paras 10 and 55..

iii. **Environmental Risk of Setting a "Functional" Forest Test -** Another concern raised in the judgment is its de facto adoption of a "functional test"—where forest status depends on current ecological utility. This may weaken the precautionary principle embedded in *Vellore Citizens' Welfare Forum v. Union of India*[57], and could lead to greater exploitation of scrub or degraded lands without due consideration of their potential for regeneration, ecosystem services, or future. It may be argued that many dry or semi-arid forests do not exhibit dense green cover but serve as critical wildlife corridors, grazing reserves, and carbon sinks.[58] In ignoring these secondary functions, the judgment may unintentionally narrow the scope of ecological value to visible or quantifiable forest metrics.

iv. **A Model for Rights-Based Environmental Governance-** Despite these concerns, the judgment offers a model of rights-based environmental governance one that respects the plural values of the Constitution. It asserts that environmental laws must not become barriers to human development, especially for historically marginalized communities. The Court's reliance on the Central Empowered Committee's empirical findings ensured that decisions were evidence-based rather than ideology-driven, distinguishing the case from unscientific declassification efforts. The use of Articles 21 and 48A in tandem reflects an integrated constitutionalism where Fundamental Rights and Directive Principles are mutually reinforcing rather than competing.[59] The Court's method of conditional declassification and emphasis on sustainable development principles strengthens this plural constitutional vision.

---

57 (1996) 5 SCC 647.

58 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India*, 2nd edn., Oxford University Press, New Delhi (2001).

59 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

v. **Future Directions and Need for Legislative Clarity-** Going forward, there is a need for clear legislative or policy frameworks that differentiate between various categories of forest-type lands (notified forests, deemed forests, revenue forests, etc.), and provide criteria for their reclassification. Without such clarity, judicial discretion may become the dominant mode of land governance an unsustainable trend for both democracy and ecology. The *Zudpi Jungle* case invites policymakers to rethink land use governance in India moving beyond rigid binaries of "forest" and "non-forest" to more nuanced, participatory, and equitable classifications.

VIII. CONCLUSION

The Supreme Court's decision in *In Re: Zudpi Jungle Lands* is a landmark in Indian constitutional jurisprudence not merely for resolving a long-standing administrative impasse but for the manner in which it harmonized competing constitutional obligations. The case demonstrates that the right to shelter under Article 21 and the duty to protect forests under Article 48A are not necessarily adversarial but can be balanced through judicial sensitivity, proportionality, and constitutional harmony. The judgment reaffirmed that access to land for basic human needs such as housing, health, education, and sanitation is central to a dignified life and, therefore, constitutionally protected. It emphasized that socio-economic development cannot be sacrificed at the altar of rigid environmentalism, especially where lands lack viable forest potential and are already serving community needs. At the same time, the Court did not compromise on environmental protection. By preserving ecologically valuable tracts, insisting on compensatory afforestation, and subjecting post-1996 land use changes to statutory scrutiny, the Court ensured that Article 48A retained its ecological integrity. It affirmed that the forest conservation regime must not devolve into administrative absolutism that restricts rights without ecological justification.

The *Zudpi Jungle* decision is also important for reaffirming the doctrine of harmonious construction as a central tool in constitutional adjudication. Echoing earlier decisions like *Minerva Mills Ltd.* and *Narmada Bachao Andolan,* the Court struck a balance between development and conservation, rights and duties, present needs and future imperatives. For policymakers, the judgment signals the need for urgent reform in land classification frameworks, integration of forest law with rural development policy, and institutional clarity in managing common lands. For the judiciary, it represents a shift towards a rights-based environmental jurisprudence that foregrounds both ecological and human dignity. Ultimately, the case sets a new benchmark for how Indian constitutionalism can evolve to meet the intersecting challenges of development, ecology, and social justice not by choosing one over the other, but by holding all in constitutional balance.

COMMUNITY SERVICE SENTENCES UNDER THE BHARATIYA NYAYA SANHITA 2023: A SHIFT IN PENAL POLICY

KAPIL SHARMA*

ABSTRACT : Professor Michael Sandel has rightly stated that we are not born as an unencumbered self; rather, we are born as an encumbered self. We owe certain duties towards our society. It is our duty to rectify the mistake that we have made, and such rectification can also be done through providing services to the community. Community service has emerged as a transformative approach in modern penal policy, aimed at fostering rehabilitation and restorative justice rather than mere punishment. Rooted in the belief that individuals have a social responsibility and the potential for change, community service programs offer offenders a chance to contribute positively to society while taking accountability for their actions. The recent implementation of community service provisions within the framework of the Bharatiya Nyaya Sanhita, 2023, represents a notable transformation in the legal landscape of India. This initiative underscores a rehabilitative paradigm that emphasizes societal benefit, reflecting a progressive approach to criminal justice that prioritizes rehabilitation over retribution.

KEYWORDS: Community Service, Restorative Justice, Social Duties, Encumbered Self, Unencumbered Self.

---

* LL.M. (GENERAL) IV Semester, Law School, Banaras Hindu University (Session 2024-25), E MAIL- *kapilsharmaj5552@gmail.com*

I. INTRODUCTION

Elizabeth Fry, a well-known prison reformer, once quoted that "punishment is not for revenge, but to lessen crime and reform the criminal." Indian Penal Code, 1860 contained 5 types of punishment at the time of its repealment. Those punishments were- Death, Imprisonment for life, imprisonment (simple or rigorous), Fine and Forfeiture pf Property. Initially it also contained sixth type of punishment i.e., Transportation of Life which was later removed due to its inhuman nature. A significant reform has been introduced by Bharatiya Nyaya Sanhita, 2023 (BNS), which replaces 160 the 160-year-old Indian Penal Code, which came into effect on 1st July 2024. The BNS marks a significant shift by incorporating "community service" as one of the forms of punishing the accused for certain offences. This inclusion represents a notable development in India's penal system, signaling a move towards a more restorative and rehabilitative approach, alongside the traditional focus on retribution and deterrence.

II. ORIGIN AND DEVELOPMENT OF COMMUNITY SERVICE

The first community service programs were introduced in the USA at Alameda County, California, in 1966 for female traffic offenders. Local programs soon followed in a number of counties around the nation.[1] Various efforts have sought to establish community service programs as a feasible substitute for incarceration. In 1972, England and Wales were the first European nations to offer community service as an option to incarceration. In the 1980s, additional European nations followed: Italy in 1981, Denmark and Portugal in 1982, France in 1983, and the Netherlands in 1985. In India, Several decades ago, the Indian Penal Code (Amendment) Bill, 1978, made a preliminary effort to include community service as a punishment under the IPC.

1 Wright M (1991) Justice for victims and offenders: a restorative response to crime, 40, Open University Press, Bristol.

The Indian Jail Committee's report from 1980 to 1983 highlighted the drawbacks of imprisonment and proposed alternatives such as community service. The adoption of community service was also supported by the Malimath Committee Report and the Law Commission's 156th report, but these proposals were never implemented. Judges have, however, interestingly utilised Section 482 of the Code of Criminal Procedure, 1973 (CrPC), which gives High Courts unrestricted power to further the ends of justice, to impose community service as a penalty. For instance, in July 2024, the Delhi High Court mandated that two people charged with disrespecting the modesty of their neighbour's wife complete community service at Gurudwara Rakab Ganj Sahib for a month. The Indian Courts have repeatedly emphasized the importance of community service as a practical form of punishment.

In the case of Babu Singh v. State of Uttar Pradesh,[2] the Supreme Court declared that justice should be focused on rehabilitation rather than retribution and on restorative practices like personal development and community service. In Sunita Gandharva v. State of M. P. (2020),[3] the Madhya Pradesh High Court expressed that Section 437(3) of the CrPC allows for the imposition of community service as a bail condition while evaluating the extent and range of such conditions. It was also noted that community service has social and cognitive benefits and can replace changes implemented prior to and following a trial. In India, the only legislation governing community service prior to the introduction of the BNS was Section 18(1)(c) of the Juvenile Justice (Care and Protection of Children) Act, 2015, which allows for community service for juvenile offenders. In a recent event in Pune, a youngster driving a Porsche caused a fatal accident that resulted in two deaths. The Juvenile Justice Board initially sentenced him to 15 days of community service, during which he was

2 1978 AIR 527.

3 2020 SCC OnLine MP 2193.

required to collaborate with traffic police and compose an essay on road accidents. After this decision was greeted with fierce opposition and demands for a harsher penalty, the Board revoked the bail order.

III. DEFINING COMMUNITY SERVICE UNDER THE BHARATIYA NYAYA SANHITA, 2023

Bharatiya nyaya Sanhita 2023 does not define expression "community service". However, under explanation attached to Section 23 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) defines community service as "the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration." There is ambiguity as to what types of tasks will be assigned to offenders, however, they may include public work like street cleaning, helping with social welfare programs, working in hospitals, or engaging in environmental conservation activities, depending on their skills and credentials as per the discretion of the court.

Section 4 clause (f) of Bharatiya nyaya Sanhita, 2023 incorporates community service as one of the forms of punishment for the offences punishable under this code. It can be given for six offenses:

(i) Section 202: Public servant unlawfully engaging in trade.

(ii) Section 209: Non-appearance in court in response to a proclamation under Section 84 of BNSS.

(iii) Section 226: Attempt to commit suicide to compel or restrain the exercise of lawful Power.

(iv) Section 303(2): Theft where the value of the stolen property is less than Rs. 5,000 And a person is convicted for the first time and returns or restores the value of the property.

(v) Section 355: Misconduct in public by a drunken person.

(vi) Section 356(2): Defamation.

The conjunction "or" is used under these clauses hence there is a option open to the court to provide punishment according to the gravity of offence committed. It is relevant that community service be a punitive option for offenses under Sections 202, 209, 226, 355, and 356(2) of the BNS. Notably, under Section 303(2) of the BNS, community service is not only an optional sentence for theft; it is the only compulsory penalty that the court must impose for this particular crime. Additionally, the BNS discusses the ramifications of failing to complete community service in Sections 8(4) and 8(5). Under section 8(4) it is provided that in default of community service convict may be provided with imprisonment of either description. However, section 8 clause 5 clarifies that if the offence is punishable with fine or community service only then in case of default only simple imprisonment can be awarded.

The procedural framework for Implementing community service as a punishment involves the court ordering the convict to perform such service. Section 23 of the BNSS confers the powers of imposing community service as form of punishment on the courts. Judges are granted considerable discretionary powers in deciding whether to impose community service as a punishment and also which type of community service is to be provided.

IV. COMMUNITY SERVICE AS A FORM OF PUNISHMENT IN OTHER COUNTRIES

Community service is promoted as an alternative choice in punishment by the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules),[4] thus forcing an offender to give back to the community without being incarcerated.

i. ***United Kingdom: Structured Community Orders :*** In the United Kingdom[5], a community sentence may be imposed on

4 General Assembly resolution 45/110, annex.

5 U.S.C. Sec. 3563(b)(12).

an offender rather than imprisonment for minor theft, assault, or vandalism. It would take the form of Community Payback, which involves unpaid labor, such as desecrating public areas, clearing wasteland, or painting them. There system of community orders allows judges to tailor the sentence based on the offense and the offender's needs. This flexibility ensures that the punishment is proportionate and addresses the root causes of offending behavior. The system includes strict monitoring and enforcement that ensures Compliance. Failure to complete the assigned community service can lead to further penalties, that can include imprisonment.[6]

ii. ***United States: Restorative Justice Initiatives :*** Some states in the U.S. use restorative justice approaches where offenders are required to engage with victims and community members to understand the impact of their actions. This can include apologies, restitution, and community service. The focus is on making amends and fostering rehabilitation.[7] In the United States, community service is often imposed as a condition of probation, supervised by NGOs or government agencies. Offenders may perform tasks like park maintenance or volunteering at community centers. The system emphasizes accountability and rehabilitation, with clear guidelines on hours and tasks.

iii. ***New Zealand: Sentencing Act 2002 :*** The Sentencing Act of 2002 established community service in New Zealand.[8] According to Section 55 of this Act, a judge may impose between 40 and 400 hours of community service on an offender as they see appropriate. The assigned duties might

6 Emily Jackson, "Community Sentencing: A Pathway to Rehabilitation," The Times of India, New Delhi.

7 Michael Roberts, "Successful Community Service Programs: Lessons from Abroad," The Hindu, Mumbai.

8 Sentencing Act, 2002.

involve removing graffiti, helping food banks, or cleaning parks. In addition, the probation officers assign duties according to the offender's skills, requirements, and offenses.

iv. ***Canada: Community Service Orders :*** In Canada,[9] "Community Service Orders" are a recognised form of alternative sentencing, imposed as part of a probation order or a conditional sentence. When community service is a condition of a probation order in Canada, there is a limit of up to 240 hours of service that must be completed within an 18-month period.

V. LEGAL PHILOSOPHY BEHIND COMMUNITY SERVICE AS PUNISHMENT

The Unpaid community service is performed during free time and over a specified period for the benefit of the community. The offender "shall pay back to the community via unpaid work."[10] Therefore, the original philosophy of community service aligns well with the restorative justice concept and the particular preventive goal of punishment (resocialization or, in the case of juvenile justice, education). Wright defines a different direction in the context of restorative justice: "Community service places the focus on accountability rather than on punishment or rehabilitation." It places emphasis on "offenders' strengths rather than their needs; on their capacity for responsibility rather than their lack of insight; on their capacity to choose rather than their vulnerability to social and psychological factors." These distinguish a rehabilitative approach from a restorative/community service approach. Additionally, in a restorative system, the imposition of community service orders may be accompanied by punitive components only as a result of the offender dedicating their time and effort".[11]

9 Criminal Code (R.S.C., 1985, c. C-46)

10 Goldson B (2008) Dictionary on youth justice, 78, Willan, Cullompton.

11 Wright M (1991) Justice for victims and offenders: a restorative response to crime, 44, Open University Press, Bristol.

The concept of community service as a form of punishment can also be examined through the lens of different schools of jurisprudence, each offering a unique perspective on its justification and application. From a utilitarian perspective, the primary aim of punishment is to maximize overall happiness and well-being in society. "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do."[12] This is often achieved through deterrence and rehabilitation. Community service can align with utilitarian goals by acting as a specific deterrent, imposing an unpleasant consequence for wrongdoing that might prevent the offender from re-offending. It can also serve as a general deterrent, signalling to the wider community that even minor offences will be addressed. Furthermore, by engaging offenders in constructive activities that benefit the community, community service can foster a sense of responsibility, develop useful skills, and promote their reintegration into society, thus contributing to rehabilitation. However, a potential limitation from a utilitarian standpoint is the concern about whether community service provides sufficient punishment for certain offences to effectively deter more serious criminal behaviour. Prominent utilitarian jurists like Jeremy Bentham, in his work An Introduction to the Principles of Morals and Legislation, argued for punishments that produce the greatest good for the greatest number, suggesting that the effectiveness of community service would be judged by its ability to reduce crime and promote social welfare.

Cesare Beccaria emphasised the importance of punishment being swift, certain, and proportionate to deter crime, principles that could be applied to the design and implementation of community service. [13] According to him, "It is better to prevent crimes than to

---

12 J Bentham, *An Introduction to the Principles of Morals and Legislation,* (Clarendon Press, 1996).

13 C Beccaria, *On Crimes and Punishments,* (Hackett Publishing Company, 1986) 87.

punish them." By substituting a short period of community work for incarceration, the State reinforces certainty of sanction while preserving social bonds and preventing further criminalization.

According to Roscoe Pound, the function of law is Justice, and Justice, according to him, is balancing different interests in society. "Law secures interests by punishment, by prevention, by specific redress, and by substitutional redress …"[14]

Retributivism, as a school of thought, emphasises the principle of just deserts, arguing that punishment should be proportionate to the severity of the offence committed. The number of hours required or the nature of the service performed can be tailored to reflect the gravity of the offence, mainly addressing concerns about proportionality. Immanuel Kant, a key figure in retributive philosophy, in The Metaphysics of Morals, posited that punishment should be inflicted because the crime has been committed, and that it should be equivalent to the offence. Applying this to community service suggests that the service should be of a nature and duration that is seen as a just response to the specific crime. Similarly, G.W.F. Hegel viewed punishment as the negation of the crime, restoring the legal order. Community service, by requiring the offender to contribute positively to the community they harmed, can be interpreted as a way of negating the negative impact of their crime and restoring social equilibrium.

Restorative justice offers a different lens through which to view punishment focusing on repairing the harm caused by crime and involving the victim, offender and the community in the process. Community service also aligns with the core principles of restorative justice. By requiring offenders to engage in activities that benefit the community, community service directly contributes to repairing the

---

14 R Pound, *An Introduction to the Philosophy of Law,* (West Publishing Co., 1922).

harm caused by their actions. It provides an opportunity for reintegration as offenders work within the community. John Braithwaite,[15] discusses the importance of reintegrative shaming, where the community disapproves of the criminal act but welcomes the offender back upon making amends. Community service can be a key part of this reintegrative process. According to him "Because crime hurts, justice should heal." Therefore it can be well said that Community service embodies restorative healing. Offenders perform work that repairs victim and community harm, facilitating reintegration rather than isolation.[16]

VI. SIGNIFICANCE OF COMMUNITY SERVICE IN THE BHARATIYA NYAYA SANHITA 2023

The inclusion of community service as a form of punishment in the Bharatiya Nyaya Sanhita 2023 holds significant implications for the Indian criminal justice system. The legislative intent behind this provision likely stems from a desire to modernize the penal framework and align it with contemporary penological approaches that recognize the limitations of purely punitive measures. By introducing community service, the legislature aims to provide an alternative to imprisonment for certain minor offences, which could potentially help in reducing the chronic problem of prison overcrowding in India. Furthermore, this move reflects a growing emphasis on the rehabilitation and reintegration of offenders into society, offering them an opportunity to contribute positively rather than simply being confined. The explicit inclusion of community service also signifies a recognition and adoption of restorative justice principles, allowing offenders to make amends to the community they have harmed. The introduction of community service offers several potential benefits within the Indian context. By providing an alternative to short-term imprisonment, it can aid in the

---

15 In Philosophy of Right. In Crime, Shame and Reintegration.

16 J Braithwaite, *Restorative Justice & Responsive Regulation,* (Oxford University Press 2002) 37.

rehabilitation of offenders, potentially leading to lower rates of recidivism as individuals are given a chance to reform through with the community.

VII. PARLIAMENTARY DELIBERATIONS ON COMMUNITY SERVICE UNDER BNS 2023

During the tabling of the Bharatiya Nyaya Sanhita Bill, 2023 in Parliament, the Union Home Minister explicitly stated that it was proposed to provide community service as one of the punishments for petty offenses for the first time. This statement underscores the novelty and the intended application of this punishment to less serious forms of wrongdoing.

The recommendations for standing parliamentary committee are as follows:

a) **Problem with not defining 'community service':** Sanhita does not offer any explanation or clarification of what constitutes 'community service', even though it provides for community service as a Penalty for minor offences. Hence it should be defined.[17] However it is pertinent to mention that explanation to section 23 of Bhartiya Nagarik Suraksha Sanhita, 2023 defines community service as work which court may order to convict that benefits community without remuneration.

b) **Judicial Oversight**: Courts have discretion in assigning community service based on the offense and the offender's background.

c) **Probation Officers or Supervisors:** Appointed officers monitor offenders' progress and ensure compliance with the service.[18]

17 Department-Related Parliamentary Standing Committee on Home Affairs Two Hundred Forty Sixth Report on The Bharatiya Nyaya Sanhita, 2023, 13.

18 Ibid p. 20.

d) **Reporting Requirements:** Offenders may be required to submit periodic reports to a supervising authority documenting their progress.

VIII. OUTLOOK: THE ABILITY OF COMMUNITY SERVICE TO LOWER THE PRISON POPULATION AND IMPROVE OFFENDER REINTEGRATION

During the 1990s and 2000s, there were two distinct trends in European sanction policy: the increased use of imprisonment and the introduction of new community sanctions. The first one is a reflection of the growing punitive and populist trends in national crime policies, while the second one attempts to counter this by promoting more rational, humane, and constructive alternatives to imprisonment.[19] After a number of lessons from various jurisdictions have been learned, community sanctions can be a useful instrument in the fight against the overuse of imprisonment. The most important questions on context of Indian criminal justice system are: (1) how to make sure that these penalties are imposed in the first place; (2) how to make sure that they take the place of jail (rather than other noncustodial punishments); and (3) how to maintain and support the overall legitimacy of these sanctions. The present difficulties and accomplishments have been summarized as follows.[20]

1. The need for explicit (statutory) implementation standards is necessary for the efficient use of new alternatives and consistent sentencing procedures. The courts should be

---

19 Van Kalmthout AM (2000) Community sanctions and measures in Europe: a promising challenge or a disappointing Utopia? In: Council of Europe (ed) Crime and criminal justice in Europe. Council of Europe Publishing, Strasbourg, 121–133.

20 Lappi-Seppälä T (2003) Fines. Community sanctions as a means to restrict the use of imprisonment? In: European Conference for Probation (Ed) Probation in Europe. Bulletin of the conférence permanente Européenne de la Probation, no 27.

provided with explicit instructions on the timing and target of new sanctions. It is also necessary to define the function and place of novel alternatives inside the current criminal system (how they relate to other penalties).

2. The overall success of any community sanction depends on resources and a suitable infrastructure. Community-based sanctions can only be implemented within a community-oriented infrastructure that is designed to meet the unique needs of these sanctions. Their implementation is contingent upon the existence of a body such as the probation service. The essential resources and financial backing should come from the government and the local communities.

3. In order to maintain the overall legitimacy of new sanctions and minimize failure rates, supervision, support, and quick responses are necessary. Additionally, the dropout rate is higher in environments with less supervision and control. There should also be a clear and consistent procedure when the terms of the sentence are broken. Varying and careless practices generate skepticism and opposition from the public, the judiciary, and public prosecutors.

4. The concerns of justice and equality must not be ignored. Because they are simple to employ against socially privileged groups of offenders, community sanctions can frequently result in discrimination. To prevent social prejudice, action must be taken. One important means to this end are clear and accurate implementation rules and procedures. Another method is to customize the community service punishment system to address the needs of various offender populations with their unique challenges.

5. It needs to be promoted repeatedly. Things are not guaranteed to go well in the future, just by virtue of initial success. The public may withdraw its support, judges and prosecutors may

lose faith, and the enforcement agencies may become demotivated. The continuous process of establishing the overall credibility of community penalties and proving their suitability does not stop with the passage of the necessary laws and the organization of an initial training course.

6. Don't make community service simply a punishment in the community. The potential for community service to rehabilitate and reintegrate should not be "sold" as part of efforts to broaden its use and gain political support. Policy planners should avoid the temptation, as has happened in some jurisdictions, of portraying community service to the public as simply a "credible" and "demanding" option, if not outright humiliating. Instead, community service should be implemented with the goal of restorative justice and rehabilitation in mind (which would be consistent with international human rights standards) and not be left to punitive populism and repressive orientations of "punishment in the community."
7. Matching offenders with appropriate types of work that align with their skills, the nature of their offence, and the needs of the community will also be essential.
8. Establishing robust mechanisms for supervision and monitoring the compliance of offenders with community service orders will be necessary to ensure the integrity of this form of punishment. Logistical issues such as transportation for offenders to their service placements and ensuring their safety during the work will also need to be addressed.

The implementation of community service under the BNS is likely to face several challenges. One significant challenge is the lack of a specific and detailed definition of community service within the legislation itself. The absence of comprehensive guidelines for implementation and supervision could lead to inconsistencies in its application across different jurisdictions. Ensuring compliance from

offenders and effectively addressing instances of non-compliance will also be critical. Determining the appropriate duration and nature of community service for different offences will require careful consideration by the judiciary. There might also be a perception of the community.

IX. CONCLUSION

The introduction of community service as a form of punishment under the Bharatiya Nyaya Sanhita 2023 represents a progressive step towards a more balanced and potentially rehabilitative criminal justice system in India. By offering an alternative to traditional punishments for certain offences, the BNS acknowledges the need for a more nuanced approach that considers both accountability and reform. The potential benefits of community service, such as reducing prison overcrowding, promoting rehabilitation, and aligning with restorative justice principles, are significant and hold promise for improving the overall effectiveness of the Indian criminal justice system. However, the analysis reveals several key areas that require careful attention to ensure the successful implementation of this new provision. The current definition of community service in the BNSS is broad and lacks the specificity needed for consistent application. The absence of detailed guidelines regarding the types of work, duration, supervision, and enforcement mechanisms could lead to disparities and hinder its effectiveness. The comparative study with other civilized nations highlights the importance of a well-defined legal framework and robust implementation infrastructure.

IMPACT OF ARTIFICIAL INTELLIGENCE ON HUMAN RIGHTS: A FACILITATOR OR A DESTROYER?

BHAVYA SOM GARG*

ABSTRACT : The use of Artificial Intelligence (AI) has taken the world by storm, with its pervasive use stretching beyond the human imagination. Its rapid evolution has repeatedly challenged the conventional wisdom related to its impacts on human life and society. One such effect of the large-scale use of AI is the impact it has had on the existing notions of human rights. Various rights of man, which seemed inviolable and were deemed essential for a dignified life, have come under a cloud due to the use of a machine created to help humans in the first place. This article attempts to list some of the important human rights and the manner in which they are affected by the use of AI. It also urges the states to step in and mitigate the damage, ensuring stability in both human and technological spheres.

KEY WORDS : Artificial Intelligence (AI), Human Rights, UDHR, ICCPR, European Union

I. INTRODUCTION

There exists a strong correlation between democracy, the rule of law, and human rights. Robust and accountable democratic institutions, alongside inclusive and transparent decision-making processes, as well as an independent and impartial judiciary that

* LL.M. (HRDE), IV Semester, Law School, Banaras Hindu University; E-Mail: *bhavyasomg@gmail.com*

upholds the rule of law, are essential prerequisites for safeguarding human rights.

The International Bill of Rights[1] Constitutes a body of international human rights law that includes nine major human rights treaties; regional rights instruments in the Americas, Africa, and Europe; it has been integrated into national constitutions and national laws, as well as customary and case law. Non-binding intergovernmental instruments, such as the UN Guiding Principles on Business and Human Rights[2], have also addressed the responsibilities of private sector stakeholders within the context of human rights.

International human rights law mandates that nation-states ensure the provision of effective remedies in cases where an individual experiences a violation of human rights. Effective remedies encompass judicial and administrative avenues, such as the provision of compensation or an apology, along with preventive measures that may entail modifications to law, policy, and practice. Human rights obligations further require states to establish effective mechanisms aimed at preventing encroachments upon human rights.[3]

The international human rights law framework serves as a well-established means to ensure the protection of rights broadly, including within the digital environment, such as the rights to equality and non-discrimination. Its nature as an actionable set of standards is particularly

---

1 Comprised of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

2 UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc Resolution 17/4 (June 16, 2011).

3 ICCPR art 2(3) requires each State Party to ensure a person whose Covenant rights have been violated has an effective remedy, and that this remedy will be enforced. See also: UN Human Rights Committee (2004). The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, available at: https://www.refworld.org/docid/478b26ae2.html

well-suited to technologies that transcend national boundaries, such as artificial intelligence (AI). A human rights-based approach affords normative guidance to AI developers in order to uphold human dignity, regardless of jurisdiction.

Human rights law can guide the formulation of technical and policy safeguards concerning the deployment of artificial intelligence (AI). In this context, in 2019, the Human Rights Council (HRC) enacted the Resolution (41/11) regarding "New and Emerging Digital Technologies and Human Rights."[4] The resolution recognizes the necessity of more effectively addressing the comprehensive range of human rights ramifications associated with new technologies to maintain relevance in the digital era.

In 2021, the Council endorsed Resolution 47/23, underscoring the importance of a human rights-based approach to the creation and application of innovative digital technologies. The resolution observes that new technologies possess the capability to provide numerous opportunities for the advancement of human rights by positively influencing the establishment of democratic institutions and the strengthening of civil society, as well as facilitating the achievement of the Sustainable Development Goals (SDGs). Human rights advocates, technology developers, and governments must remain responsive in addressing the human rights challenges presented by AI, utilizing protections and instruments rooted in established human rights norms and frameworks.[5]

For AI to promote the public good, its design and implementation must, at a minimum, refrain from jeopardizing fundamental human values safeguarded by international human rights

---

4 UN Human Rights Council (2019). New and emerging digital technologies and human rights, available at: https://digitallibrary.un.org/record/3834165.

5 "Promoting and Protecting Human Rights in the Digital Era", *DiPLO*, Sept. 19, 2022, *available at*: https://www.diplomacy.edu/event/promoting-and-protecting-human-rights-in-the-digital-era/ (last visited on Apr. 22, 2024).

law, which offers a strong framework for the preservation of these values. AI, provided that appropriate safeguards are established, could also serve as a crucial facilitator in enhancing and endorsing human rights.

II. HUMAN RIGHTS ISSUES DUE TO THE USE OF ARTIFICIAL INTELLIGENCE (AI)

i. Liability for Damage

The implementation and utilization of AI technologies can result in harm to individuals and property. For instance, Gluyas and Day provide several examples, including the running over of pedestrians by driverless cars, crashing and damage caused by a partially operated drone, and incorrect medical treatment diagnoses by an AI software program. They further clarify, "As there are many parties involved in an AI system (data provider, designer, manufacturer, programmer, developer, user, and AI system itself), liability is difficult to establish when something goes wrong, and there are many factors to be taken into consideration…".[6]

Liability issues of AI could be managed under the framework of civil or criminal liability. JKC Kingston examines AI and legal liability: both whether criminal liability could ever be applicable, to whom it might pertain, and, under civil law, whether an AI program qualifies as a product subject to product design legislation (product liability, for example, in instances of design or manufacturing failures) or as a service to which the tort of negligence pertains.[7]

---

6 Lee Gluyas and Stefanie Day, "Artificial Intelligence - Who is Liable When AI Fails to Perform?", *Cms*, *available at*: https://cms.law/en/gbr/publication/artificial-intelligence-who-is-liable-when-ai-fails-to-perform (last visited on Apr. 22, 2024).

7 J.K.C. Kingston, "Artificial Intelligence and Legal Liability", in Max Bramer and Miltos Petridis (eds.), *Research and Development in Intelligent Systems XXXIII* 269-279 (Springer, 2016).

Gabriell Hallevy examines the criminal liability of AI entities, specifically focusing on the responsibility for harm caused, and investigates whether an AI entity itself could bear criminal liability (independent of the criminal liability of the manufacturer, end-user, or owner, and apart from their civil liability) and posits that the imposition of criminal liability on AI entities for perpetrating intellectual property offenses is indeed plausible, proposing solutions for sentencing AI entities.[8] Liability matters may also be addressed through consumer protection law.

ii. Right To Access to Court, Fair Trial, and Due Process

According to Article 14 of the ICCPR: "All individuals shall be treated equally before the courts and tribunals. In the process of determining any criminal charge against an individual, or regarding their rights and obligations in a civil suit, everyone shall have the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law [.....] Everyone accused of a criminal offense shall possess the right to be presumed innocent until proven guilty according to law."

Concerning law enforcement and the legal system, the possibility for AI to reinforce or exacerbate existing biases is a significant concern. The rights to liberty, security, and fair trial may be compromised when an individual's physical freedom or personal safety is threatened, as seen with predictive policing, recidivism risk assessment, and sentencing. AI systems render it challenging for legal professionals, including judges, attorneys, and prosecutors, to understand the reasoning behind the outcomes of the system, complicating the justification and appeal processes of the decisions.[9]

---

8 Gabriel Hallevy, "AI Vs. IP Criminal Liability for Intellectual Property Offences of Artificial Intelligence Entities", in Dennis J. Baker and Paul H. Robinson (eds.), *Artificial Intelligence and the Law* (Routledge, 1st edn., 2020).

9 CAHAI Secretariat, "TOWARDS REGULATION of AI SYSTEMS Global Perspectives on the Development of a Legal Framework on Artificial Intelligence Systems Based on the Council of Europe's Standards on Human Rights, Democracy and the Rule of Law" (2020)

AI and Automated Decision Making (ADM) exert a considerable influence on individuals' lives and may frequently restrict one's right to engage in, contest, or otherwise challenge the outcomes or inputs of decisions. Often, AI systems, owing to their "black box" nature, are incapable of providing a human-comprehensible and understandable explanation of their decisions. Furthermore, these systems may encapsulate biases that hinder access to courts and justice for marginalized and underrepresented groups.

For example, tools for criminal risk assessment are presented as resources to aid judges in making sentencing decisions. Although authorities classify an individual as high or low risk of reoffending, thereby implying a certain level of potential guilt, this practice could conflict with the right to an impartial jury and the presumption of innocence. Predictive policing software may similarly reflect societal biases and pose the risk of employing historical data to perpetuate bias and inaccurately assign guilt. There are numerous documented cases where the utilization of AI algorithms in predictive policing, risk assessment, and sentencing has resulted in suboptimal outcomes within the criminal justice system.

In numerous instances, the implementation of AI for risk scoring of defendants and predictive policing endeavors is marketed as a well-meaning initiative to eliminate the potential human bias of judges in their sentencing and bail determinations, while efficiently allocating limited police resources to avert crime. However, these AI systems, if not developed with ethical considerations, may ultimately intensify the very biases they aim to alleviate by either directly integrating biased elements or utilizing proxies for bias in their recommendations.[10] This can lead to severe repercussions, including the continuation of discrimination against specific groups.

---

10 For instance, according to public records, the police in New Orleans used software created by Palantir for criminal investigations in a manner that extended beyond the software's original intended scope. Following a sequence of investigative reports and significant public backlash, the city terminated its six-year contract with Palantir in March 2018.

Therefore, when Artificial Intelligence systems exhibit bias and lack transparency, they raise concerns about the standards of a fair trial, such as the presumption of innocence, the right to be promptly informed of the origin and nature of an accusation, the right to a fair hearing, and the ability to self-represent. The opacity in decision-making by AI systems further exacerbates worries about the arbitrary deprivation of liberty, as well as the right not to be subjected to punishment without legal justification.[11]

In the case of *State v. Loomis*[12] The Wisconsin Supreme Court concluded that the application of the COMPAS algorithm, a proprietary risk assessment instrument, during sentencing did not infringe upon the defendant's due process rights. COMPAS was initially created to assist parole boards in assessing the risk of recidivism; however, the outcome produced by COMPAS, a risk assessment score, was utilized by both the State and the trial court in the sentencing process. North pointe, Inc., which developed COMPAS, declined to disclose its methodology to the court or the defendant. The sentencing court imposed a six-year prison term on the defendant, rather than granting parole, based on the algorithm's determination of a significant probability of recidivism.[13]

Although the Court affirmed the validity of COMPAS, numerous restrictions were imposed on its usage. The algorithm was not permitted to be used for evaluating whether a convicted individual would serve prison time or for estimating the duration of their sentence.

---

11 CAHAI, "The Impact of Artificial Intelligence on Human Rights, Democracy and the Rule of Law." (2020)

12 881 N.W.2d 749 (2016).

13 Ellora Israni, "Algorithmic Due Process: Mistaken Accountability and Attribution in State v. Loomis", *Jolt Digest*, Aug. 31, 2017, *available at*: https://jolt.law.harvard.edu/digest/algorithmic-due-process-mistaken-accountability-and-attribution-in-state-v-loomis-1 (last visited on Apr. 22, 2024).

Any Presentence Investigation Reports that included the score were required to contain an extensive, five-part disclaimer regarding the limitations of the algorithm. Its application also mandated a separate justification for the imposed sentence. The Supreme Court opted not to hear the case on appeal from the defendant.[14]

It remains an unresolved issue whether it is appropriate for the court to allow an algorithm, which judicial operators have limited visibility into, to play even a minor role in the deprivation of an individual's liberty. The ruling of the Wisconsin Supreme Court, along with the appellate documents, highlights fundamental misjudgments concerning the operational implications of an algorithm like COMPAS and the requisite protections necessary to render it beneficial in sentencing. These misconceptions offer insight into a potentially more effective framework, one that would enable algorithms to enhance the justice system without introducing legal, technological, or ethical challenges.[15]

iii. Lack of Effective Remedy

The utilization of AI systems in contexts where human rights are at risk may pose significant challenges in guaranteeing the right to remedy. Given that many AI systems are characterized by a lack of transparency, individuals may remain unaware of the processes by which decisions impacting their rights were made, or whether such processes were discriminatory. Frequently, the judicial operator utilizing the AI system may find themselves unable to elucidate the automated decision-making procedures. These complications are exacerbated by the deployment of AI systems that suggest, render, or enforce decisions within the Judiciary, which is fundamentally responsible for safeguarding rights, inclusive of the right to an effective remedy.[16]

---

14 *Ibid*

15 *Ibid*

16 Toronto Declaration, available at: https://www.torontodeclaration.org/declaration-text/english/ (last visited on Apr. 22, 2024).

Automated decision-making processes are prone to presenting challenges regarding individuals' capacity to obtain an effective remedy. These challenges encompass the lack of transparency regarding the decision itself, its rationale, and whether individuals have consented to the utilization of their data in formulating this decision or even recognize how it affects them. It remains unclear to whom individuals should communicate their concerns regarding the decision, owing to the difficulties associated with attributing responsibility for the decision.

Given the nature of judgments being generated automatically, with minimal or no human involvement, and emphasizing efficiency over human-contextual reasoning, organizations adopting ADM systems bear an even greater responsibility to furnish impacted individuals with a means to pursue redress.[17]

In this context, it is notable that the proposed EU AI liability directive aims to establish a rebuttable 'presumption of causality', thereby reducing the burden of proof necessary to demonstrate damage inflicted by an AI system. This provision will mitigate some of the obstacles encountered when initiating a claim for harm resulting from an AI system. Furthermore, it would empower national courts to mandate the disclosure of evidence concerning AI systems suspected of inflicting damage.[18]

iv. Right to Protection Against Discrimination

Article 26 of the ICCPR says: "All individuals are equal before the law and are entitled to equal protection of the law without any

17 Committee of Experts on Internet Intermediaries (MSI-NET) (2018). Algorithms and Human Rights: Study on the Human Rights Dimensions of Automated Data Processing Techniques and Possible Regulatory Implications, Council of Europe Study, DGI/2017/12, available at: https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5 (last visited on Apr. 22, 2024).

18 Proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence, available at: https://commission.europa.eu/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/liability-rules-artificial-intelligence_en (last visited on Apr. 22, 2024).

discrimination. In this regard, the law shall forbid all discrimination and guarantee to all individuals equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status."

According to Article 27 of the ICCPR: "In those States where ethnic, religious, or linguistic minorities exist, individuals belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their culture, to profess and practice their religion, or to utilize their language."

As per Article 3 of the ICCPR and the ICESCR: "The States Parties to the present Covenant commit to ensuring the equal right of both men and women to the enjoyment of all [. . .] Rights outlined in the present Covenant."

The rights to protection against discrimination may be compromised by AI systems, due to the potential for bias from algorithm developers; bias incorporated in the models upon which the AI systems are constructed; bias embedded in the datasets employed to train the models; or bias introduced during the application of such systems in practical settings. These risks intensify when AI systems are utilized to assist judicial operators in their routine activities.

The design of AI systems and their application in judicial procedures should be directed toward producing outcomes that are compliant with human rights and free from discrimination. Minimum standards and safeguards should be established; if such standards cannot be achieved, the AI system in question ought not to be employed.

No individual should be subjected to an automated decision that leads to a criminal record, and AI technologies should not undermine the right to a fair trial by an impartial and independent tribunal. AI systems must not pre-label individuals as criminals without due process, nor should they enable authorities to take unjustified,

disproportionate actions against individuals without reasonable suspicion.[19]

Where AI systems influence decisions regarding the deprivation of liberty, they should be calibrated to produce outcomes that favor release, and detention should only occur as a final measure. To guarantee that AI systems accomplish the objective of reducing pre-trial detention rates, they must undergo thorough testing.[20]

AI systems must exhibit transparency and clarity so that their primary users, such as decision-makers, parties involved in litigation, and defendants, can understand and evaluate them. Commercial or proprietary interests, including trade secrets, should be reconciled with the requirements about transparency. Each AI system ought to be subject to auditing by an independent auditor, and its processes should be reproducible for this purpose.[21]

v. Misinformation and AI

AI technologies can contribute to unequal access to information and exacerbate existing digital divides. For example, AI may be utilized to create and disseminate targeted propaganda, and this issue is amplified by AI-driven social media algorithms focused on "engagement," which prioritize content most likely to receive clicks. The data analysis conducted by social media companies to construct user profiles for targeted advertising is fueled by ML algorithms. Furthermore, bots impersonating authentic users propagate content beyond narrowly targeted social media groups by disseminating links to fraudulent sources and actively interacting with individuals as chatbots utilizing natural language processing.[22]

---

19 Fair Trials, "Regulating Artificial Intelligence for Use in Criminal Justice Systems in the EU" (2022)

20 *Ibid*

21 *Ibid*

22 Evgeni Aizenberg and Jeroen Van Den Hoven, "Designing for Human Rights in AI" *Big Data & Society* 1-14 (2020).

Entities employing AI screening and scoring algorithms often neglect to provide adequate notification, if any, to those individuals undergoing scoring and screening. Due to the lack of awareness regarding the mechanisms these tools utilize for decision-making and the types of data they incorporate, their implementation can undermine regulations about access to information. Because individuals do not comprehend the operation of these tools, they are rendered incapable of contesting eligibility determinations that influence their access to services, employment, housing, or benefits.[23]

Moreover, the emergence of deepfakes, which are AI systems capable of producing realistic video and audio recordings of real individuals, has led many to fear that this technology will be employed in the future to fabricate incriminating footage of world leaders for malicious intents. While it appears that deepfakes have not yet been employed as components of actual propaganda or disinformation efforts, and the forged audio and video currently lack convincing quality, the AI technology underlying deepfakes is progressing, and the potential for inciting chaos, provoking conflict, and advancing the crisis of truth should not be underestimated.[24]

In countries where religious freedom is under threat, AI could assist government officials in surveilling and targeting members of persecuted religious groups. This not only may enhance the secrecy of such assemblies out of fear of exposure, but also could result in dire consequences ranging from arrest to fatality. Additionally, AI might be utilized to identify and eliminate religious content. If individuals are unable to display religious symbols, engage in prayer, or instruct others about their faith online, such actions would represent a gross violation of the freedom of religion.[25]

---

23 *Ibid*

24 "Human Rights in the Age of Artificial Intelligence", *Access Now*, *available at*: https://www.accessnow.org/wp-content/uploads/2018/11/AI-and-Human-Rights.pdf (last visited on Apr. 22, 2024).

25 *Ibid*

vi. Right to Privacy and Data Protection

"No individual shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor unlawful attacks on his honour and reputation. Every individual possesses the right to the protection of the law against such interference or attacks."

- Article 17 of the ICCPR

Privacy is essential in safeguarding other human rights, including the rights to freedom of speech, opinion, affiliation, and assembly. In the absence of privacy, it often becomes impractical or unsafe to organize political opposition, engage in commercial competition, or otherwise develop alternatives to established policies, prevailing narratives, or encountered injustices. The Universal Declaration of Human Rights (UDHR, article 12), the International Covenant on Civil and Political Rights (ICCPR, article 17), and numerous other international and regional human rights treaties recognize the right to privacy as a human right.[26] The importance of the right to privacy for the online and offline exercise of other human rights, such as freedom of expression and access to information, is amplifying in a data-centric world.[27]

---

26 For example, the Convention on the Rights of the Child (article 16), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 14), Convention on the Rights of Persons with Disabilities (article 22), African Charter on the Rights and Welfare of the Child (article 10), American Convention on Human Rights (article 11) and Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, article 8).

27 UN Human Rights Council (2021). The right to privacy in the digital age. Report of the United Nations High Commissioner for Human Rights, available at: https://www.ohchr.org/en/HRBodies/HRC/RegularSessions/Session48/Documents/A_HRC_48_31_AdvanceEditedVersion.docx

Privacy regulations have evolved in response to the new challenges presented by the digital and online environment. Numerous nations worldwide have enacted regulations mandating the consent of data subjects for the use and processing of their data online, ensuring access to personal data by data subjects, and providing the right to have this personal data deleted, corrected, or transferred to another entity.

Privacy-preserving legislation in the AI context seeks to empower individuals with the right to view the contents of databases containing information about them. These laws also aim to limit the use of personal information without the consent of the data subject, except under specific circumstances outlined by law. Under these statutes, individuals possess the right to agree to the terms of use before downloading an application onto their cell phone or commencing the use of freeware, namely products and services whose economic model is based on the commercialization of personal data.[28]

Personal data, which is retained online, is frequently processed in various ways and for different purposes, some of which cannot be foreseen at the time consent is given by the data subject. Moreover, many individuals seldom review the terms of use, even when they are succinct and displayed prominently.[29] For example, it would take an individual 76 days to read the privacy policies that may be encountered annually.

Another facet of privacy within the AI landscape is the comprehension of privacy as the "right to be left alone."[30] This pertains to the entitlement to maintain a secure and safeguarded space surrounding our physical being, personal thoughts, emotions, and way

---

28 Tehilla Shwartz Altshuler, "Privacy in a Digital World", *TechCrunch*, *available at*: https://techcrunch.com/2019/09/26/privacy-queen-of-human-rights-in-a-digital-world/ (last visited on Apr. 22, 2024).

29 *Ibid*

30 *Ibid*

of life while engaging online. Continuous online surveillance of our activities by sensors, surveillance cameras, digital assistants, such as Siri, Alexa, and other AI and digital instruments, can significantly influence the right to privacy as a fundamental human right.[31]

III. CONCLUSION

The discourse on the impact of AI on human rights is currently restricted to issues regarding data privacy and identity theft. However, it must include issues regarding the use of AI in warfare, legal proceedings, and actions of autonomous AI robots, among other things.

Human rights as an issue of discourse, while widely important, are seldom discussed as frequently as they should be. While the world is moving towards the adoption of AI at a rapid pace, the concerns about its human rights implications have lagged, to the extent of becoming a casualty in the face of AI becoming a modern-day Leviathan.

For instance, the use of AI tools like COMPAS in the USA deprives an accused of the basic human right of presumption of innocence in the name of offender profiling. This human right, enshrined in the UDHR and almost all the legal systems of the world, is a cardinal principle of criminal law and seeks to ensure that no person accused of an offence is tried in an unjust and prejudicial manner by imposing culpability upon them.

Further, the issue of misappropriation of data is also a major concern. It is common knowledge that any AI tool runs on Big Data, which is sourced from the users through means like compulsory sharing of user data to run an application. This data not only serves as the basis of creating the algorithms used in running an AI tool, but it also facilitates the creation of user-centric suggestions on various

31 *Ibid*

applications. However, with its good uses, the presence of this data in the hands of multi-national corporations and other miscreants raises apprehensions regarding violation of personal privacy and ends up making individuals and their data mere commodities to be used in the creation of AI tools.

Therefore, it is pertinent that the states should ensure sufficient protection to the human rights of people who suffer from the rapid adoption and use of AI programmes.

Additionally, another concern, albeit a futuristic notion, lies in the creation of AI-powered robots, or *"Machina Sapiens"* (as stated by Gabriel Hallevy). In the event of the creation of another intelligent being apart from humans, will the existing human rights extend to such entities as well? If it does happen, the entire notion of human rights will undergo a significant change, which the states of the world must be ready to adopt in a way that does not alienate the human rights presently available to biological beings.

In conclusion, it is crucial to note that there is a wide range of possible strategies for addressing accountability for damages brought about by AI systems at the theoretical level of civil law. Theoretically, the ideas of strict liability, vicarious liability, product liability, and fault-based liability could be used to address this issue. It is also possible to give autonomous AI systems legal personality and make them directly liable for any harm they may cause.

CRITICAL APPRAISAL OF RAWLS'S CONCEPT OF DUTIES: DUTIES DERIVED FROM CONSENT AND RATIONALITY

*JAGRITI SINGH**
*KRISHNA KUMAR***

ABSTRACT : Professor John Rawls is one of the leading thinkers of liberalism in the second half of the 20th century. He was Professor of political philosophy at Harvard university. He was an expert in political philosophy. He belongs to America, and he, through his theory, wanted to solve two contemporary problems. First, the problem of race or racial discrimination in America. This racial discrimination in America has given rise to many political issues, for example, civil rights movements, socio-economic inequalities, etc. The second problem was to differentiate capitalism from Marxism. (To defend the idea of liberalism and capitalism from the attack of Marxism). Rawls was basically a supporter of liberalism for capitalism. However, he also wanted to accommodate Marxist theory. His theory is known as justice as fairness. He propounded this theory in his famous book, A Theory of Justice. According to Rawls, the concept of fairness is a theory that evolves through a fair process. Rawls emphasised fair thinking, fair logic, and fair procedure free from any prejudices. In this article, a sincere effort has been made to critically analyse the notion of duties propounded

* BA LLB 10th Semester, Faculty of Law, Banaras Hindu University (2024-25), E- mail- Jagritisingh831@gmail.com

** LLM (GENERAL) 4th Semester, Faculty of Law, Banaras Hindu University, E-mail- Krishnaforlaw@gmail.com / Kirshna.kumar@bhu.ac.in

by Professor John Rawls in his massive book, 'A Theory of Justice'.

KEY WORDS : Utilitarianism; Liberalism; Justice as fairness Meritocracy; Entitlement Theory of Justice.

I. INTRODUCTION

Professor John Rawls is one of the eminent philosophers of the 20th century. Professor NE Simmonds writes, "John Rawls's massive book "A Theory of Justice" provides the most influential alternative to utilitarianism in present-day jurisprudence and political theory"[1]. Professor NE Simmonds, in his 1st edition of 'Central Issues of Jurisprudence', writes that Rawls rejected utilitarianism on two grounds:

1. Utilitarianism ignores the distinctness of a person and converts what is moral into political.
2. Utilitarianism understands rights in terms of good.

Rawls adhered to Kantian principles; thus, similar to Kant, he contended that the concept of right takes precedence over the notion of good. In Chapter 7 of his book "A Theory of Justice," Rawls discusses goodness in terms of rationality. Additionally, he appears to be influenced by Aristotelian concepts. Rawls's understanding of duties is fundamentally rooted in justice, rationality, and consent. He posits that justice is indifferent to moral deserts and remains neutral among competing conceptions of the good. Rawls appears to reject obligations rooted in meritocracy, aristocracy, and feudalism, instead advocating for responsibilities based on consent, distributive justice, and liberalism. He asserts that we are born as unencumbered selves, suggesting that we are only accountable for duties we have agreed to undertake. Furthermore, Rawls contends that we do not merit our talents, intelligence, or natural abilities; rather, he believes that such attributes are contingent upon chance.

1 NE Simmonds, Central Issues in Jurisprudence 39 (Eastern Book Company, Lucknow, 2003)

In the opening chapter of his book, Rawls introduces the concept of justice as fairness. He asserts that "justice is the first virtue of social institutions, akin to truth in a system of thought. Any theory, no matter how elegant or concise, must be dismissed or revised if it is proven to be untrue. In the same vein, laws and institutions, irrespective of their efficiency or well-structured nature, must be amended or abolished if they are unjust. Each individual has an inviolability grounded in justice that cannot be overridden by the welfare of society as a whole. Consequently, justice maintains that the loss of freedom for some cannot be justified by a greater benefit experienced by others." In this context, Rawls critiques utilitarianism and aligns himself with Kant's perspective by treating individuals as ends in themselves. He even seeks to establish the connection between the Kantian framework and his theory of justice, articulated as "Justice as Fairness," in chapter 4 of his book, which is subtitled "The Kantian Interpretation of Justice as Fairness." Additionally, Rawls explores natural duties in chapter 4, "Duties and Obligations" in chapter 6, and the notion of goodness as rationality in chapter 7.

Rawls believed that behind the veil of ignorance, following two principles of justice would emerge as a result of contract :

1. The first principle of justice, which is also known as the libertarian principle of justice. It assures equal fundamental liberties for all citizens, such as freedom of speech and religion. These principles have an overriding effect on utilitarian calculation and general welfare.
2. The second principle of justice is known as the equality principle. This principle is also known as the "difference principle". The principle asserts that social and economic inequalities can be deemed justifiable only to the extent that they benefit the least advantaged members of society. Under this principle, Rawls emphasised distributive justice. Rawls believed that we no more deserve our talents and abilities than we deserve our parents' fortune, emphasising that both are

equally irrelevant from the point of view of justice.[2] Rawls believed that under the veil of ignorance, people would follow the maximin rule when making decisions. The maximin rule will choose the alternatives that have the best worst outcomes.

II. RAWLS'S NOTION OF DUTIES

Rawls believed that first, we have to agree on the principles for the basic structure of the society. Then, we have to agree on the principles of individuals and the principles of the law of nations. Lastly, we have to adopt priority rules.[3] Rawls argues that, while it is feasible to prioritise many of the natural duties ahead of those related to the basic structure without significantly altering the underlying principles, the order in either situation demonstrates that obligations are based on principles governing social forms. Specific natural duties also rely on these principles, such as the obligation to support just institutions. Therefore, it appears more straightforward for individuals to adopt all principles after establishing those for the basic structure.[4] Thus, Rawls argues that in most cases, the principles for duties and obligations should be settled upon after those for basic structure.

In his discourse on the principle of fairness, John Rawls articulates that this principle mandates an individual to fulfil their obligations as delineated by institutional rules under the fulfilment of two specific conditions.

a. The institution can be characterised as just, or equitable, in that it adheres to the two fundamental principles of justice.[5]

---

2 NE Simmonds, *Central Issues in Jurisprudence* 43 (Eastern Book Company, Lucknow, 2003)

3 John Rawls, *A Theory of Justice* 110 (Universal Law Publishing Company, private limited, Delhi, 2008)

4 *ibid*

5 John Rawls, *A Theory of Justice* 112 (Universal Law Publishing Company, private limited, Delhi, 2008)

b. An individual has consciously embraced the advantages of the arrangements or has leveraged the opportunities available to advance their interests.[6]

Therefore, Rawls argues that it is fundamentally untenable to hold that one can have an obligation to autocratic and arbitrary forms of government. The necessary foundation for such obligations does not exist, regardless of how they may be articulated, and obligatory ties inherently require just institutions, or at least those deemed reasonably just given the circumstances. Consequently, it is misguided to argue against justice as fairness and contract theories on the grounds that they imply citizens are obligated to comply with unjust regimes that either coerce their consent or gain their tacit acquiescence through more subtle methods.[7] Rawls mentioned that Locke was the object of this mistaken criticism, which overlooked the necessity for certain background conditions.

Rawls tried to distinguish between obligations and natural duties. He mentioned that there are several characteristics of obligations which distinguish them from other moral requirements, such as :

1. Obligations emerge from our voluntary actions, which can manifest through explicit or implicit understandings, such as promises and agreements. However, it is critical to note that these obligations do not arise simply from the acceptance of benefits.

2. The nature of obligations is invariably delineated by an institution or practice, whose normative rules specify the expectations of conduct that individuals are required to fulfill.

3. Obligations are typically owed to specific individuals, particularly those who collaborate to uphold the particular arrangement in question.

---

6 *ibid*

7 *ibid*

Rawls tried to make us understand through an example, "Consider the act of running for and holding public office within a constitutional regime. This endeavour generates certain obligations, specifically the duty to fulfil the responsibilities associated with the office. These responsibilities define the essence of these obligations. It is important to recognise that while these duties are not inherently moral in nature, one may still have a moral reason, based on principles of fairness, for fulfilling them. Furthermore, an individual who assumes public office bears a responsibility to their fellow citizens, whose trust and confidence they have sought, and with whom they collaborate in the governance of a democratic society. Similarly, as Rawls suggests, we assume obligations not only when we marry but also when we accept positions of judicial, administrative, or other forms of authority. We acquire these obligations through promises and tacit understandings, and even in engaging in a game, we take on the obligation to adhere to the rules and to exhibit good sportsmanship."[8] Rawls believed that all these obligations are covered by the principle of fairness.

Rawls again, writing about the natural duties, mentioned that, "In contexts where all obligations are evaluated through the lens of fairness, one can identify a myriad of natural duties that encompass both positive and negative dimensions."[9] Rawls admitted that he didn't attempt to bring all these duties under one principle. He gave the following examples of natural duties:

1. The ethical obligation to assist individuals in need or in peril, contingent upon the capacity to do so without incurring excessive personal risk or loss;
2. The duty to refrain from inflicting harm or injury upon others;
3. The duty to avoid causing unnecessary suffering.

---

8 John Rawls, *A theory of justice* 113 (Universal Law Publishing Company private limited, Delhi, 2008)

9 *Id* at 114

According to Rawls, the duty number "1", i.e, the duty of mutual aid, is a positive duty (it is a duty to do something good for another). The last two duties, i.e duties number '2' and '3', are negative duties. (They require us not to do something that is bad). In distinguishing between positive and negative duties, Rawls mentioned that the distinction between positive and negative duties is important only in connection with priority, and he emphasised that negative duties have more weight than positive ones.

Rawls mentioned that Natural duties differ from obligations because they apply to us regardless of our choices. They are not linked to institutions or social customs, and their meaning is not defined by these rules. For example, we have a natural duty not to be cruel and to help others, whether or not we have agreed to do these things. Saying we have not promised not to be cruel or to help is not a valid excuse. A promise not to kill is often unnecessary and does not create a moral obligation where one did not exist before. Such a promise might be appropriate only in special cases where there is a right to kill, like in certain just war situations.

Rawls highlighted an important aspect of natural duties: they apply to everyone, regardless of their roles or relationships. They exist between all people as equals with moral worth. In this sense, the natural duties are generally owed to definite individuals and persons. Rawls mentioned that, "This feature in particular suggests the propriety of the adjective 'natural'. One aim of the law of nations is to assure the recognition of these duties in the conduct of states."[10]

From the perspective of justice as fairness, Rawls believed that a fundamental natural duty is the duty of justice. This obligation compels us to support and adhere to just institutions that govern us. Additionally, it binds us to advocate for establishing just arrangements that are not yet in place, provided that doing so does not impose

10 John Rawls, *A Theory of Justice* 115 (Universal Law Publishing Company, private limited, Delhi, 2008)

excessive costs on ourselves. Rawls mentioned that, "if the basic structure of the society is, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do their part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise."[11]

Thus, the principles of natural duty come from a contract-based viewpoint but don't require any consent or voluntary action to be valid. These principles apply to individuals and institutions and would be recognized in a hypothetical situation where agreements are made. Since they don't rely on any binding or consensual actions, they are unconditional. Obligations, however, usually depend on voluntary actions, as stated in the second part of the principles.

Rawls noted that the principle of fairness can establish a connection to existing just arrangements, suggesting that the obligations it encompasses can reinforce a bond that originates from the natural duty of justice. Therefore, an individual may hold both a natural duty and an obligation to comply with an institution and fulfill their role within it.[12] It is important to recognize that there are various ways in which one may be bound to political institutions. Generally, the natural duty of justice is more fundamental, as it binds all citizens and does not require any voluntary acts for its application. In contrast, the principles of fairness bind only those who occupy public office or, conversely, those who, being in more advantageous positions, have advanced their interests within the system. This introduces another aspect of noblesse oblige: specifically, that individuals with greater privilege tend to acquire obligations that connect them even more strongly to a just scheme.

Rawls believes that once we choose the principles that define our requirements, we don't need to add anything else to explain permissions. He further stated that permissions are actions we are

11 *ibid*

12 *Supra* note 13 at 116

free to do or not do, as they don't violate any obligations or duties. When looking at permissions, we focus on the ones that are important morally and how they connect to duties and obligations. He asserted that many of these actions are often unimportant or trivial from a moral standpoint.

Rawls emphasised that, "but among permissions is the interesting class of supererogatory actions. These are acts of benevolence and mercy, of heroism and self-sacrifice. It is good to do these actions, but it is not one's duty or obligation. Supererogatory acts are not required, though normally they would be if it were not for the loss or risk involved for the agent himself. A person who does a supererogatory act does not invoke the exemption that natural duties allow. For while we have a natural duty to bring about a good day, say, if we can do so relatively easily, we are released from this duty when the cost to ourselves is considerable."[13] Rawls further emphasised that supererogatory acts raise fundamental questions for ethical theory. It seems that classical utilitarianism struggles to account for such acts, suggesting that we are obligated to perform actions that yield a greater good for others, regardless of the cost to ourselves, as long as the total benefits surpass those of the alternative actions available. Rawls stated that there is no equivalent to the exemptions found in the formulation of the natural duty, and he concludes that some actions that justice as fairness categorises as supererogatory are indeed included in the formulation of natural duties.

III. Criticism of Rawls's notion of Duties

Professor Michael Sandel criticises Rawls for basing his political philosophy on an untenable metaphysics of the self. He argued that if we ignore positive claims about what people deserve based on Rawls's ideas, then we should also reject the idea that criminals deserve punishment for their actions. According to Rawls's arguments, it seems unreasonable to consider a "criminal character" simply as

13 *Supra* note 13 at 116

something people are born with or as a result of negative social influences. Instead, the costs related to crime should be shared by the whole community, not just the criminals. According to Professor Michael Sandel, Consent is not an essential prerequisite for moral obligations. When mutual benefits are sufficiently evident, the moral claims of reciprocity may be upheld even in the absence of explicit consent. Sandel believes that obligations exist beyond consent. Though liberals like Rawls believe that obligations can arise only in two ways– as natural duties we owe to human beings and as voluntary obligations we incur by consent. They believe that we are born as an unencumbered self; therefore, we are not liable for the acts of our ancestors. We are only liable for such acts for which we have given consent. Sandel stated that natural duties are universal. We owe them to persons as persons, as rational beings. They include the duty to treat persons with respect, to do justice, to avoid cruelty, and so on. Since they arise from autonomous will (Kantian notion of freedom) or from a hypothetical social contract (Rawls), they do not require an act of consent. Sandel emphasised that, unlike natural duties, voluntary obligations are specific rather than universal, originating from consent. These obligations focus on fulfilling particular duties toward the individuals for whom we have granted our consent. He argued that liberal justice necessitates that we respect people's rights rather than actively promoting their well-being. Whether we should care about others' well-being depends on the agreements we have made and the people involved. Professor Michael Sandle seems to follow the notion of duties as propounded by the jurists of the historical school of Jurisprudence like Edmund Burke, Herder and Karl Von Savigny. Historical jurists emphasised particular duties, duties based on romanticism, duties based on emotions, and duties based on customs and history. Therefore, the notion of duties as propounded by Savigny is also a criticism of Rawls's notion of duties.[14]

14 See also, Krishna Kumar, "*Applicability and Relevance of Savigny's Volkgeist Theory in the Contemporary World*", *Vol. 03 No. 1 &2 MSLJ 26-33 (2023)*

Robert Nozick proposed "the entitlement theory of Justice", giving more importance to individuals' autonomy and liberty, personal choice and political freedom. Being libertarian, he supports laissez-faire capitalism, the free market, and private ownership. Despite being a disciple of John Rawls, he rejects Rawls's notion of the patterned conception of justice. Unlike Rawls, who believed that we don't deserve our natural abilities and talents, Nozick believed that we own our body, our skills and abilities. He believed that all rights are negative. Therefore, it is the duty of another person not to interfere with the rights of another person. He follows the dignity theory of Immanuel Kant, which states that one should treat human beings as ends in themselves, and therefore he also rejected utilitarian's notion of duties, which treat human beings as a means to a certain end. Robert Nozick emphasised that rights cannot be overridden with any amount of justification. Like Kant, he also emphasised that right is prior to good.

IV. CONCLUSION

Professor Wayne Morrison has rightly stated that:

> *"The American political theorist John Rawls begins his highly influential A Theory of Justice (1971) with the argument that social arrangements in modernity require legitimacy. Even if the arrangements of a society were efficient and perfectly logically arranged, that society does not satisfactorily express human aspirations unless we can defend its institutions as just. Moreover, ' only in the social union is the individual complete. A fully satisfying existential life requires justice. But an obvious problem arises: how are we to recognise whether the arrangements of any particular social ordering are just or unjust? Rawls's intellectual predecessors are Kant (who provides, among other things, the idea of the primacy of the right over*

> *the good, and the regulative idea of the social contract) and John Stuart Mill (who provides the spirit of tolerance)"*[15].

Wayne Morrison further emphasised that, " as a foundation for agreeing on the principles of justice, Rawls replaces the utilitarian model of the ideal spectator with the idea of agreeing to abide by decisions made behind a veil of ignorance."[16] Thus, Rawls asked us to follow our duties based on the contract that we have made under the veil of ignorance. Rawls argued that justice is neutral between rival conceptions of good. The following were four rival theories of the distribution of justice:

1. Feudal or Caste system: Rawls rejected this conception of distribution of justice because distribution was based on a fixed hierarchy based on birth.

2. Libertarian: Rawls contended that individuals do not deserve the fortunes, talents, or natural abilities bestowed upon them by their parents. Libertarians advocate for a free market that emphasizes formal equality of opportunity. However, Rawls argues that the arbitrary nature of the natural distribution of talents should compel us to view these abilities as resources to be utilized for the benefit of all. While Rawls acknowledges that the libertarian theory of justice allows everyone to compete and strive, he highlights that, in practice, opportunities may not be truly equal. Granting everyone access to the race is a positive step, but if participants begin from different starting points, the race cannot be considered fair.

3. Meritocratic According to the meritocratic view, the way income and wealth are distributed in a free market is

---

15 Wayne Morrison, *Jurisprudence: from the Greeks to Post Modernism* 392 (Routledge, 711 Third Avenue, New York, 2016)

16 *Id* at 393

considered just, but this is only true if everyone has equal opportunities to develop their talents. Rawls believes that while the meritocratic view addresses some morally arbitrary advantages, it still falls short of what justice truly means. Even if we manage to bring everyone to the same starting point, it becomes quite predictable who will win the race—like the fastest runner. But being the fastest runner isn't completely due to individual effort; it is influenced by factors that are not in our control. This is similar to how someone might come from a wealthy family. Rawls argues that the meritocratic system still allows for wealth and income distribution to be shaped by the natural distribution of talents and abilities.

4. Rawls also opposed the utilitarian notion of justice because utilitarianism ignores the distinctness of a person and converts what is moral into political. Moreover, they used persons as a means to promote utility, considering good prior to right.

John Rawls argued that his difference principles effectively avoid basing the distribution of income and wealth on morally arbitrary factors, such as the accident of birth or social advantages. He challenged the common belief that resources should be allocated according to moral deservingness, which he saw as flawed. Instead, Rawls proposed that justice should be conceived as fairness, emphasising a distinction between "entitlement to legitimate expectations" and "moral deserts." This redefinition prioritises equitable distribution over merit-based allocation. Professor Michael Sandel writes, "Unlike a desert claim, an entitlement can arise only once certain rules of the game are in place. It can't tell us how to set up the rules in the first place."[17] Rawls contends that distributive justice should not be viewed as a means of rewarding virtue or moral merit. Rather, it centres on fulfilling the legitimate expectations that emerge

17 Michael Sandel, *Justice: What's the Right Thing to Do* 160 (Penguin Books, United Kingdom, 2010)

once the rules of the social contract are established. Once the principles of justice delineate the terms of social cooperation, individuals are entitled to the benefits they have earned under these rules. Therefore, if the tax system mandates that they contribute a portion of their income to assist the disadvantaged, they cannot justifiably claim that this obligation deprives them of something they morally deserve. Professor Ronald Dworkin comments on Rawls's 'A Theory Of Justice', "No theorist has made a greater contribution to legal philosophy in modern times than the political philosopher, John Rawls.[18] I offer you a confession, but with no apology. Each of us has his or her own Immanuel Kant, and from now on, we will struggle for the benediction of John Rawls. After all the books, all the footnotes, all the wonderful discussion, we are only just beginning to grasp how much we have to learn from that man."[19]

18 Ronald Dworkin, Justice in Robes 34 (Harvard University Press, Cambridge, 2006),

19 Ronald Dworkin, Justice in Robes 261 (Harvard University Press, Cambridge, 2006)

MARITAL RAPE IN INDIA: THE LEGAL PARADOX OF CONSENT WITHIN MARRIAGE

JUGAL KISHOR DWIVEDI*

ABSTRACT : The status of marital rape remains conflicting inside India because the law acknowledges sexual assaults within marriage but refuses to create criminal laws against it. This research investigates the relevant legal structure contained in both the Bhartiya Nyaya Sanhita, 2023 and the Protection of Women from Domestic Violence Act, 2005, which display an explicit exemption from criminal prosecution of non-consensual sexual activity inside marital relationships. The article dedicates comprehensive attention to judicial progress regarding this issue through evaluations of crucial rulings from the Gujarat and Kerala High Courts, along with Uttarakhand High Court decisions, while discussing the Supreme Court's endorsement in the Independent Thought case. This comprehensive analysis underscores the evolving legal landscape and its implications.

The article analyzes marital consent misunderstandings in law due to circular logic, which makes it extremely difficult to prove non-consent. The research demonstrates that victims sustain extreme physical and mental consequences that result in depression, PTSD, and suicidal thoughts, although few reports have been documented. The paper explains the complexities of proving marital rape and examines both India's legal framework and global perspectives on this issue.

---

* LL.B.(Hons.) VI Semester (2024-25), Faculty of Law, Banaras Hindu University, Varanasi. Email : *jkdwivedi2002@gmail.com*

The article examines the potential risks associated with false reporting, utilizing data from the National Crime Records Bureau and considering Supreme Court decisions regarding the fear of misuse. The analysis starts by reviewing international viewpoints together with Justice Verma Committee recommendations and continues by evaluating *Hrishikesh Sahoo versus State of Karnataka,* Supreme Court, which serves as a vital constitutional assessment. The Supreme Court of India will take on a crucial legal dispute in *Hrishikesh Sahoo versus the State of Karnataka.* This case evaluates how marriage exemptions affect basic human rights when viewed through equality principles and bodily independence alongside dignity protection. The decision made in this context could have profound effects on these essential rights within society.

KEY WORDS : Marital rape exception, Consent conundrum, Judicial recognition, False allegations, Evidentiary challenges.

I. INTRODUCTION

Few unresolved legal matters exist in modern Indian criminal law that create as much debate as marital rape. While India has improved its understanding of gender-based violence, the legal system upholds a unique position when it comes to marital consent to sexual relations. This article investigates the existing legal uncertainties about marital rape in India by analyzing court judgments together with deficiencies in legislation, followed by their impact on women's basic rights and their holistic health.

II. LEGAL FRAMEWORK: THE CONSPICUOUS ABSENCE

The legal framework in India explicitly acknowledges marital rape but refuses to establish it as a criminal offense. The Bhartiya Nyaya Sanhita, 2023 (old the Indian Penal Code, 1860), does not have a separate provision dedicated to marital rape. Exception 2 of Section 63 of the Bhartiya Nyaya Sanhita provides that "sexual

intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." Under the Protection of Women from Domestic Violence Act, 2005, legal protection for sexual abuse suffered by married women exists, yet such cases remain without criminal consequences. The legislative text does not explicitly state what constitutes marital rape by classifying sexual abuse as part of domestic violence categories. Such violations hold the status of civil wrongs and not criminal offences under this classification system.

III. JUDICIAL EVOLUTION: INCREMENTAL RECOGNITION

Despite legislative inertia, Indian courts have incrementally recognized the severity of marital rape through landmark judgments. The Gujarat High Court explicitly acknowledged marital rape as a form of cruelty, signaling judicial recognition of its harmful nature.[1] A watershed moment occurred in 2017 when the Supreme Court partially addressed the issue by invalidating the marital rape exception for wives between 15 and 18 years. However, this protection was not extended to adult women in marriages.[2]

The Kerala High Court further expanded judicial recognition in a 2021 judgment, characterizing marital rape as matrimonial cruelty and a valid ground for divorce. The court took cognizance of the wife's allegations of "being subjected to unnatural sex many times" and "forced sex when she was sick, bedridden, and even on the day when his mother passed away."[3]

Currently, the Supreme Court is deliberating on a direct challenge to the marital rape exception in *Hrishikesh Sahoo v. State of Karnataka*[4], which raises fundamental constitutional questions about equality, dignity, and privacy within marriage.

---

1 *Nimeshbhai Bharatbhai Desai v. State of Gujarat* 2018 SCC On Line Guj 732

2 *Independent Thought v. Union of India* (2017) 10 SCC 800

3 Mat. Appeal Nos. 151/2015 and 179/2015

4 https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception/

IV. IN ABSENCE OF STATUTE: AUTHORITATIVE DEFINITIONS OF MARITAL RAPE

The lack of a marital rape definition in Indian statutory law can be clarified through authoritative legal sources which provide conceptual frameworks. The European Institute for Gender Equality defined marital rape as "Non-consensual vaginal, anal or oral penetration of the body of another person where the penetration is of a sexual nature, with any bodily part or with an object, as well as to any other non-consensual acts of a sexual nature, by a spouse or ex-spouse or by a former or current partner with whom a victim of rape is or has been living in a partnership recognised by the national law."[5]

The *UN Human Rights Council*, (A/HRC/47/26) in its report, recommends that states ensure that rape, including marital rape, is characterized as "a crime against the right to personal security and physical, sexual and psychological integrity," and emphasizes that the definition should be "based on the lack of consent and took into account coercive circumstances."[6] The Harvard Human Rights Journal (2019) describes marital rape as "unwilling sexual intercourse between a husband and a wife."[7] The key components identified in these definitions emphasize both the marital relationship between the victim and the perpetrator as well as the total lack of consent.

V. THE CONSENT CONUNDRUM

Consent functions as the fundamental legal issue in this dispute. Judicial decisions from recent times establish that marriage provides a legal inference of consent. The Uttarakhand High Court declared in July 2024 that any sexual behavior performed during marriage is

5 https://eige.europa.eu/publications-resources/thesaurus/terms/1397?language_content_entity=en

6 https://digitallibrary.un.org/record/3925615/files/A_HRC_47_26-EN.pdf

7 https://journals.law.harvard.edu/hrj/2019/01/marital-rape-a-non-criminalized-crime-in-india/

presumed to have consent; therefore, it cannot be classified as an offence, regardless of its potential classification as "unnatural."[8] Similarly, the Madhya Pradesh High Court reaffirmed that marital consent extends to all forms of sexual activities between spouses, provided these activities are consensual.[9] The legal system establishes a circular reasoning based on marital consent, which renders the proof of absent consent virtually impossible to demonstrate.

VI. HEALTH IMPACT: THE HIDDEN BURDEN

The destructive mental effects from marital rape surpass the destructive outcomes of physical force. Studies performed throughout India have shown that marital rape leads to noticeable psychological damage based on statistical research. Seven out of eight studies focusing on depression discovered that marital rape has a significant impact on the mental health of victims[10]. The research on Post-Traumatic Stress Disorder discovered connections between traumatic experiences of marital rape.[11]

The psychological distress experienced by women who face marital rape is greater than the distress levels of women assaulted by either strangers or acquaintances. Research from America and other nations with established marital rape anti-legalization policies reveals women raped within their marriages develop more severe anger, depression, and suicidal tendencies relative to devotees attacked by foreign victims.[12] Abuse victims experience more severe trauma because of their enduring mistreatment, the trusted nature of their spouse, and the refusal of legal authorities to recognize their distress.

---

8 Dr. *Kirti Bhushan Mishra v. State of Uttarakhand And Anr* (2019) 08 UK CK0023

9 *Umang Singhar v. State of Madhya Pradesh and Ors*. (2023) SCC Online MP3221

10 https://pmc.ncbi.nlm.nih.gov/articles/PMC10021972/

11 Ibid

12 Ibid

The difficulty for survivors to seek help increases their mental health burden. Research indicates that sexual intimate partner violence victims in India report treatment help to only 24-26% of the population, and authorities receive intervention only from 2-4% of victims[13]. Survivors avoid reporting for two main reasons: public disgrace combined with family restrictions and financial dependency, and inadequate legal status in the country. Victims who do not disclose their abuse as well as seek proper intervention end up with worsened mental health problems, which increase their exposure to symptoms of anxiety and depression.

Reviewing the physical along with psychological effects of marital rape remains poorly understood by society. Research reveals alarming statistics:

- Study findings show that Indian intimate partners employ sexual coercion in rates between 9% and 80%, while marital rape occurs between 2% and 56% of cases.[14]
- Research data indicates that worldwide, about 736 million women have suffered from partner violence.[15]
- During 2023, approximately 51,100 women lost their lives because of violent actions from family members or romantic partners.[16]

The physical effects of marital rape lead to genital harm, vaginal bleeding, and urinary tract infections and produce both undesired pregnancies and the transfer of sexually transmitted infections. When women suffer abuse from intimate partners, their experience of psychological damage leads to depression and PTSD alongside anger and thoughts of suicide, which appear more frequently rather cases

13 Ibid

14 Ibid

15 https://www.unwomen.org/en/articles/facts-and-figures/facts-and-figures-ending-violence-against-women

16 Ibid

of assaults by strangers. Data from the National Commission for Women (2024) shows domestic violence makes up 24% of all complaints (6,237) out of 25,743 total cases, where Uttar Pradesh leads as the prime source area, followed by Delhi, Maharashtra, and Bihar.[17]

VII. THE JUSTICE VERMA COMMITTEE RECOMMENDATIONS

Following the 2012 Nirbhaya incident, the Justice J.S. Verma Committee recommended comprehensive reforms, including:

1. Removal of the marital rape exception
2. Explicit specification that marital relationships cannot constitute a valid defense against rape
3. Prohibition against considering marriage as a mitigating factor in sentencing

The Committee emphasised that "marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife." Despite these recommendations, the Criminal Amendment Act of 2013 conspicuously failed to criminalize marital rape.

VIII. CONCERNS ABOUT FALSE ALLEGATIONS IN THE INDIAN LEGAL CONTEXT

(i) The Prevalence of False Rape Cases

The criminalization of marital rape creates serious issues due to potential abuse, considering the existing statistics on false rape claims in India. The data from the National Crime Records Bureau (NCRB) for 2020 shows that less than 8% of all investigated rape cases turned out to be false[18]. The actual situation differs when we examine the

---

17 https://economictimes.com/news/india/uttar-pradesh-tops-list-of-domestic-violence-cases-in-2024-ncw/articleshow/116881778.cms

18 https://www.jcdr.net/articles/PDF/17942/62489_CE%5BRa1%5D_F_(IS)_PF1(HB_KM)_PFA(OM)_PN(KM).pdf

statistics at a regional level. The Delhi Commission for Women assessed that 53.2% of rape cases documented throughout April 2013 until July 2014 in Delhi ended up being unfounded[19]. BBC reporting established that more than fifty percent of reported rapes in Delhi during that period turned out to be "false."[20]

The Supreme Court, in the case of *Rakesh Walia v. State of NCT of Delhi,* has expressed growing concern about false rape allegations in several landmark judgments. The Court dismissed a rape case against a 64-year-old former Indian Army officer after discovering that the 39-year-old married woman accuser had filed eight similar fake cases in various Delhi police stations since 2014.[21] The bench termed this pattern an "abuse of the process of law." Back in November 2024, the Supreme Court raised concerns about what it considered an escalating issue of women who file rape allegations against former sexual partners after their relationships become strained.[22] Justice B.V. Nagarathna and Justice N. Kotiswar Singh of the two-judge bench showed their frustration toward women who use criminal statutes for rape by claiming marriage opportunities after their romantic relationships break down.[23]

IX. IMPLICATIONS FOR MARITAL RAPE CRIMINALIZATION

The data about marital cases, along with false sexual assault reports, increase worries about what might happen if governments make marital rape a prosecutable offense. The evidence collection process inside marital relationships becomes harder than standard rape investigations, thus making it challenging for innocent partners to clear

---

19 Ibid

20 https://www.bbc.com/news/magazine-38796457

21 https://timesofindia.indiatimes.com/city/delhi/sc-learns-woman-filed-8-similar-fake-cases-clears-ex-army-officer-of-rape/articleshow/118690416.cms

22 Mahesh Damu Khare v. State of Maharashtra & Another, 2024 INSC 897

23 Ibid

their names. The marital intimacy with its private nature makes it harder to differentiate between consensual sexual acts and non-consensual acts, thus exposing spouses to a higher risk of false accusations.

X. EVIDENTIARY CHALLENGES AND IMPLEMENTATION CONCERNS

The argument against criminalizing marital rape includes multiple real-world difficulties.

(i) Evidentiary Hurdles

- The forensic investigation fails to distinguish between consensual marital sex and cases of rape
- Absence of physical injuries in many cases
- The timing when consent was revoked presents an unclear matter for determination

These evidentiary challenges become even more complex in light of the data on false allegations. While the Supreme Court in the case of *State of Uttar Pradesh v. Pappu @ Yunus & Anr* (2005) (3) SCC 594 has established that the absence of injuries does not disprove rape, this creates particular evidentiary ambiguity in marital cases where the burden of proof could be especially difficult to establish.

(ii) Institutional Concerns

- Potential misuse as "an easy tool for harassing husbands"
- The challenge of recording consent during marital sexual activities appears impractical.
- Outside social expectations affect both reporting cases to police and the decisions made by legal authorities when handling such cases.

The false sexual assault charge against Delhi estate agent Yogesh Gupta demonstrates how false allegations fundamentally affect

people who become victims of such erroneous claims[24]. The court evidence showing his innocence failed to protect Gupta from eight months of public disgrace during the investigation process until the accuser finally admitted making up the false claim. False marital rape accusations would create equal amounts of ruin to families and reputations until the truth emerges about the charges.

It is also unreasonable to expect married couples to sign consent papers before all intimate moments because evidence will be needed to defend against potential marital rape accusations. This requirement creates an impractical and unwieldy procedure for married couples regarding their natural intimacy needs, along with seeking solutions for consent issues in marriage. Medical evidence raises distinctive challenges because consensual sexual intercourse can produce identical physical evidence as cases of non-consensual intercourse do. When marital rape becomes a criminal offense it might lead to such a challenging legal environment where proving innocence becomes extremely complex because marital intimacy takes place behind closed doors.

XI. COMPARATIVE INTERNATIONAL PERSPECTIVE

Countries which make marital rape a punishable offense notice their survivors experience serious mental health concerns where depression, PTSD, and anxiety disorders are more prevalent. The effect of criminalization serves two functions simultaneously: it acknowledges survivor experiences, and it offers possible enhanced access to assistance networks.

XII. CONCLUSION

Marital rape remains a legal paradox in India since the nation accepts the potential for sexual abuse within marriages and prohibits its classification as a punishable offense. The absence of specific

---

24 *State v. Yogesh Gupta* (2016)

legislation for marital rape exists because it exposes a clash between established marital traditions and modern standards of bodily rights and consent. The discussion remains complex because the Indian legal system has records showing many false rape reporting incidents. Guarding real victims of spouse abuse remains the priority, but the law needs protections against its improper application. Evidentiary challenges experienced in standard rape cases would become substantially worse during marital rape proceedings because both the court and investigators must clarify consent or non-consent for sexual intercourse in relationships where it is typically hard to define these boundaries.

India finds itself at a threshold while the Supreme Court considers constitutional challenges against the marital rape exception. Every eye in the nation follows the ongoing *Hrishikesh Sahoo v. State of Karnataka* trial. The State of Karnataka presented the most compelling arguments to overturn the exemption for marital rape in Indian law. The outcome of this pivotal case may finally resolve decades of legal ambiguity and determine whether the constitutional rights to equality, dignity, and bodily autonomy extend within the bounds of marriage. The resolution of this legal paradox will become the standard for women's marriage rights in addition to revealing the national level of commitment toward gender equality and human dignity inside the core of family institutions. The question remains whether Indian jurisprudence will continue to maintain the exceptional status of marital consent or align with global human rights standards that recognize that marriage does not extinguish a woman's right to sexual autonomy.

ODD NUMBERS OF ARBITRATORS AS ORDAINED, OR PARTY AUTONOMY AS SOVEREIGN? RECONCILING ARBITRATION'S FOUNDATIONAL TENSIONS

*ABHISHEK GUPTA**

ABSTRACT : This article critically examines the tension between party autonomy and statutory mandate of odd number of arbitrators under India's Arbitration and Conciliation Act, 1996. It analyses the Supreme Court's landmark rulings demystifying section 10 ranging from MMTC, Narayan Prasad Lohia, which upheld the permissibility of even-numbered tribunals through a party autonomy centric interpretation of Section 10, to Deepashree which offers a balanced approach. The article deconstructs Lohia's flaws, highlighting that it contravenes legislative intent, defies basic principles of statutory interpretation, and renders the office of decisive odd arbitrator a mere formality. Comparative insights from foreign jurisdictions, which permit even-numbered tribunals with safeguards, are contrasted with rigid default rule of statutory odd number. Practical implications like cost efficiency, enforceability, and industry-specific practices are evaluated, revealing a global preference for odd-numbered panels. The article concludes by advocating a hybrid model prioritizing odd numbers as default while allowing deviations with clear tie-breaking mechanisms, thereby balancing arbitration's flexibility with procedural integrity.

---

* B.A. LL.B. (Hons.), VIII Semester, Faculty of Law, Banaras Hindu University, Varanasi, 221005, India. Email: shakuguptaabhishek@gmail.com

KEY WORDS : Section 10, Statutory Odd-Number, Lohia, Deepashree, Party-Autonomy

I. INTRODUCTION

Arbitration, a linchpin of alternative dispute resolution, is a consent-based participative adversarial dispute resolution process built upon the twin pillars of party autonomy and procedural efficiency. It enables the litigants to evade the crisis of the traditional court-based system of justice dispensation where suits lag and appeals drag for years, by providing a tailored approach to justice dispensation earmarked with ample party autonomy in selecting the procedure, composition, qualification and numbers of the Arbitrators in the Tribunal. One of the most debated questions in this domain is whether parties should have unrestricted freedom to determine the number of arbitrators including even-numbered Arbitral tribunals or whether statutory mandate requiring an odd-numbered panel better serve arbitration's objectives. This issue strikes at the heart of arbitration's flexibility, enforceability of arbitral award, and the practical functionality of the entire arbitration regime in this 21st century wherein the traditional court-based adversarial system is already on the verge of a breakout and can't afford to have any addition of private disputes to its already swollen docket.

While the Global position reflects that some arbitration laws and institutional rules mandate an odd-numbered tribunal to avoid deadlocks, some argue that party autonomy should prevail, allowing parties to choose an even number if they mutually agree. The problem is whether a statutory requirement for an odd-numbered tribunal better serves arbitration's efficiency and fairness or whether unrestricted party autonomy aligns more closely with arbitration's essence as a flexible, consensual dispute resolution mechanism. Should legal frameworks prioritize enforceability and decisional certainty, or should parties have the freedom to structure their tribunal as they see fit even at the risk of potential deadlock?

A probe into legal frameworks, institutional practices, and real-world illustrations is crucial to reconcile these competing priorities and assess which approach truly aligns with arbitration's foundational goals viz. speed, fairness, and party-centric resolution.

II. LEGAL DIMENSIONS INVOLVED

India's arbitration regime operates under the statutory mandate of the Arbitration and Conciliation Act, 1996 section 10 of which lays down in unequivocal terms that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number and failing the determination the arbitral tribunal shall consist of a sole arbitrator. The provision is couched in a strong negative mandate giving a prima facie impression of casting a mandatory obligation of an odd number of arbitrators but on account of the absence of any consequences being provided in the Arbitration and Conciliation Act, 1996 for its breach, which is generally considered a hallmark of mandatory provision, a divergent practice of the parties in appointing the even numbers of arbitrators ushered compelling the Hon'ble Supreme Court to interpret the nature of the provision to demystify the mystery of s.10 whether a mandatory or a derogable provision. The first opportunity arose *in Dodsal Private Ltd vs Delhi Electric Supply Undertaking of Municipal Corporation of Delhi*[1] wherein the issue was left unanswered. Again in *M.M.T.C. Ltd. v. Sterlite Industries (India) Ltd.*[2], a division bench of the Hon'ble Supreme Court took the recourse of a conjoined reading of sections 7 and 10 of the Arbitration and Conciliation Act, 1996 to clarify that the number of arbitrators is a procedural matter as sec. 10 being a machinery provision which ought not thwart the object of the Act of implementing the scheme of alternative dispute resolution. The Hon'ble Court observed:

---

1 AIRONLINE 1996 SC 751.

2 (1996) 6 SCC 716.

> "*There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus, the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid.*"[3]

However, the Hon'ble Court seems to be in favor of the statutory odd number as can be reflected from their observation:

> *"In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of Sub-section (1) of Section 10 is satisfied."*[4]

The Controversy was put to rest by the ruling of *Narayan Prasad Lohia v. Nikunj Kumar Lohia*[5], wherein a 3 Judge bench of the Supreme Court clarified that sections 4, 10, and 16 of Arbitration and Conciliation Act, 1996 are part of an integrated scheme conjoined reading of which establishes that sec 10 is a derogable provision and appointment of even number of arbitrators doesn't make the agreement invalid. Composition of Arbitral tribunal is a matter touching the roots of the jurisdiction of the Arbitral Tribunal and which falls for determination of the Arbitral Tribunal itself under section 16

3 *Id.*, Para 9.

4 *Id.,* Para 12.

5 2002 (3) SCC 572.

upon a plea the limitation of which is expressly provided in section 16(2) beyond which the plea of faulty composition entailing no jurisdiction of Arbitral Tribunal is rendered waived in terms of Section 4(a). How can a provision pertaining to a matter waivable in respect of raising an objection be mandatory. The inference is irrefutable that an objection to the composition of the arbitral tribunal is a matter derogable rendering section 10 a non-mandatory and derogable provision despite its strong mandatory colour. In such a situation if the two arbitrators agree and give a common award there is no frustration of the proceedings on account of deadlock or impasse or if there be any deadlock or impasse the arbitrators should then appoint a third arbitrator under s. 11(3) of A&C Act to act as the presiding arbitrator.

The Supreme Court in Lohia's judgment further ruled Sec 10 as mandatory predominantly upon the interpretation accorded to Sec. 34(2)(a)(v) of Arbitration and Conciliation Act, 1996 that it applies only if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and the composition of the arbitral tribunal is in conflict with a provision of Part I with which the parties cannot derogate. The words "failing such agreement" would come into play only if there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure and the composition of the arbitral tribunal or the arbitral procedure was not in accordance with Part I of the said Act. So long the composition of the arbitral tribunal is in accordance with the agreement of the parties, which may even provide for even number of arbitrators despite of sec. 10(1), section 34 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with sec 10(1) for providing even number of arbitrators. Thus, sec 34(2)(a)(v) considers an even-numbered arbitral tribunal constituted in accordance with the arbitration agreement which provides for even number of arbitrators as properly valid despite the fact that it may derogate from the requirement of

section 10(1). A tribunal comprising of even number of arbitrators is contemplated as perfectly valid despite the positive suggestion for an odd-numbered tribunal under section 10(1), this unequivocally elucidates that Section 10 is a derogable provision the waiver of which is possible under sec. 4(a).

The aforementioned interpretation accorded to Section 34(2)(a)(v) was reinforced by the Hon'ble Supreme Court on considerations of public policy that when parties agreed for an even-numbered arbitration consciously which encountered no objection as to the composition during the course of arbitral proceeding, the culmination of the proceedings manifested in form of award can't be abhorred and sought to be set aside by the court u/s. 34(2)(a)(v) as this would in a true sense undermine the public policy and would be most inequitable entailing a colossal waste of time, money and energy spent in the arbitration. Parties can't be allowed to blow hot and cold at the same time, i.e., to proceed with even-numbered arbitration and challenge it if an award comes against him. On the other hand, there would be no waste of time, money and expense if a party, with open eyes, agrees to go to the Arbitration of two persons and then participates in the proceedings and in conflict appoints the 3rd arbitrator.

III. DECONSTRUCTING LOHIA'S JUDGMENT: FLAWS AND FALLACIES

At first impression, the legal position appears to have settled firmly by the authoritative pronouncement of Lohia's judgment. But the judgment is not jurisprudentially sound as a serious flaw breeds deep down in its approach. The interpretation given seems to be in serious defiance of legislative intent underlying section 10, the time-honoured principles of statutory interpretation, reasonably susceptible interpretation of section 10 and the legislative prudence in devising the mechanism of odd numbered tribunal in sections 10 and 11 by rendering nugatory the position of the 3rd arbitrator.

Article 10 of the UNCITRAL Model Law on International Commercial Arbitration confers absolute liberty to parties to determine the number of arbitrators without any fetter of odd numbers. On the other hand, the Arbitration and Conciliation Act 1996 of India has made a deliberate departure from the UNCITRAL model on this aspect. The departure is not by any inadvertence but consciously intended on account of public policy to avoid potential deadlock which may arise in case of even-numbered tribunals owing to which the parties would then be left remediless and would have to start litigation or a fresh arbitration all over again. This would result in a colossal waste of time, money and energy.

Also, Section 10 in clear terms stipulates that the number "SHALL NOT" be an even number and it is settled principle of statutory interpretation ***Absoluta Sententia Expositor non indiget*:** A plain sentence doesn't require interpretation. Unless and until there exists an absolute ambiguity, absurdity, or injustice, it is obligatory to stick to the literal interpretation and not to resort to hypothetical constructions and judicial legislation. The ordinary popular meaning of "SHALL" unequivocally suggests that sec 10 is a mandatory provision from which no departure is allowed whatever hardship may ensue to the parties and of which no waiver is possible.

Also, the interpretation of Lohia on sec 34(2)(a)(v) can by no stretch of imagination be susceptible to that interpretation. Even if the composition is in accordance with the agreement of the parties an award can be set aside if the composition is in conflict with the provisions of Part I of the said Act. The words "failing such agreement" mean failing an agreement that is in consonance with a provision of Part I of the said Act. Mere conformity with the arbitration agreement will not save the composition from the mandatory clutches of section 10 and the consequent award of such tribunal is liable to be set aside u/s. 34(2)(a)(v).

But, the most serious problem with Lohia's judgment lies in the point that it fosters an illusion wherein the two arbitrators can go ahead and if they agree then the appointment of the third arbitrator is a mere formality that has no effect on the award given by two arbitrators in the absence of a third, in such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was none, had differed.[6] This view is in utter disregard to the opinion expressed by the earlier decision of the Constitution Bench in the case of *Bharat Bank Ltd. v. Employees*[7] wherein the award was signed by two members in an Industrial Tribunal comprising of 3 members. The plea that it would not affect the award was not accepted by Justice Mahajan:

> *"It may well have been that the opinion of the third have influenced the other two or the decision arrived at may have been quite different. ... The presence of the third in such a situation may have very vitally affected the result."*[8]

Hence, the holding in Lohia's case is an untenable aberration, unworthy of judicial fidelity.

IV. THE FLIP SIDE: JUDICIAL PRECEDENTS AGAINST LOHIA'S NARRATIVE

The law laid down in *Sri Venkateswara Construction Co. v Union of India*[9] and *Wipro Finance Ltd. v. Sandplast India Ltd. (2006) Raj.* offers a diverse perspective that the parties are at liberty only to appoint odd numbers of arbitrators and if the parties fail to

---

6 Rajinder Sachar, "Some Aspects on Arbitration Law", *ebc-india.com* (2003) PL WebJour 11, *available at* https://www.ebc-india.com/lawyer/articles 608.htm (last visited on 10th May, 2024).

7 1950 SCR 459.

8 *Id.*, Para 46.

9 2001 (3) ALT 59.

provide for an odd number, the arbitral tribunal shall be constituted in accordance with Section 10(2), i.e., by a sole arbitrator.

Also, in *Deepashree, Dr. v. Sultan Chand & Sons*[10] the Delhi High Court clarified that Lohia's judgment is context-specific rendered in a post-award situation wherein the legality of the entire arbitral proceeding was contingent upon the interpretation of the nature of section 10(1) and no interpretation of the nature of section 10(1) in light of section 10(2) at a pre-award pre-appointment stage, in an application under section 11 for the appointment of arbitrator, is pending. The Delhi High Court endorsed the view of the apex court in ***Citi*** *Bank N.V. v. TLC Marketing (2008)*[11] that the constitution of a larger Arbitral Tribunal is neither requisite nor expedient, nor can it be deemed equitable or reasonable in the broader interests of the parties. Such an expansion would impose undue financial burdens, thereby undermining the foundational objectives of the Arbitration and Conciliation Act to deliver a cost-effective and efficient dispute resolution mechanism. Thus, appointment of even number of arbitrators, let's say two, would probably lead to appointment of another arbitrator as an umpire thus inflating the tribunal and expenses of the parties at the same time. So, such even number ought to be considered as no determination leading to appointment of sole arbitrator under sec. 10(2).

Thus, another view appears to be that an arbitration agreement that provides for an even number of arbitrators, will not be void or unenforceable on that count alone. In such a case, that part of the arbitration agreement will be invalid or inoperative being contrary to the mandatory provision of Sec. 10(1) and the operation of Sec. 10(2) will be attracted.

---

10 2008 (4) Arb.LR 94 (Delhi).

11 AIR 2008 SC 118.

V. PRAGMATIC IMPLEMENTATIONAL CONSIDERATIONS AND APPLIED REPERCUSSIONS

After having abundant clarity as to the legal back-and-forth on statutory requirements on number of arbitrators, taking a step back and understanding the practical implications of the issue becomes pertinent.

a) Deliberation on the Merits of Even Numbered Tribunals.

The essence of arbitration lies in its flexibility, party autonomy, and the ability to tailor the dispute resolution process to the needs of the disputing parties. Therefore, party autonomy aligns more closely with the fundamental principles of arbitration than a rigid statutory requirement for an odd number of arbitrators. This autonomy extends to waiving formalities. A mandatory odd-number rule undermines this flexibility. Odd-Number Requirement is a practical safeguard, not a core value, for an odd number of arbitrators helps to avoid deadlocks, which is a practical consideration rather than an intrinsic feature of arbitration.

Also, party autonomy in numbers leads to Cost Savings by generating confidence, for instance in joint venture disputes wherein the parties trust their nominees and prefer cost savings over a permanent third arbitrator, those arbitrators resolve most issues collaboratively, but on few contentious points, the umpire cast the deciding vote.

Also, it leads to faster decisions and is apt for smaller disputes and Industry-specific practices, e.g., maritime arbitration traditions suggest a long-standing tradition of using two arbitrators plus an umpire to resolve disputes. This practice reflects the unique needs of the shipping industry, where speed, expertise, and commercial practicality often outweigh formal procedural rigidity. Even some Bilateral Investment Treaties allow two arbitrators plus an appointing authority to balance state-investor interests. The Court of Arbitration for Sport

(CAS) often uses two arbitrators plus a president, with no deadlock issues.[12]

That's why some legal systems (e.g., Swiss[13], German[14], and Swedish[15] arbitration law) permit parties to agree on an even number of arbitrators, trusting them to manage the risk of a tie (e.g., by allowing a third arbitrator to break a deadlock if needed) supported by a default rule that if parties do not agree, the tribunal shall consist of three arbitrators. Thus, Party Autonomy wherein Parties may agree on an even number (e.g., two or four), but must also specify a tie-breaking mechanism (e.g., an umpire or chair's casting vote) is gaining required acceptance. The statutory odd-number rules are defaults, and not mandates, for most laws (e.g., English Arbitration Act 1996[16], UNCITRAL Model Law[17]) impose an odd-number requirement only when parties fail to agree, reinforcing that party choice comes first.

This is not a recent development. Even early arbitrations often used two arbitrators along with an umpire, suggesting that even numbers can work with safeguards. Berman & Dasser give instances of how medieval European merchant courts (Lex Mercatoria), e.g., Piepowder Courts in England and Hanseatic League tribunals often used two arbitrators (one appointed by each side plus an umpire to break deadlocks).[18] Similarly, Leon Trakman cites Flemish and Italian merchant guilds (12th–15th centuries) resolving disputes via "arbitrators of the trade," with umpires as tie-breakers.[19] One such

12 Code of Sports-related Arbitration, s. 3. *See also* https://www.tas-cas.org/en/general-information/frequently-asked-questions.html.

13 Swiss International Arbitration Law, (Chapter 12 PILA), art. 179(1).

14 German Arbitration Act, s. 1034 ZPO.

15 Swedish Arbitration Act, s. 13.

16 English Arbitration Act, s. 15.

17 UNCITRAL Model Law on International Commercial Arbitration, art. 10.

18 Berman & Dasser, *The 'New' Law Merchant and the 'Old'* (1990).

19 Leon Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983).

example is the Statute of the Staple (1353, England) which required merchant disputes to be settled by two "good men" of the trade, with a mayor or third neutral stepping in if they disagreed.[20]

Even in early English Common Law of Arbitration, the instances legitimizing even numbered tribunals exist in abundance. Sir Edward Coke notes that arbitration agreements frequently appointed two arbitrators plus an umpire, with the umpire acting only if the arbitrators deadlocked.[21] Even Blackstone confirms this practice in commercial disputes.[22]

b) Deliberation on Demerits of Even Numbered Tribunals

A party autonomy-centric approach to composition permitting even numbered tribunals is not a paradise lost as it appears to be. It is imbued with decisional uncertainty, procedural complexity, notoriety of partiality and exponential cost proliferation.

On the other hands a statutory requirement mandating an odd number of arbitrators ensures procedural efficiency, minimizes the risk of deadlock, and enhances the enforceability of arbitral awards in foreign regimes. By preventing evenly split decisions, an odd-numbered tribunal guarantees a definitive outcome, upholding arbitration's goal of finality and avoiding costly delays or re-litigation in appointing a tie-breaker mid-proceeding. Moreover, in two-arbitrator tribunals, each arbitrator is typically party-appointed, raising concerns about "Party arbitrators" favoring their appointer.

Also permitting even numbers of arbitrators for the sake of party autonomy results in the lack of a neutral chair to balance perspectives and a neutral deciding vote in contentious issues, divesting

---

20 27 Edward III, Stat. 2 (1353), in The Statutes of the Realm, vol. 1 (London: Great Britain Record Commission, 1810), 332–34.

21 Sir Edward Coke, *Commentaries on Littleton* (17th century).

22 Blackstone's Commentaries on the Laws of England (1765–1769).

the arbitral proceedings of better deliberation. Studies show that three-member tribunals produce more reasoned awards. Even-numbered tribunals unnecessarily require pre-negotiated tie-breakers, e.g., umpires, adding complexity and instances of post-deadlock interventions, e.g., LCIA Court appointments[23], leading to cost escalations.

The ICC Report highlights that majority of cases used one or three arbitrators, reflecting institutional preference for odd numbers.[24] Also, some jurisdictions refuse to enforce awards from even-numbered tribunals, viewing them as procedurally defective. Enforceability concerns under the NY Convention (Art. V(1)(d)) may arise. Also, statutory requirement of odd numbers aligns with Institutional Best Practices. Institutional rules like ICC Rules (2021, Art. 12(5)); LCIA Rules (2020, Art. 5.8); and SIAC Rules (2016, Rule 8.1), all favour odd numbers. Even some legal systems impose an absolute odd-number rule like England & Wales[25], France[26] and United States[27] in form of sole arbitrator if no agreement; otherwise, one or three. Thus, authorities supporting statutory odd number are ample in number.

VI. CONCLUSION

The debate between party autonomy and statutory requirements for an odd number of arbitrators underscores a fundamental tension in arbitration: flexibility versus enforceability. While party autonomy aligns with arbitration's core principles of consensual

23 The London Court of International Arbitration Rules, 2020, arts. 5.9, 5.10.

24 ICC's Commission Report, "Decisions on Costs in International Arbitration" (2018), *available at:* https://iccwbo.org/wp-content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf.

25 English Arbitration Act 1996, s. 15.

26 French Code of Civil Procedure, art. 1454.

27 Federal Arbitration Act, s. 5.

dispute resolution, statutory safeguards for odd-numbered tribunals mitigate risks like deadlocks, biased decision-making, and enforcement challenges under the New York Convention. Jurisdictions like India, through judicial interpretation, have struck a balance allowing even-numbered panels if parties agree but prioritizing odd numbers as a default to ensure procedural integrity.

While party autonomy is central to arbitration, statutory safeguards for odd-numbered tribunals strike a balance by protecting parties from their own potential oversight or tactical imbalances, ensuring a fair and functional process without unduly restricting their freedom to choose arbitrators. This framework reinforces arbitration's credibility while mitigating risks inherent in even-numbered panels, such as the need for additional tie-breaking mechanisms.

Practical considerations, such as cost efficiency and industry-specific practices (e.g., maritime arbitration), demonstrate that even-numbered tribunals can work with clear tie-breaking mechanisms. However, institutional preferences (ICC, LCIA) and global enforceability concerns overwhelmingly favour odd-numbered panels.

Ultimately, while party autonomy should be respected, statutory odd-number requirements serve as a necessary backstop to uphold arbitration's credibility, finality, and effectiveness. Arbitration thrives when it balances freedom with functionality. Statutory odd-number rules are not a constraint but a reinforcement of arbitration's promise—efficient, enforceable, and equitable dispute resolution. The ideal approach may lie in hybrid models prevalent in some jurisdictions, imposing an odd-number default but allowing deviations in practice, like Singapore[28], and Hong Kong[29] wherein the default rule requires odd number but Parties may agree on an even number if institutional rules permit (SIAC Rules, HKIAC Rules), defaulting to odd numbers

---

28 Singapore International Arbitration Act, s. 9A.

29 Hong Kong Arbitration Ordinance, s. 23.

while permitting deviations where parties explicitly agree, provided safeguards are in place. This ensures arbitration remains both adaptable and reliable, preserving its essence as a party-driven yet legally robust alternative to litigation.

INSIDE THE WEB OF DECEIT UNDERSTANDING CYBER CRIME AND ITS MANY FACES

*AMAN MISHRA**

ABSTRACT: Communication has greatly improved, especially with the invention of the Internet. But along with these improvements, cybercrime—also called e-crime or electronic crime—has become a big problem in today's world. Cybercrime affects countries, businesses, and people everywhere. It has spread to many parts of the world, and millions of people have become victims. Because cybercrime is serious and affects many people globally, it's important to have a clear and common understanding of it to fight it effectively. This study looks at what cybercrime is, the different types, and how it happens. It also discusses the laws in India that are used to fight cybercrime.

KEY WORDS: Cybercrime, Online Fraud, Scams, Data, Privacy

I. INTRODUCTION

Cybercrime is a relatively new type of crime that involves the use of computers, the internet, or other digital technology. According to the Information Technology Act[1], any illegal activity done through these technologies can be considered cybercrime. In today's India, cybercrime has become one of the most common and harmful crimes. These crimes cause serious damage to people, society, and even the

---

* LLB (Hons) II Year, Semester -IV, Faculty of Law, Banaras Hindu University Email ID: *amanbhu86@gmail.com*

1 The Information Technology Act, 2000, (Act 21 of 2000).

government. Often, the criminals hide their real identities and use their technical skills to commit crimes online. Cybercrime includes any activity where a computer or the internet is used to commit a crime, either as a tool, a target, or both. While Indian courts have explained what cybercrime is in some cases, there is still no clear definition of the term in any Indian law or act.

Cybercrime has become a big challenge because our daily lives now depend so much on technology. The use of computers and the internet is growing quickly and is now a major part of everyday life. However, it also opens the door to new types of crimes.

II. CYBER CRIME: A WAY FORWARD

Cybercrime involves using technology to commit traditional crimes like robbery, fraud, or cheating. It can also include planned attacks, such as hacking into a system to disable security before entering a restricted area. These crimes can happen at different levels—by individuals, groups, or even between countries. In the case of a cyberattack on a country, laws or security forces may not always be able to respond effectively, especially when the attack is aimed at political, economic, or military pressure.

Cybercrime can also be completely digital. For example, sharing illegal images, sensitive documents, or stolen data online is a form of cybercrime. There are even organized groups of skilled programmers who sell digital tools or services that can be used for hacking, system attacks, or taking control of computer networks. These services can be sold to anyone—from unknown individuals to government bodies. As we spend more time online, these kinds of crimes are expected to grow.

Even though cybercrime is becoming more common, Indian law still doesn't give a clear legal definition for it. Not even the Information Technology Act of 2000, which deals with cybercrime, defines the term clearly. In general, though, cybercrime means any illegal act done using the internet or computers.

There is no exact legal definition of cybercrime, but the Oxford Dictionary explains it as

"Crimes that are done using computers or the internet."[2]

III. TYPES OF CYBER CRIMES

i. **Child Pornography :** This is one of the most serious types of cybercrime. Criminals use the internet to contact and abuse children. The growth of the internet has made kids easy targets for online predators. These criminals, often paedophiles, create fake identities and enter chat rooms to trick children into trusting them. They try to get personal information and then abuse or exploit the child for sexual purposes.

ii. **Hacking :** Hacking means breaking into someone else's computer or device without permission. The hacker changes the system or settings to gain long-term access or control, all without the owner knowing or agreeing.

iii. **Denial of Service (DoS) Attack :** In this type of attack, the hacker overloads a computer or server with too much traffic or data, making it crash or stop working properly. This blocks other users from accessing the server or website.

iv. **Virus Spread :** This involves putting harmful software like viruses, worms, or logic bombs into someone's computer. These programs can damage or delete data, slow down the system, or stop it from working. Doing this without permission is a crime and is often called computer sabotage.

v. **Computer Forgery :** This refers to creating or changing digital documents or data in a dishonest way to cheat or

---

2 Oxford by Lexico, available at https://www.lexico.com/definition/cybercrime

mislead someone. It's similar to regular forgery but done using computers.

vi. **Credit Card Fraud :** This type of crime happens when someone steals credit card information to make purchases or withdraw money without permission. Cybercriminals often target personal and financial details stored online. Since digital data is so valuable today, stealing it can lead to big financial losses.

vii. **Phishing :** Phishing is when someone pretends to be a trusted person or company to trick people into giving their personal or financial information, like passwords or bank details. This is usually done through fake emails or websites.

viii. **Spoofing :** Spoofing is when a hacker disguises one computer as another to fool the network and gain access to system they shouldn't be able to use. This often involves pretending to be a trusted computer with special access.

ix. **Cyberstalking :** Cyberstalking is when someone follows, watches, or harasses another person online. The stalker collects personal information and uses messages or threats to scare or bother the victim. It invades the victim's privacy.

x. **Threatening :**In this type of crime, the criminal sends abusive or threatening messages through emails or chat rooms to scare or harm the victim emotionally.

xi. **Salami Attack :** In this trick, the criminal makes very small changes to go unnoticed. For example, they might take a tiny amount of money (like ₹ 2.50) from every customer's bank account and put it into their own account. Because the amount is so small, it usually doesn't get noticed right away.

xii. **Email Bombing :** This happens when someone sends a huge number of emails to a person, organization, or server all at once. It can overload the system and make it crash or stop working.

xiii. **Data Diddling :** In this crime, someone secretly changes data before it's processed by a computer and then changes it back afterward to avoid being caught.

xiv. **Virus/Worm Attacks :** Viruses are harmful programs that attach themselves to files or computers. They spread across networks and can change or delete data. Worms are similar, but they don't need to attach to anything. They just keep copying themselves until the system runs out of memory and crashes.

xv. **Logic Bombs :** This type of malware stays hidden in a system and activates only when a certain condition is met—like a specific date or action. For example, the Chernobyl virus only activated on one particular day.

xvi. **Trojan Attacks :** A Trojan is a harmful program that pretends to be normal, safe software. Once installed, it can damage the system or steal data without the user knowing.

xvii. **Internet Time Theft :** This happens when someone uses another person's paid internet connection without permission. The victim may not notice until they see unusual charges. This type of crime is covered under the Bhartiya Nyaya Sanhita[3] and the Indian Telegraph Act[4].

xviii. **Cyberstalking :** Cyberstalking involves repeatedly harassing or threatening someone using the internet. It's like online stalking, where the victim is followed or targeted

3 Bharatiya Nyaya Sanhita, 2023, (Act 45 of 2023).

4 Indian Telegraph Act, 1885, (Act 13 of 1885).

over and over again through messages or threats, making them feel scared or unsafe.

xix. **Cybersquatting :** Cybersquatting is when someone registers a domain name (website address) similar to a business or brand name, hoping to sell it later for a profit. Sometimes, only one letter is changed (called typo-squatting). This is done in bad faith to earn money from the real brand owner.

xx. **Cyber Defamation :** This happens when someone posts false or harmful statements about a person or a company online to damage their image or reputation. When this is done using computers or the internet, it's called cyber defamation.

xxi. **Keystroke Logging :** This is a method used by hackers to secretly record everything a person types on their keyboard. It's often used to steal passwords, login details, or other private information.

xxii. **Data-Driven Attack :** This type of attack looks like normal or safe data but actually contains harmful instructions. When a computer or program processes this data, the attack begins. This can even bypass firewalls and target systems behind them.

xxiii. **DNS Spoofing :** In this type of attack, the hacker tricks the system that matches website names (like www.example.com) to their actual IP addresses. This can lead users to fake or harmful websites without them knowing.

xxiv. **Dumpster Diving :** This involves going through trash or discarded materials to find useful information like passwords, account details, or other sensitive data that people throw away without shredding or destroying properly.

xxv. **Electromagnetic intrusion :** It involves purposely sending strong electromagnetic signals into communication systems to try and trick or confuse the people using them.

xxvi. **Digital Arrest :** Scammers pretend to be the police or government and tell you that you've broken the law and need to pay a fine or face arrest. It's just a trick to steal your money or personal details.

xxvii. **Voice Phishing (Vishing) :** Fraudsters call you, pretending to be from a trusted company (like your bank), and try to get you to share personal information, like your passwords or credit card details.

xxviii. **Ransomware-as-a-Service (RaaS) :** Cybercriminals sell ransomware tools to other hackers, making it easier for anyone to lock your files and demand money to unlock them.

xxix. **Deepfake Crimes :** Hackers make fake videos or audio recordings (called "deepfakes") to trick people, blackmail them, or spread false information.

xxx. **IoT Attacks :** Hackers target smart devices (like cameras, smart fridges, or fitness trackers) to steal your data or take control of your devices.

xxxi. **Cryptocurrency Scams :** Scammers deceive people into investing in fake cryptocurrencies, fake wallets, or fake exchanges to steal their money.

xxxii. **SIM Swapping :** Criminals steal your phone number by swapping your SIM card and use it to hack into your bank or social media accounts.

xxxiii. **Supply Chain Attacks :** Hackers go after companies' suppliers or software providers to break into their systems and cause harm to many businesses at once.

IV. CYBER LAWS IN INDIA

a. Information Technology Act, 2000

India's cyber laws are mainly governed by the Information Technology (IT) Act, 2000. This law was created to make online business (eCommerce) more secure and legally protected. It helps people and companies safely register online records with the government. As technology grew and cybercriminals became smarter, the law was updated several times to deal with new threats and the misuse of technology.

The IT Act provides strong rules and penalties to protect online services like e-governance (government services online), e-banking, and e-commerce. It also covers modern digital devices and communication tools. This act is very important because it guides how Indian laws handle cybercrimes. Some important sections include:

i. **Section 43[5] :** If someone uses or damages a computer, system, or network without the owner's permission, they must pay a fine or compensation.

ii. **Section 66[6] :** If someone intentionally or fraudulently does anything illegal as mentioned in Section 43, they can be jailed for up to 3 years, fined up to ₹ 5 lakh, or both.

iii. **Section 66B[7] :** If someone knowingly receives or keeps a stolen computer or communication device, they can be jailed for up to 3 years, fined up to ₹ 1 lakh, or both.

iv. **Section 66C[8] :** If someone fraudulently uses another person's digital identity—like their password, e-signature, or any other unique ID—they can be punished with 3 years in jail and/or a fine of up to 1 lakh.

5 The Information Technology Act, 2000, (Act 21 of 2000), s. 43.

6 Ibid, s. 66.

7 Ibid, s. 66B.

8 Ibid, s. 66C.

v. **Section 66D[9] :** If someone pretends to be someone else (fake identity) using a computer or communication device to cheat or trick someone, they can be jailed for up to 3 years and may also have to pay a fine of up to ₹ 1 lakh.

a. **Bharatiya Nyaya Sanhita (BNS), 2023 :** The Bharatiya Nyaya Sanhita (BNS), 2023, and the Information Technology Act, 2000, are both used to deal with identity theft and other cybercrimes.

The main BNS sections related to cyber fraud include:

i) Making fake documents (Section 335 of BNS)[10] This covers creating false documents or records.

ii) Using false documents (Section 336 of BNS)[11]

This is about creating or using fake documents to mislead others.

iii) Forgery done with the intent to cheat (Section 336(3) of BNS)[12]

This includes making fake documents specifically to trick or deceive someone.

iv) Harming someone's reputation using fake content (Section 336(4) of BNS)[13]

This deals with damaging someone's image or name by using false or misleading information.

v) Using a fake document as if it's real (Section 340(2) of BNS)[14]

---

9 Ibid, s. 66D.

10 The Bharatiya Nyaya Sanhita, 2023, (Act 45 of 2023), s. 335.

11 Ibid, s. 336.

12 Ibid, s. 336(3).

13 Ibid, s. 336(4).

14 Ibid, s. 340(2).

This is about showing a forged or fake document and pretending it's genuine.

A few important sections one should know is given below:.

Offence	Relevant Section(s)	Penalty
Damage to computer system	Section 43[15] IT Act	Compensation to the affected person and/or imprisonment up to 3 years and/or a fine up to ₹2,00,000
Power to issue directions for blocking information	Section 69A[16] IT Act	As per government order, non-compliance may lead to penalties.
Power to collect traffic data for cyber security	Section 69B[17] IT Act	As per government order, non-compliance may lead to penalties.
Unauthorized access to a protected system	Section 70[18] IT Act	Imprisonment up to 10 years and/or a fine
Penalty for misrepresentation	Section 71[19] IT Act	Imprisonment up to 2 years and/or a fine up to ₹1,00,000
Breach of confidentiality and privacy	Section 72[20] IT Act	Imprisonment up to 2 years and/or a fine up to ₹1,00,000

15 The Information Technology Act, (Act 21 of 2000), s. 43.
16 Ibid, s. 69A.
17 Ibid, s. 69B.
18 Ibid, s. 70.
19 Ibid, s. 71.
20 Ibid, s. 72.

Publishing false digital signature certificates	Section 73[21] IT Act	Imprisonment up to 2 years and/or a fine up to ₹1,00,000
Publication for fraudulent purposes	Section 74[22] IT Act	Imprisonment up to 2 years and/or a fine up to ₹1,00,000
Contravention of the IT Act outside India	Section 75[23] IT Act	As per Indian law, penalties as applicable.
Compensation, confiscation, or penalties	Section 77[24] IT Act	As per court order, it may include compensation or confiscation.
Compounding of offences	Section 77A[25] IT Act	As per court order, it may involve settlement and withdrawal of charges.
Offences by companies	Section 85[26] IT Act	As per court order, it may involve penalties on the company and responsible individuals.
Dealing with Obscene material, Including digital content	Section 294[27] BNS	Imprisonment up to 2 years and/or a fine
Sending defamatory messages by e-mail	Section 356[28] BNS	Imprisonment up to 2 years and/or a fine

21 Ibid, s. 73.
22 Ibid, s. 74.
23 Ibid, s. 75.
24 Ibid, s. 77.
25 Ibid, s. 77A.
26 Ibid, s. 85.
27 The Bharatiya Nyaya Sanhita, 2023, (Act 45 of 2023), s. 294.
28 Ibid, s. 356.

Cyber frauds	Section 318[29] BNS	Imprisonment up to 7 years and/or a fine
Email spoofing	Section 336[30] BNS	Imprisonment up to 3 years and/or a fine
Stalking	Section 78[31] BNS	Imprisonment up to 3 years and/or a fine
Voyeurism	Section 77[32] BNS	Imprisonment up to 3 years and/or a fine
Criminal intimidation by anonymous communications	Section 351(4)[33] BNS	Imprisonment up to 2 years and/or a fine
Online sale of drugs	NDPS Act[34]	As per the NDPS Act, penalties as applicable.
Online sale of arms	Arms Act[35]	As per the Arms Act, penalties as applicable.

Source: Author's compilation based on Cyber Offences under the I.T. Act 2000 and BNS Act 2023.

29 Ibid, s. 318.

30 Ibid, s. 336.

31 Ibid, s. 78.

32 Ibid, s. 77.

33 Ibid, s. 351(4).

34 Narcotics Drugs and Psychotropic Substances Act, 1985, (Act 61 of 1985).

35 The Arms (Amendment) Act, 2019, (Act 48 of 2019).

Statistical Data of Cybercrime of India

'Year-wise Number of Incidents of Digital Arrest Scams and related Cyber Crimes reported on National Cyber Crime Reporting Portal from 2022 to 2025'

Sl. No.	Year	Number of Incidents	De-frauded Amount (In Crores)
1	2022	39925	91.14
2	2023	60676	339.03
3	2024	123672	1939.51
4	2025	17718	210.21

Source: Compiled by author from Rajya Sabha Session- 267.[36]

'State/UT-wise Details of Statistics on National Cyber Crime Reporting Portal (NCRP) Related to Cyber Fraud Cases as on 28-02-2025'

Sl. No.	**State/UT**	**Total Incidents Reported**	**Amount Reported (In Lakhs)**	**Lien Amount (In Lakhs)**	**Refunded Amount (In Lakhs)**
1	Andaman and Nicobar Islands	1685	1388.82	113.46	0.02
2	Andhra Pradesh	113439	155989.39	20378.75	200.11
3	Arunachal Pradesh	2246	5542.17	808.3	1.01

36 Rajya Sabha Session

4	Assam	30821	16067.21	2017.32	27.85
5	Bihar	149857	82232.92	12095.07	124.49
6	Chandigarh	12399	11435.56	1659.94	7.6
7	Chhattisgarh	63941	40559.57	4806.79	82.62
8	Dadar and Nagar Haveli and Daman and Diu	1615	1861.01	176.51	4.3
9	Delhi	205464	194345.27	18667.93	261.7
10	Goa	6052	14906.43	1375.74	9.38
11	Gujarat	367754	274589.93	55698.11	1031.58
12	Haryana	212001	149290.62	22713.37	352.47
13	Himachal Pradesh	20503	18499.14	1833.68	6.64
14	Jammu and Kashmir	14476	17566.02	1545.27	39.52
15	Jharkhand	38632	42667.99	7326.73	51.71
16	Karnataka	252487	415117.32	40341.8	475.96
17	Kerala	83945	114292.61	16526.08	112.59
18	Ladakh	505	618.56	36.86	1.02
19	Lakshadweep	85	66.77	11.92	0
20	Madhya Pradesh	105991	79242.97	7576.84	78.93

21	Maharashtra	427607	575492.05	62187.87	918.83
22	Manipur	1992	3163.44	386.71	8.08
23	Meghalaya	2517	5230.24	320.72	0.93
24	Mizoram	1135	1895.32	177.61	5.55
25	Nagaland	1167	1237.05	161.17	0
26	Odisha	75274	58375.72	5995.18	96.89
27	Puducherry	5255	8626.79	547.62	51.17
28	Punjab	75087	74092.69	10150.78	142.96
29	Rajasthan	267781	150912.65	18338.66	543.4
30	Sikkim	844	1462.01	118.86	0.07
31	Tamil Nadu	185584	312596.73	22650.3	172.04
32	Telangana	241666	333165.59	46809.74	610.9
33	Tripura	7143	4368.21	461.11	2.47
34	Uttarakhand	61712	31443.18	4283.43	35.69
35	Uttar Pradesh	630778	285875.57	30610.47	382.2
36	West Bengal	153110	160602.33	19169.87	210.97
37	Total	3822550	3644819.85	438080.57	6051.65

Source: Compiled by author from Rajya Sabha Session- 267.[37]

37 Rajya Sabha Session

V. RESULTS AND DISCUSSIONS ON CYBERCRIMES AS REPORTED IN INDIA

India has seen a considerable increase in digital arrests and related cybercrime reports. Over 1.23 lakh cybercrime events were reported in the year 2024. During the time period studied, Uttar Pradesh had the highest proportion in comparison to the rest of the country, with over 6 lakhs incidents. States like Karnataka, Uttar Pradesh, and Maharashtra, and cities like Bengaluru, Mumbai, and Hyderabad are most affected. The majority of these complaints were filed under the Information Technology Act with the intent of defrauding or sexually exploiting victims. These were, however, projections based only on reported data. Because of a lack of cybercrime awareness and classification procedures in a country like India, the true figures are likely to be underreported. This shows the need for flexible cyber laws that adapt to fast-changing threats. Cyberattacks can harm critical systems like power grids and defence networks. Experts suggest a public-private partnership model to improve cybersecurity in smart cities, as current laws don't cover all types of cyber threats.

VI. CONCLUSION

Even though there are cyber laws in place, it's very important for people to stay alert and aware to help prevent cybercrime. Online fraud is very common and often happens through fake websites that steal personal information like banking passwords. To stay safe, individuals should avoid sharing personal details such as passwords, phone numbers, and email addresses with unknown sources. Be careful about what you post on social media, and don't respond to suspicious emails or messages. Use strong passwords for all accounts and keep antivirus software updated to protect your devices. Since mobile phones can also be hacked, only download apps from trusted sources. Always update your operating system and lock your screen when not in use to avoid any misuse.

At the business or supervisory level, strong steps are needed to fight cybercrime. Every district court should have a special cyber court to quickly handle cyber cases. Digital evidence should be certified using proper tools to prove it's real. Indian websites and services must follow local rules, and personal data of Indian citizens should be stored on Indian servers. All companies and government offices must follow proper cybersecurity standards and practices. Governments should focus on responding to cyber threats, stopping cybercrime, and building strong cyber systems to make the world safer. Cybercriminals should be treated as seriously as other major criminals. Although India has laws to handle cybercrime, these laws need regular updates as technology changes. To fight cybercrime effectively, Indian and international law enforcement must work together. India's National Cyber Security Strategy is a good move, but it must also learn from global laws, as cybercrime is a worldwide issue. The global nature of the internet often clashes with the idea of national control, so cooperation is key. Most internet users are unaware of cyber laws, which adds to the problem. Fighting cybercrime needs teamwork between individuals and the government. It's also important to analyze how an attack happened, what damage it caused, and who did it. Everyone—including employees, partners, and customers—should receive proper training and awareness about cybersecurity.

While the internet continues to grow, it also attracts criminal activities. India has taken significant steps in reducing cybercrime by adopting the Information Technology Act and granting authorities the power to tackle cybercrime. However, it's impossible to completely eliminate cybercrime from the internet. The key to reducing these crimes is educating people about their rights and responsibilities and enforcing stricter laws. The Information Technology Act marks a significant achievement in cyberspace security, but updates and improvements are

necessary to make it even more effective. In the future, cyber laws should be updated to strike a balance—too strict laws can stifle innovation, while too loose laws can lead to more crime.

OPAQUE OVERSIGHT: JUDICIAL IN-HOUSE INQUIRIES AND THE PROBLEM OF INSTITUTIONAL BIAS IN INDIA

*HARSH VARDHAN MISHRA**

ABSTRACT : The Indian Judiciary is often regarded as the cornerstone of the country's democratic setup and protector of fundamental rights of the citizens, yet its credibility and accountability have been challenged by the opaque mechanism of in-house inquiries conducted against allegations of judicial misconduct by the higher judiciary. By exploring the systemic flaws and patterns of institutional bias embedded in these internal mechanisms, this article highlights the urgent need for transparent, statutory reforms. It examines various comparative international frameworks and notable Indian case studies, proposing a redefined model of judicial accountability that harmonises the fundamental concept of judicial independence with the public's entitlement to transparency and justice.

KEY WORDS : Judicial Independence, Transparency, In-House Inquiry, Institutional Bias, Fairness

I. INTRODUCTION

Indian judiciary holds a unique position as the watchdog of democracy, guardian of the constitution and arbiter of civil liberties[1]. Laws are like dead letters without the courts to explain and expound their appropriate meaning. It is considered an independent body divested from the executive and legislative wings of the government.

---

* B.A.LL. B (Hons), VI Semester, Law School, Banaras Hindu University, Email : *harshvm14@gmail.com*

1 Keshavnanda Bharati v. State of Kerala (1973) 4 SCC 225

This judicial independence has been enshrined to ensure impartiality among citizens, protect the rights and freedoms of people, check the abuse of power, and ensure fair justice. However, when allegations of misconduct are surfaced against members of the higher judiciary, the mechanism to investigate and address such allegations is clouded in opacity. The in-house inquiry procedure, developed by the judiciary itself, raises some serious questions about accountability, transparency, and institutional bias.

II. THE GENESIS AND FRAMEWORK OF IN-HOUSE PROCEDURE

The current in-house inquiry mechanism is the result of the Supreme Court's leading judgments in the case of *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*[2], which exposed the absence of a mechanism to deal with judicial misconduct falling short of the level required for impeachment. The apex court opined that

> *"Yawning gap between proved misbehaviour and bad conduct inconsistent with the high office on the part of a non-cooperating Judge/Chief Justice of a High Court could be disciplined by self-regulation through an in-house procedure. This in-house procedure would fill in the constitutional gap and would yield a salutary effect".*[3]

Subsequently, in compliance with the directions issued in this case, a five-judge committee was constituted, comprising three judges of the Supreme Court and the two senior-most Chief Justices of High Courts. This committee was entrusted with the responsibility of formulating an "in-house inquiry procedure" to address instances where judges, through acts of omission or commission, failed to uphold the "accepted values of judicial life." The committee submitted its report in October 1997, and its recommendations, with certain amendments, were adopted at a full-court meeting in December 1999.

---

2 1995 SCC (5) 457

3 *Idem.*

The report[4] was structured into three distinct parts, each addressing a specific category of judicial inquiry. The first part outlines the procedure for conducting an inquiry against a Judge of a High Court, while the second and third parts address inquiries involving the Chief Justice of a High Court and a Judge of the Supreme Court, respectively. When a complaint is received against a High Court Judge, the Chief Justice of the High Court or the Chief Justice of India first examines it to determine whether it is frivolous or lacks seriousness, pertains solely to the merits of a judicial decision, and if so founded, the complaint is filed and closed. However, if the complaint raises serious allegations of misconduct or impropriety, the concerned Judge's response is sought. Upon considering the response, if no further action is warranted, the complaint is filed; otherwise, it is forwarded to the CJI along with the comments of the Chief Justice of the High Court. The CJI may then constitute a three-member committee comprising two Chief Justices of other High Courts and one High Court Judge to conduct a fact-finding inquiry. The committee can devise its procedure in consonance with natural justice for conducting an inquiry. A similar procedure is followed when a complaint is received against the Chief Justice of a High Court, the CJI examines the complaint and, if necessary, after seeking the Chief Justice's response, forms a committee consisting of a Supreme Court Judge and two Chief Justices of other High Courts to investigate the matter. Likewise, in the case of a complaint against a Supreme Court Judge, the CJI examines it and, if it is not frivolous or minor, seeks the Judge's response. If a deeper inquiry is found necessary, the CJI constitutes a committee of three Supreme Court Judges to conduct a fact-finding inquiry. In all cases, further action is taken based on the committee's findings.

If the committee's report states that misconduct is serious in nature, the Judge is advised to resign or to take voluntary retirement

4 Supreme Court Committee, "Report on in-house procedure" (October, 1997)

and is not allocated any judicial work, and the President and the Prime Minister are informed that allegations against such Judge are serious in nature and sufficient as to warrant the impeachment proceedings under Article 124[5] accordingly. For minor misconduct, the CJI advises the concerned Judge and records the findings. This procedure was reaffirmed and detailed by apex court in Additional District and Sessions Judge 'X' vs Registrar General, Madhya Pradesh High Court[6], where Supreme Court detailed out a seven-pointer internal process for judicial inquiries and thus, these procedures are followed for conducting an in-house judicial inquiry. This process, however, lacks legislative backing and operates outside the purview of the Right to Information Act, making it largely inaccessible to the public[7].

III. ANATOMY OF INSTITUTIONAL BIAS

It is a fundamental requirement of law that the doctrine of natural justice be complied in any proceeding and there shouldn't be any chance of biasness. Bias refers to the operative prejudice which leads to decide a case or an issue in a particular manner only. Such predisposition does not leave the mind open to conviction[8]. It exists in different forms, with institutional bias being one of them. Institutional bias occurs when an organization or institution, consciously or unconsciously, protects its own members irrespective of impartiality principal. In the context of in-house judicial inquiries, it refers to the tendency of judges to favor their colleagues during investigations due to their personal closeness or some other internal motive(s). These judicial inquiries are often conducted in secrecy, without public access

---

5 The Constitution of India, art. 124

6 AIR 2015 SC 645

7 Ashish Tripathi, SC rejects RTI plea for in-house inquiry probe report on Justice Varma cash row, *Decan Herald,* 26th May 2024, https://www.deccanherald.com/india/sc-rejects-rti-plea-for-in-house-inquiry-probe-report-on-justice-varma-cash-row-3557879 (last visited on 29th May 2024)

8 I.P. Massey, *Administrative Law 192* (Eastern Book Company, Lucknow, 2022)

or detailed reporting. This lack of openness often creates suspicion about procedures which are followed in such inquires. It appears that such procedures are designed to shield wrongdoers rather than hold them accountable.

Generally, judicial proceedings are held in open courts to ensure transparency. The access to judicial record by way of inspection by the litigant or their lawyer and the facility of providing certified copies of that record are factors which not only ensure transparency but also instil and inspire confidence in the impartiality of the Court proceedings but these inquires seems to be violation of Natural Justice principles like *nemo judex in causa sua* which means "no one should be a judge in their own cause"[9]. In a situation where a Judge investigates the other fellow judge, he may face implicit pressure in order to protect his colleague, especially when they are in closely-knit judicial circle where professional and personal relationships are intertwined. Such situation may amount to biasness and while giving the decision leading to failure of justice.

The judiciary derives its legitimacy from public confidence. When inquiries appear to be biased, it damages the very faith that upholds this holy institution. If judges are seen to be above the law, it may give a wrong message to society that judicial misconduct is either ignored or inadequately punished. Institutional bias in in-house judicial inquiries not only weakens the judiciary internally but also erodes the foundational principle of equality before the law. It is necessary that these internal processes must be reformed as it is not an attack on the judiciary's independence, rather, it is a necessary step toward strengthening it by ensuring greater accountability, transparency, and public trust.

9 *Id.* at 193

IV. CASE STUDIES OF CONTROVERSIAL INQUIRIES

Controversial judicial inquiries in India serve as serious reminder that the quest of institutional independence often eclipses the pursuit of transparency and justice. In order to fully grasp the structural flaws of in-house judicial inquiries, it is essential to examine certain cases where the process has been impaired with controversy, opacity, and allegations of institutional bias. To begin with, in 1991, Justice V. Ramaswami was the first judge to face impeachment proceedings under Articles 124[10] of the Constitution.[11] Initially, an in-house committee appointed by the Chief Justice of India found no prima facie evidence against him. However, a committee of inquiry constituted by the Speaker of the Lok Sabha under the Judges (Inquiry) Act subsequently found sufficient evidence to justify his removal. Despite this, the motion for his removal was defeated in the Lok Sabha, allowing Justice Ramaswami to remain in office without judicial work until his retirement.

Next, in 2001, three Karnataka High Court judges were charged of involvement in a sex scandal also famously known as Mysore Sex Scandal.[12] An in-house committee was setup to review the allegations which gave them clean chit in 2002. Later, a PIL was filed by Senior Advocate Indira Jaising, praying for the publication of the report of the in-house committee in the public domain. Jaising

---

10 *Supra* note at 5, art. 124

11 T. Ramakrishnan, Justice Ramaswami: the first judge of the Supreme Court to face impeachment proceedings, The Hindu, 12 March 2024, https://www.thehindu.com/news/national/tamil-nadu/justice-v-ramaswami-the-first-judge-of-supreme-court-to-face-impeachment-proceedings/article69317021.ece (last visited on 19th May 2024)

12 Stephen David, Three Karnataka High Court judges allegedly involved in sex scandal cleared by panel, *India Today,* 17th Feb 2003, https://www.indiatoday.in/magazine/indiascope/story/20030217-three-karnataka-high-court-judges-allegedly-involved-in-sex-scandal-cleared-by-panel-793261-2003-02-16 (last visited on 19th May 2024)

had also prayed for a direction to form a professional and independent investigating agency having expertise to conduct a thorough investigation into the said incident and to submit a report on the same, but supreme denied both the prayers stating that it will do more harm than good to the institution.

Then, in 2008, then Chief Justice of India K.G. Balakrishnan constituted an in-house committee to investigate the "cash-at-door" allegations against Justice Nirmal Yadav of the Punjab & Haryana High Court[13]. The inquiry progressed slowly, leading to accusation that the judiciary was protecting one of its own. Later on, in November 2021, an RTI revelation showed that although the three-member committee had found Justice Yadav's "misconduct" serious enough to warrant removal proceedings, the CJI ultimately gave her a clean chit and later on court also acquitted her. This case highlighted the limitations of internal judicial inquiries in dealing with serious criminal allegations.

Lastly, a sensitive matter came into limelight when a former Supreme Court staffer accused the then Chief Justice of India, Ranjan Gogoi, of sexual harassment in 2019[14]. An in-house committee comprising sitting Supreme Court judges cleared him of all charges as they found "no substance" in the allegation, and the report was not made public. This case drew criticism for procedural impropriety and lack of transparency.

These cases have created doubt in mind of people regarding this inquiry system as it doesn't seem to be fair and transparent. The liberty of in-house committee to determine its own procedure violates the principles of natural justice. There is no due method to examine

---

13 Namit Saxena, The Cash at Judge's Door case: A chronological revisit, *Bar and Bench*, 6 Nov 2021, https://www.barandbench.com/columns/the-cash-at-judges-door-case-a-chronological-revisit (last visited on 19th May 2024)

14 X, India chief justice Gogoi accused of sexual harassment, BBC, 20th April 2019, https://www.bbc.com/news/world-asia-india-47996468 (last visited on 19th May 2024)

whether due process is being complied with or even any procedure is followed. So far, eight in-house committees have been constituted by the Chief Justice of India (CJI). However, as their reports are not publicly available, the internal procedures followed and the basis for their conclusions remain cloaked in secrecy[15]. So, it is utmost important that a trustworthy procedure must be established.

V. COMPARATIVE INTERNATIONAL PRACTICES

While India's judiciary relies on opaque internal mechanisms, several other nations have adopted more transparent, statutory models of judicial oversight that merit close examination like in the United States, the Judicial Conduct and Disability Act allows anyone to file complaints against federal judges for misconduct, and an amendment in 1990 empowered Chief Judges of Circuit Courts to initiate inquiries and appoint special committees for investigation. Appeals against a Chief Judge's decision can be made to the Circuit Judicial Council[16]. Under Article 1 of the US Constitution, federal judges can be impeached by the House of Representatives, which acts as a prosecutor in a Senate trial[17]. So, here, Federal judges are subject to the said Act, which allows complaints by the public. Although committee comprises of judges but operate under clear statutory mandates, and their reports are publicly accessible and appeal can also be filed against their decision.

Likewise, in United Kingdom, the Judicial Conduct Investigations Office (JCIO), established in 2013, serves as the model for maintaining judicial accountability without compromising judicial independence. It is an independent body tasked with investigating complaints concerning the personal conduct of judges, tribunal

---

15 V. Venkatesan, Judge inquiry: The opacity of the in-house process, Supreme Court Observer, 8th April 2024, https://www.scobserver.in/journal/judge-inquiry-the-opacity-of-the-in-house-process/ (last visited on 19th May 2024)

16 Judicial Conduct and Disability Act, 1980 S. 351, 352, 353, 354 &355

17 The Constitution of United States, 1789 Art. 1, S. 2 & 3

members, and magistrates. Any member of the public can file a complaint, and the procedures for lodging and investigating complaints are transparent and publicly accessible. The JCIO also publishes annual reports with details of the number and types of complaints received and the outcomes of investigations along with any disciplinary actions (if taken)[18]. Most importantly, it operates independently from the judiciary purview, thereby minimizing the risk of institutional bias.

Similarly, in Canada, the Canadian Judicial Council, established in 1971 under the Judges Act, conducts formal investigations into allegations of judicial misconduct through a well-defined and transparent process, which includes public hearings and the disclosure of reports[19]. In South Africa, the Judicial Service Commission is responsible for selecting fit and proper individuals for appointment as a judge and for investigating complaints against judicial officers[20]. In Sweden, the Swedish Parliamentary Ombudsman system ensures judicial accountability. Four ombudsmen are chosen by the Swedish parliament to make sure that public employees, including judges, carry out their responsibilities legally and competently[21]. In the circumstances involving errors, malpractices, or maltreatment of court witnesses, the ombudsman can step-in during on-going proceedings. The Australia presents an interesting model of decentralized judicial oversight, with each federal, state, and territory has its own mechanisms to address judicial misconduct. At the federal level, the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act allows for the establishment of an independent commission to investigate serious allegations against judges[22].

18 Judicial Conduct Investigations Office, "JCIO Annual Report 2023-2024" (2024)

19 The Canada Judges Act, 1971 S. 58

20 The Constitution of South Africa, 1998 S. 178

21 The Sweden Riksdag Act, 1809 Ch. 13 S.2

22 The Australian Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act, 2012 S.9

The above-mentioned countries share significant philosophy with that of India, particularly in upholding the principle of judicial independence. Yet, these nations have been successful in establishing a procedure to keep an eye on misconduct of judges. One of key difference that exists in other countries is the proceeding takes place in public and report are published. In foreign countries, people generally know about process of proceeding as well as its outcome. It creates more trust among citizen regarding judiciary as everyone including judges are subject to Rule of Law. However, in our country, proceedings are done behind closed doors and sometime even complainant also doesn't know about it like happened in CJI Rajan Gogoi case, where lady complainant was not given report of finding of committee, just there was communication of result in public domain. This endangers core belief of people in judiciary.

VI. LEGAL AND CONSTITUTIONAL CONSIDERATIONS

The Indian Constitution provides the framework for the appointment, tenure, and removal of judges, yet it is silent on the issue of regular mechanism to deal with judicial misconduct. Art. 124[23] and 217[24] outline the process for the appointment and removal of Supreme Court and High Court judges, respectively. However, these provisions only contemplate removal through the extraordinary process of impeachment, leaving a vast gap for instances of minor or moderate judicial misconduct.

The parliament also enacted The Judges (Inquiry) Act[25] to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of a High Court, but it addresses only the most severe cases where a judge's continuance in office becomes untenable. In practice,

---

23 *Supra* note 5 art. 124

24 The Constitution of India, art. 217

25 The Judges (Inquiry) Act, 1968 (Act 51 of 1968)

impeachment is so rare and politically sensitive due to which no judge has been impeached till now[26]. The constitutional and legal framework, therefore, provides no day-to-day mechanism to address complaints of judicial misconduct, abuse of discretion, ethical lapses, or instances of inappropriate behavior.

This lacuna has led to the judiciary informally establishing an "in-house procedure" in 1997[27]. However, this system operates entirely without statutory backing. It exists merely as a self-regulatory mechanism, covered from public scrutiny, and beyond any legal binding. By retaining exclusive control over misconduct investigations, the judiciary is fostering an unusual and undesirable culture—one where it regulates the conduct of other agencies, yet its own conduct remains accountable to no one but itself.

Therefore, the most concerning thing is the legislature's unnecessary and unexplainable silence on this critical issue. Despite widespread debates about judicial transparency and multiple recommendations from commissions such as the Law Commission of India, the parliament has failed to enact a robust, independent, and transparent judicial accountability framework. However, attempts like the Judicial Standards and Accountability Bill[28], introduced in 2010, were made but it was lapsed without passage and there have been no serious legislative effort to renew it since then, leaving the judiciary to function in an insulated environment where allegations are managed internally without external checks violating the fundamental principle of check and balances.

---

26 Supra note 14

27 Supra note 2

28 Aditi S. Verghese & Albin G. Thomas, "The Origin and Sources of The Judicial Standards and Accountability Bill, 2010" 2 *NLIU LAW REVIEW 157-179 (2010)*

VII. TRANSPARENCY VERSUS JUDICIAL INDEPENDENCE: THE FALSE DICHOTOMY

The Indian judiciary frequently invokes the principle of independence of judiciary as a shield against the calls for greater transparency. While the judicial independence from the executive and legislature is a cornerstone of constitutional governance, but equating it with immunity from public scrutiny creates a false dichotomy. In reality, transparency and judicial independence are complementary, not contradictory ideas. Transparency enhances public trust in the judiciary which in turn strengthens the judiciary's institutional authority and ability to function independently[29].

Similarly, the current opaque in-house inquiry system suggests that any external interference would breach the judicial neutrality. However, this argument is flawed. An independent judiciary derives its moral authority from public confidence, not from isolation[30]. People generally believe that the judicial system is a helping hand available to them in order to get justice. However, in this digital era, when incidents of judicial misconduct come into public, it becomes extremely important that appropriate steps are taken that too publicly, to again revive that lost confidence of public. It is not only necessary that justice is done but it is also important that it is seen to be done but these private proceeding often creates a massive suspicion in the mind of people which may breach entire confidence of people that they possess on the judicial setup. Without transparency, the judiciary may be perceived as an unaccountable institution which is disconnected from the democratic values which it is entrusted to uphold.

Transparency also serves as a tool for self-correction and continuous improvement as public scrutiny invites higher ethical standards and greater diligence among judges, knowing that their

29 Supreme Court Advocates-on-Record Association v. Union of India (2016) 5 SCC 1

30 Law Commission of India, 195th Report on Judges Inquiry Bill (2006)

actions are subject to review not just by peers, but by the society to whom they serve. In this way, transparency is not merely an instrument of accountability, it is also a mechanism for strengthening judicial excellence and fears that transparency will subject the judiciary to populist pressures is certainly exaggerated. Transparency does not mean trial by media or political witch-hunts. It means structured, fair, and publicly accessible procedures that ensure the judiciary remains worthy of the immense trust placed in it[31] and most importantly, the independence of the judiciary is not protected by insulation from regular investigative processes, but by making it fully accountable and transparent in its functioning. Therefore, it is necessary that proper recourse should be adopted in order to maintain independence of judiciary along with transparency.

VIII. PROPOSALS FOR REFORM

A meaningful reform in the judicial accountability mechanism must begin by acknowledging that the present system, rooted in secrecy and self-regulation, is no longer tenable. The first essential reform is the enactment of a comprehensive statutory framework that governs judicial conduct and accountability. Such legislation should codify the procedures for dealing with allegations of misconduct, lay down clear standards of ethical behavior, and define the rights of complainants and, most importantly, the law must mandate transparency at every stage of inquiry. It will safeguard the legitimate interests of judicial independence. The lapsed Judicial Standards and Accountability Bill[32], which had proposed setting up a statutory oversight body, can serve as a valuable starting point for framing new legislation that balances these concerns.

Secondly, an independent Judicial Oversight Commission must be established, comprising a balanced mix of retired judges, eminent

31 Central Public Information Officer, *Supreme Court of India v. Subhash Chandra Agarwal* (2019) 11 SCC 369

32 *Supra* Note at 27

jurists, representatives of civil society, and perhaps even members from diverse fields such as academician etc. It is necessary that there should be presence of non-judicial members which would ensure that oversight is not reduced to a collegial process driven by internal considerations alone. Such a body must have clear powers to investigate complaints, recommend disciplinary actions, and refer matters for impeachment when found guilty and, importantly, its functioning should be insulated from political pressures through secure tenure for its members and autonomous budgetary allocations.

Thirdly, transparency must be embedded as a fundamental principle of judicial accountability. All outcomes of misconduct inquiries, whether they result in exoneration or censure, should be made public through reasoned reports, except in cases where disclosure would harm national security or personal safety. This public disclosure will not only enhances public confidence but also acts as a deterrent against frivolous complaints and will protect judges from wrongful accusation. Transparency, as mentioned earlier, ensures that justice is not only done but seen to be done.

Fourthly, some training and sensitization programs must be organised for judges at all levels. These regular workshops will help judges to also focus on ethics, gender sensitivity, and constitutional values which will reinforce the judiciary's commitment to high standards of conduct. It is also duty of judges that they should not treat training as a formality but as an integral part of their professional development, constantly evolving with societal expectations.

Finally, the periodic non-intrusive performance reviews for judges can serve as a preventive mechanism against misconduct. Such reviews, conducted by independent bodies, could assess parameters such as case disposal rates, respect for litigants' rights, ethical behavior, and professional demeaner, without encroaching upon judicial decision-making. Together, these reforms can help to dismantle the culture of opacity and institutional bias that currently undermines public faith in

the judiciary. A transparent, accountable, and independent judiciary is not just an aspiration; it is a constitutional necessity for India's democratic future.

IX. CONCLUSION

The Indian judiciary, as the guardian of the Constitution and the protector of fundamental rights, has immense respect and trust. However, this moral authority is not absolute, it must be earned and preserved through demonstrable integrity, fairness, and accountability. The current in-house mechanism which is devoid of statutory legitimacy, transparency, and external oversight, falls short of these ideals. It breeds perception of biasness and undermines public confidence in the very institution designed to uphold justice.

The fears that greater transparency might threaten judicial independence are unfounded. In fact, independence without accountability creates opacity, while transparency ensures a judiciary that is both respected and trustworthy. Countries around the world have demonstrated that it is possible to create robust oversight mechanisms that preserve judicial independence while ensuring accountability.

India must move decisively to reform its judicial accountability framework. This requires legislative will, institutional courage, and public pressure. A statutory mechanism, an independent oversight body, mandatory transparency, and a commitment to continuous ethical training are not threats but they are tools to safeguard the judiciary's sanctity in a democratic society. To sum up, for a democracy to thrive, its judiciary must not only dispense justice impartially but also embody the trust and confidence of the people it serves.

INFLATED COST OF JUSTICE IN INDIA

ANKIT SHUBHAM*

ABSTRACT : This paper examines the premium cost of justice in India by analyzing economic, procedural, and institutional barriers within the legal system. Drawing from comparative international data and domestic judicial statistics, it highlights how legal costs, delay, and infrastructure deficits prevent equitable access to justice, especially for the poor. The Justice Affordability Index for India (3.64×) underscores this economic exclusion, with 22% of the population priced out of basic legal services. Through detailed data tables and legal commentary, this study critiques structural inefficiencies and proposes targeted reforms, ranging from fee regulation and judicial expansion to digitization and legal aid reforms. The findings affirm that India's legal architecture, though constitutionally robust, must be urgently realigned with its foundational commitment to equal justice for all.

KEY WORDS : Access to justice, Legal costs, Judicial reform, Legal aid, India, Case pendency, Affordability

I. INTRODCUCTION

"Access to justice is basic to human rights and directive principles of State Policy become ropes of sand, teasing illusion and promise of unreality, unless there is effective means for the common

---

* LL.B. (2024-2027); 1st Year; II Semester, Law School, Banaras Hindu University, Varanasi; Email : *shubham.ankit.shubham@gmail.com*

people to reach the Court, seek remedy and enjoy the fruits of law and justice."

- Justice V.R. Krishna Iyer,[1]

In this article, we will see the historical aspect of the Judiciary, the present modern-day cost of justice, its root causes, and the possible solutions to it. The question is whether justice is costly in India, if so, by how much in comparison to its contemporary rivals and whether a common man will be able to afford the cost of a lawsuit or not? All these questions have been taken first. This article gives us an idea about not just the prices with respect to the GDP per Capita (PPP) vs Average Lawyers cost, but also the burden it causes on the families by comparing the average household income of a family to that of the average fees of the lawyers

This article works with derived formulas and methods, which are devised, but they are done using the data available to the public by the government or credible research agencies. This data gives us an insight into the increasing cost of justice for the common people. The data here also gives us an estimated population in the country which will not be able to even afford a lawsuit in case of injustice because of the lack of funds

The subsequent section is a discussion of the root cause of the problem, and in the ten pointers, there is a detailed explanation using the data of case pendency, low conviction rates and other fundamental flaws in the infrastructural gap between the affordability of justice for a common man. This description is important to analyze as it gives us the root cause of the high cost of justice. The smaller number of judges per million for India, Unregulated charges by lawyers, Corruption and many more are the problems which have caused the problem of inflated cost of justice, and we will see the probable solutions in the last part.

1 *Justice V.R. Krishna Iyer, speech excerpt cited in Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509.*

In the last part, we again discuss in ten points what can be the solutions for the problems discussed in the penultimate part. There is an elaborate explanation of the action and its impact as well. This solution, if implemented at the institutional level, can catalyze not only judicial equality but also contribute to securing a life of dignity and equality for all values deeply enshrined in the Preamble to the Constitution of India.[2] It reaffirms the constitutional promise of justice that transcends procedural fairness and extends to substantive social and economic inclusion. By aligning legal reforms with these foundational ideals, the justice system can evolve into a truly emancipatory instrument for the most marginalized.

II. HISTORICAL BACKGROUND

"India that is Bharat," as described in the first article of the Constitution, is a mysterious and ancient land whose foundational principles are deeply intertwined with the idea of Dharma.[3] Dharma, in its traditional context, encompassed fairness, justice, morality, and righteousness.[4] Over time, however, this profound and multifaceted term has gradually been reduced in practice to mere legal justice and the mechanics of its delivery through formal agents and institutions. The evolution from Dharma to institutional justice is both philosophical and structural, reflecting changes in society's understanding of morality, accountability, and legal order.[5]

i. ***Ancient History :*** The society, in its establishment, had to devise a system; an arrangement to bring together sane and rational individuals under a common framework where the

---

2 Constitution of India, Preamble.

3 Constitution of India, art. 1

4 Ushnish/ Dasgupta, *Dharma under Indian Jurisprudence*, *Black n' White J.* (June 18, 2020)

5 Mark/ McClish, *From Law to Dharma: State Law and Sacred Duty in Ancient India*, *J. of Law & Religion* (Dec. 19, 2019).

wrongdoer could be punished and justice could prevail. This primordial necessity gave rise to one of the first concepts of an organized community: a justice system. While early human groupings were guided by the principle of "might is right," experience and moral evolution taught communities that such a system was unsustainable and unjust. Therefore, societies progressed toward more refined and organized forms of justice, embracing evolving criminal definitions and increasingly sophisticated techniques for punishment.

If we speak of the concept of Dharma mentioned in the Vedas in the land which is now known as India, we find references to intricate justice systems across various ancient texts, starting from the Rig Veda to contemporary discussions on modern judicial reforms.[6] The Rig Veda, for instance, contained a sophisticated moral and legal philosophy, identifying what is Dharma and what is not.[7] Kings and queens were entrusted with roles comparable to modern-day judges, empowered to pass verdicts and resolve all kinds of disputes within their domains. Their authority was not merely administrative; it was deeply moral, rooted in divine law and collective well-being.[8]

ii. ***Medieval History :*** With evolving time, we see a remarkable history of monarchs who have been just and righteous, often setting examples by holding themselves accountable under the principles of Dharma. Historically, a few iconic names stand out, Raja Harishchandra, the Maratha emperor Chatrapati Shivaji Maharaj, and Mughal King Jahangir. These leaders not

6 Ratan/ Kaul, *Reflections on Justice and Dharma in Ancient Indian Texts*, *Int'l J. Hum. & Educ. Rsch.*, 80–83 (2024).

7 *Vasishtha Dharmasutra* (1st c./ BCE–1st c./ CE), ¶/ on use of written evidence/ -Patrick Olivelle ed., *Dharmasutras* (1999).

8 *Vyavahāra*, in Donald/ Davis & P.V./ Kane, quoted in *History of Dharmaśāstra*, vol./ 3

only upheld justice in their courts but also went to the extent of punishing themselves or their families to establish faith in the rule of law. Raja Harishchandra's legendary sacrifice for truth, for example, remains a moral benchmark even today.[9]

With the gradual development of society, and especially after the colonial influence in India, the era of monarchs gave way to a more structured societal machinery. This machinery, which includes various administrative, legal, and political institutions, came to replace the individual king or queen. The British colonizers played a key role in institutionalizing courts, codifying laws, and introducing Western legal ideas into the Indian subcontinent.[10] While these changes brought uniformity and procedural structure, they also introduced complexities and hierarchies that were previously absent in the Dharma-driven system.

iii. Modern History : This new system of justice, like any institutional setup, came with its own merits and demerits. On one hand, it promised rule-based uniformity and predictability. On the other hand, it often became distant, procedural, and expensive. The introduction of British legal traditions, particularly through charter acts and legislative councils, transformed the justice system into a formal and often intimidating structure.[11] Though courts were accessible in theory, in practice they remained a challenge for the common person to approach.[12]

---

9 Mahabharata, Shanti Parva 24–18 (transl. K.M. Ganguli, vol. 12,/ Project Gutenberg, 2006).

10 R*egulating Act of 1773*, *Charter Act of 1833*, India Code

11 R*egulating Act of 1773*, *Charter Act of 1833*, India Code

12 Commonwealth Human Rights Initiative, Hope Behind Bars? Status of Legal Aid for Undertrials in India (2018)

The judicial machinery, post-independence, came to be recognized as one of the three constitutional pillars of democracy the others being the legislature and the executive. The Indian judiciary was largely modelled after the United Kingdom's legal framework, yet India also borrowed key features from the American system.[13] For instance, the British colonial legacy gave India the Supreme Court, High Courts, and subordinate courts. These courts were originally established by the British under various charter acts, such as the Regulating Act of 1773 and the Charter Act of 1833.[14] However, the Indian Constitution transformed them by granting judicial review and independence.

> *"The Indian Constitution integrates the past with the future by drawing from the moral fabric of our history and the legal mandates of our democracy."*
>
> ***- Justice R.S. Pathak (Former CJI)***[15]

Unlike the British courts, Indian courts were given powers to strike down legislation; a federal feature taken from the United States. This was further strengthened by the landmark judgment in the Kesavananda Bharati case, which upheld the power of judicial review as part of the basic structure doctrine.[16] According to this doctrine, Parliament cannot alter the essential features of the Constitution, thereby making the judiciary a powerful guardian of constitutional morality.

---

13 Union of India v. Madras Bar Ass'n, (2010) 11 SCC

14 R*egulating Act of 1773*, *Charter Act of 1833*, India Code

15 Justice R.S. Pathak, Inaugural Address, Supreme Court Bar Association Lecture (1987), cited in M.P. Singh (ed.), V.N. Shukla's Constitution of India 12th ed. (Eastern Book Company 2013).

16 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

iv. ***Institution of the Judiciary in India :*** The Supreme Court of India stands at the apex of this system. As the highest constitutional court in the Republic of India, its judgments are binding on all High Courts and subordinate courts. However, High Courts are not subordinate to the Supreme Court in a hierarchical sense under Article 141 and Article 226/227 of the Constitution.[17] They function independently within their assigned territorial jurisdictions and are empowered to enforce fundamental rights within their regions. This federal distribution is complemented by a complex network of subordinate courts such as district courts, sessions courts, and tribunals; that cater to specific types of legal disputes.[18]

The structure of the Indian judiciary is therefore both hierarchical and decentralized. While the Supreme Court ensures constitutional compliance and unification of law across the country, High Courts exercise regional autonomy. Subordinate courts provide the first line of recourse for civil, criminal, and administrative matters. Together, they form an elaborate, multi-tiered system that embodies the principles of both British proceduralism and American constitutionalism.

However, as this system expanded, so did its problems. Costs of litigation, procedural delays, lack of awareness, and increasing reliance on legal professionals created barriers for the ordinary citizen.[19] As a result, access to justice in India became uneven, economically burdensome, and increasingly dependent on class and geography.[20] This evolution raises a

---

17 Constitution of India, arts. 141, 226 and 227

18 National Judicial Data Grid, *Case Statistics Dashboard*, (last visited July 1, 2024).

19 World Justice Project, *Rule of Law Index 2023: India Country Profile* (2023).

20 Vidhi Centre for Legal Policy, *Evaluating the Performance of Lok Adalats in India* (2020).

pressing question: has the modern justice system in India remained faithful to its original Dharma-based ideals? Or has it, in becoming procedural and expensive, alienated the very people it was meant to serve?

III. GLOBAL COMPARISON OF LEGAL COSTS AND ECONOMIC INDICATORS

Table 1: Global Comparison of Legal Costs & Economics

Country	GDP per capita (PPP) (USD)[21]	Avg. Lawyer Cost (USD)[22]	Average Household Income[23]	% Burden (Lawyer/ GDP[24]
India	9,160	1,150	4,186	12.60%
USA	74,578	300	78,538	0.40%
Brazil	19,018	250	16,921	1.31%
Australia	60,409	375	65,000*	0.62%
UK	52, 589	3,900	53,000*	7.42%
China	22,138	175	16,800*	0.79%
Japan	45,949	200	44,000*	0.44%

Note: * Exact data was not available so we narrowed down using the help of the next nearest available data.

21 Trading Economics, GDP per Capita PPP by Country (2023), TRADINGECONOMICS.COM, https://tradingeconomics.com/country-list/gdp-per-capita-ppp (last visited Jan 30, 2024)

22 Pusch & Nguyen Injury Lawyers, *How Much Does It Cost to Sue?* (2024), https://puschnguyen.com/how-much-does-it-cost-to-sue/; Oliveira Lawyers, *How Much Does a Lawsuit Cost in Brazil?*, https://oliveiralawyers.com/; Kylie Lang, *Litigation in Australia Is Now a Rich Man's Game*, *Courier Mail* (May 2024), https://www.couriermail.com.au/news/opinion/kylie-lang; The Times, *Class Action Lawsuits Could Cost UK Economy Up to £18bn* (Mar. 2024), https://www.thetimes.co.uk/ /;Lawspot, *How Much Do Lawyers Charge in India? Fee Guide 2024*, https://www.lawspot.in/blog/how-much-

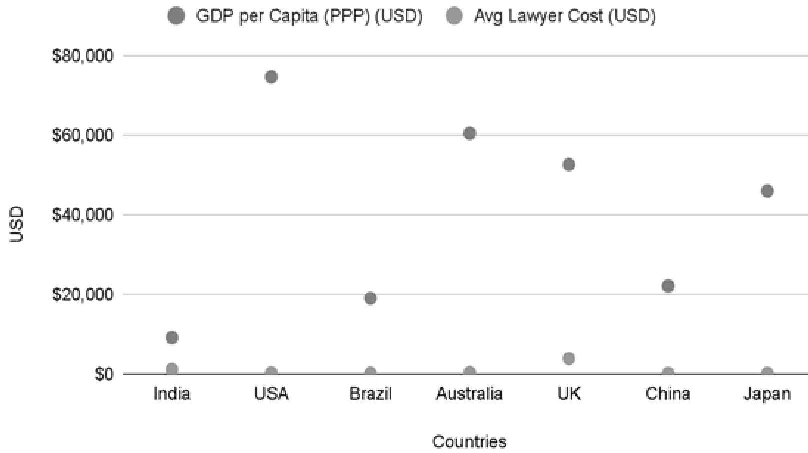

Figure 1:GDP per Capita (PPP) vs Average Lawyer Cost

---

do-lawyers-charge-in-india-fee-guide-2024/ (general advocates may charge [1] 5,000–[1] 50,000 for routine matters). (last visited Feb. 20, 2024)

23 Time Doctor, *Average Salary in India: 2024 Report*, https://www.timedoctor.com/blog/average-salary-in-india/; U.S. Census Bureau, *Income in the United States: 2023*, https://www.census.gov/library/publications/2024/demo/p60-282.html; Neilsberg Research, *Average Household Income in Brazil*, https://neilsberg.com/insights/brazil-average-household-income/; McCrindle Research, *Australian Household Income Distribution 2024*, https://mccrindle.com.au/article/topic/income-distribution/; CEIC Data, *United Kingdom Annual Household Income*, https://www.ceicdata.com/en/indicator/united-kingdom/annual-household-income-per-capita; Statista, *Annual Disposable Income per Capita in China (2024)*, https://www.statista.com/statistics/278697/; Arealty.jp, *Average Household Income in Japan*, https://blog.arealty.jp/average-income-for-japan-2024/.(last visited March 2, 2024)

24 % Burden (Lawyer Cost ÷ GDP per Capita × 100)

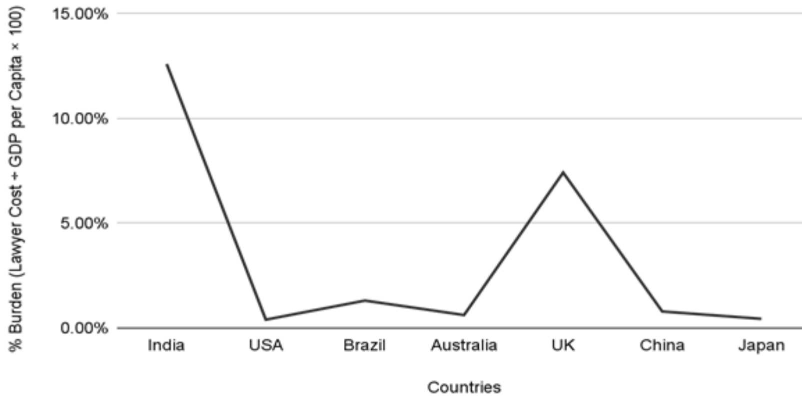

Figure 2: Percentage Burden on Households

i. Figure 1&2 Analysis

1. This chart presents a cross-country view of how much people earn (GDP per capita) compared to how much they need to spend on legal help. India immediately stands out; not just for having one of the lowest average incomes, but also because hiring a lawyer here costs far more than most people can reasonably afford.[25] The financial strain becomes clear when we see that legal costs in India amount to 12.6% of an average person's yearly income, the highest among the countries in the comparison. This means that for most Indians, justice comes at a price they can barely pay.

25 Trading Economics, *GDP per Capita PPP by Country (2023)*, TRADINGECONOMICS.COM, https://tradingeconomics.com/country-list/gdp-per-capita-ppp (last visited March 2, 2024); Time Doctor, *Average Salary in India: 2024 Report*, https://www.timedoctor.com/blog/average-salary-in-india/. (last visited March 2, 2024)

2. Meanwhile, countries like the USA and Japan have much higher lawyer fees in absolute numbers, yet the financial burden they place on individuals is far smaller, only about 0.40% and 0.44% of average incomes.[26] Why? Because these nations have systems in place: legal aid schemes, public insurance, and higher take-home incomes that protect people from being priced out of justice.[27] Even in the United Kingdom, where lawyer fees are the highest in this list ($3,900), most families can manage them due to better wages; keeping the burden at around 7.42%.[28]

3. In stark contrast, an average Indian household makes around $4,186 a year. To pay $1,150 in legal fees is not just difficult, it can mean selling off savings, taking loans, or sacrificing basic needs.[29] This paints a hard truth: the Indian legal system, in its current form, works better for the wealthy than the ordinary citizen. Without affordable legal options or publicly funded support, justice remains a luxury.[30] The poorest often must walk

---

26 Pusch & Nguyen Injury Lawyers, *How Much Does It Cost to Sue?* (2024), https://puschnguyen.com/how-much-does-it-cost-to-sue/; Arealty.jp, *Average Household Income in Japan*, https://blog.arealty.jp/average-income-for-japan-2024/. (last visited March 2, 2024)

27 World Justice Project, *Rule of Law Index 2023: Country Profiles*, https://worldjusticeproject.org/rule-of-law-index/; OECD, *Access to Justice for Inclusive Growth: Policy Roundtables* (2016), https://www.oecd.org/gov/access-to-justice.htm. (last visited March 2, 2024)

28 CEIC Data, *United Kingdom Annual Household Income*, https://www.ceicdata.com/en/indicator/united-kingdom/annual-household-income-per-capita; The Times, *Class Action Lawsuits Could Cost UK Economy Up to £18bn* (Mar. 2024), https://www.thetimes.co.uk/.(last visited March 2, 2024)

29 Lawspot, *How Much Do Lawyers Charge in India? Fee Guide 2024*, https://www.lawspot.in/blog/how-much-do-lawyers-charge-in-india-fee-guide-2024/

30 Commonwealth Human Rights Initiative, *Hope Behind Bars? Status of Legal Aid for Undertrials in India* (2018), https://www.humanrightsinitiative.org. (last visited March 2, 2024)

away from their rights because they simply cannot afford to fight for them.[31]

To bridge this growing divide, India must urgently rethink how legal services are priced and delivered. Introducing income-based legal fees, expanding the role of public defenders, and covering civil cases under legal aid could be transformative.[32] These are not just legal reforms; they are steps toward making the justice system reflect the values written in our Constitution.[33]

IV. TABLE 2: JUSTICE AFFORDABILITY INDEX & PERCENTAGE OF POPULATION PRICED OUT

Country	Avg. Household Income (USD)[34]	Avg. Lawyer Cost (USD)[35]	Affordability Index (×)[36]	Gini Coefficient[37]	% Population Priced Out[38]
India	4,186	1,150	3.64×	0.35	22%
USA	80,610	300	268.7×	0.41	0.5%
Brazil	16,921*	250	67.7×	0.53	5%
Australia	121,108	375	323×	0.33	0.1%
UK	34,805	3,900	8.92×	0.34	10%
China	4,214	175	24.1×	0.39	3%
Japan	76,000	200	380×	0.33	0.1%

Note: * indicates approximate household income estimated from the latest sources available for 2024.

31 Vidhi Centre for Legal Policy, *Evaluating the Performance of Lok Adalats in India* (2020), https://vidhilegalpolicy.in. (last visited March 2, 2024)

32 UNDP, *Access to Justice: Practice Note* (2004), https://www.undp.org. (last visited March 2, 2024)

33 Constitution of India, Preamble.

34 Average household income: Time Doctor, *Average Salary in India: 2024 Report*, https://www.timedoctor.com/blog/average-salary-in-india/; U.S.

Figure 3: Representation of the percentage of the population not able to afford the legal costs.

Census Bureau, *Income in the United States: 2023*, https://www.census.gov/library/publications/2024/demo/p60-282.html; Neilsberg Research, *Brazil Income*, https://neilsberg.com/; McCrindle Research, *Australian Household Income 2024*, https://mccrindle.com.au; CEIC Data, *UK Household Income*, https://www.ceicdata.com; Statista, *China Disposable Income*, https://www.statista.com/statistics/278697/; Arealty.jp, *Japan Income*, https://blog.arealty.jp. (last visited March 2, 2024)

35 Lawyer cost sources: Lawspot, *How Much Do Lawyers Charge in India? Fee Guide 2024*, https://www.lawspot.in; Bar & Bench, *Legal Fees in India: A Survey* (Apr./ 2024), https://www.barandbench.com/columns/legal-fees-india-survey; Pusch &/ Nguyen, *USA Legal Cost* (2024), https://puschnguyen.com; Oliveira Lawyers, *Brazil Lawsuit Cost*, https://oliveiralawyers.com; Courier Mail, *Australia Litigation Costs*, https://www.couriermail.com.au; The Times, *UK Class Actions Cost*, https://www.thetimes.co.uk. (last visited March 2, 2024)

36 Affordability Index methodology adapted from author's model: Affordability Index = Avg. Household Income ÷ Avg. Lawyer CostX

37 World Bank, *World Development Indicators: Gini Index* (2024), https://databank.worldbank.org/source/world-development-indicators. (last visited March 2, 2024)

38 The author's analysis is based on affordability thresholds: populations earning below 1× affordability index are considered priced out of litigation.

"The poorest of the poor must be able to knock on the doors of justice without fear of ruin or rejection."

-Justice P.N. Bhagwati[39]

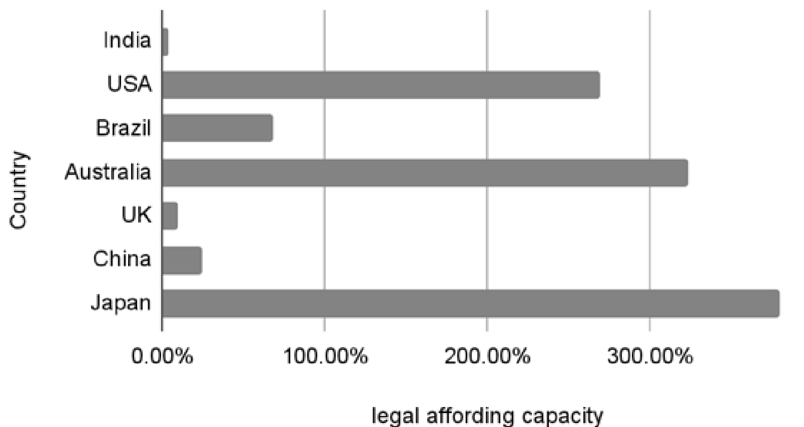

Figure 4:Affordability Index[40]

I. FIGURES 3 AND 4 ANALYSIS

1. This chart compares two powerful indicators: how affordable legal help is in a country (called the Justice Affordability Index) and how unequal people's incomes are (measured by the Gini coefficient). The Affordability Index is simple; it is calculated by dividing a country's average household income by the average cost of hiring a lawyer. The higher the number, the easier it is for people to pay for legal services.[41]

---

39 Justice P.N. Bhagwati, *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235.

40 Source: Data compiled from Table 2. Refer to footnotes 38–42

41 See Table 2: Justice Affordability Index & Percentage of Population Priced Out; Methodology discussed supra note 39

2. India scores very low on this scale. Its affordability index is just 3.64×[42], which means that most families can barely afford even one visit to a lawyer. In contrast, countries like Japan (380×) and Australia (323×) show that legal services are much more affordable, especially because those systems are designed to keep things fair and accessible.[43] These countries also have lower income inequality, which helps balance the scale even more.[44]

3. Interestingly, the United States, despite having more income inequality (Gini = 0.41), still offers much greater access to legal help with an affordability score of 268.7×[45]. This is possible because average incomes are much higher[46] and there are systems like legal aid and insurance to help people who cannot afford private lawyers[47].

4. India, on the other hand, has a Gini score of 0.35,[48] which suggests moderate inequality. But still, 22% of people are

---

42 Time Doctor, *Average Salary in India: 2024 Report*, https://www.timedoctor.com/blog/average-salary-in-india/; Lawspot, *How Much Do Lawyers Charge in India? Fee Guide 2024*, https://www.lawspot.in. (last visited March 2, 2024)

43 Arealty.jp, *Average Household Income in Japan*, https://blog.arealty.jp; McCrindle Research, *Australian Household Income 2024*, https://mccrindle.com.au. (last visited March 2, 2024)

44 World Bank, *World Development Indicators: Gini Index* (2024), https://databank.worldbank.org/source/world-development-indicators. (last visited March 2, 2024)

45 Pusch & Nguyen Injury Lawyers, *How Much Does It Cost to Sue?* (2024), https://puschnguyen.com. (last visited March 2, 2024)

46 U.S. Census Bureau, *Income in the United States: 2023*, https://www.census.gov/library/publications/2024/demo/p60-282.html. (last visited March 2, 2024)

47 World Justice Project, *Rule of Law Index 2023: Country Profile – USA*, https://worldjusticeproject.org.

48 World Bank, *Gini Index – India*, supra note 47. (last visited March 2, 2024)

priced out of the legal system; meaning they cannot afford to hire a lawyer at all.[49] That is a troubling gap. It shows that even though wealth is not wildly unequal, the way the legal system is priced and structured makes justice unaffordable for a huge part of the population.[50]

5. Take the United Kingdom as another example. It has a similar Gini score of 0.34,[51] but only 10% of people are priced out of the legal system. Why? Because their system makes justice more affordable through better public legal services and more balanced fee structures.[52]

6. Brazil is also worth noting. Even though it has a very high level of inequality (Gini = 0.53), more people can access the courts there than in India.[53] This is partly because court fees are better regulated, and legal costs are often shared or capped.[54] China also does better than India on affordability, thanks to lower legal fees and strong mediation requirements that reduce the need for full legal trials.[55]

Overall, this comparison shows a clear pattern: India's justice system makes it hard for the poor to participate. The problem is not

---

49 See Table 2: Percentage of Population Priced Out.

50 Commonwealth Human Rights Initiative, *Hope Behind Bars? Status of Legal Aid for Undertrials in India* (2018), https://www.humanrightsinitiative.org. (last visited March 2, 2024)

51 CEIC Data, *United Kingdom Annual Household Income*, https://www.ceicdata.com.

52 The Times, *Class Action Lawsuits Could Cost UK Economy Up to £18bn* (Mar. 2024), https://www.thetimes.co.uk. (last visited March 2, 2024)

53 Neilsberg Research, *Average Household Income in Brazil*, https://neilsberg.com. (last visited March 2, 2024)

54 Oliveira Lawyers, *How Much Does a Lawsuit Cost in Brazil?*, https://oliveiralawyers.com. (last visited March 2, 2024)

55 Statista, *Annual Disposable Income per Capita in China (2024)*, https://www.statista.com/statistics/278697/. (last visited March 2, 2024)

just about income; it is also about the way legal services are priced, delivered, and supported. To fix this, India needs serious reforms: standardized fees, expanded legal aid, and clear policies that help low-income individuals go to court without fear of going bankrupt.[56]

VI. DELAY IN JUSTICE DELIVERY

a) Table 3: ***Average Case Duration by Court Level (India)***

Court Level	**Average Duration (Years)**[57]
High Courts	5.5
District Courts	3.2
Uttar Pradesh HC	11.3
West Bengal HC	9.9

b) Table 4: ***Comparative Case Pendency***

Country/Region	**Approx. Pending Cases**[58]
India (All Courts)	~52 million
India – High Courts	~5.9 million
USA (Immigration)	~3.6 million

56 UNDP, *Access to Justice: Practice Note* (2004), https://www.undp.org. (last visited March 2, 2024)

57 PRS Legislative Research, *Judicial Performance in India: Issues and Statistics* (2016), https://prsindia.org/policy/vital-stats/judicial-performance-in-india. (last visited March 2, 2024)

58 National Judicial Data Grid, *Case Statistics Dashboard*, available at https://njdg.ecourts.gov.in/njdgnew/; United States Department of Justice, *Executive Office for Immigration Review, Adjudication Statistics FY 2024* (2024), available at https://www.justice.gov/eoir/page/file/1489286/download. (last visited March 2, 2024)

c) Table 5: *Conviction Rates by Country and Case Type*

Country/Case Type	**Conviction Rate[59]**
India – IPC Crimes	~57%
India – SC/ST Atrocities	<5%
China	~99.9%
Canada	~62%

i. Table 3, 4 & 5 Analysis

1. Tables 3, 4, and 5 together give us a clear and troubling picture of the Indian justice system, one that is struggling under the weight of too many pending cases and too few convictions.

2. To begin with, India has over 52 million cases waiting to be resolved across its courts.[60] That number alone makes India's case backlog one of the worst in the world. Even at the High Court level, nearly 6 million cases are still pending. Some High Courts like Uttar Pradesh and West Bengal take an average of over 11 and 9 years to complete a case.[61] In many places, a decade-long trial has sadly become normal.

---

59 National Crime Records Bureau, *Crime in India 2022*, available at https://ncrb.gov.in/en/crime-india; Ministry of Home Affairs (India), *Answer to Parliamentary Question on SC/ST Convictions*, Rajya Sabha Debates (March 2023); Supreme People's Court (China), *Annual Work Report 2023* (summary); *China Law Translate*, China Conviction Rate Statistics (2019), available at https://www.chinalawtranslate.com; Statistics Canada, *Adult Criminal Court Survey 2018–19*, available at https://www.statcan.gc.ca. (last visited March 2, 2024)

60 National Judicial Data Grid, *Case Statistics Dashboard*, available at https://njdg.ecourts.gov.in/njdgnew/ (last visited March 2, 2024).

61 PRS Legislative Research, *Judicial Performance in India: Issues and Statistics* (2016), available at https://prsindia.org/policy/vital-stats/judicial-performance-in-india (last visited March 2, 2024).

3. For ordinary people (especially the poor) this delay is not just an inconvenience. It means lost wages from court visits, costly legal fees, and years of stress. For someone living near the poverty line, a 3-year trial could mean hundreds of hours in courtrooms, lost income, and emotional exhaustion. But delays are only one part of the story. As Table 5 shows, India's conviction rates, particularly in serious crimes: are disappointing.[62] The overall conviction rate for IPC crimes is about 57%, but for grave offences like rape (29%) and murder (42%), it is much lower.[63] Most alarming is the conviction rate of less than 5% for crimes against SC/ST communities, which reflects not only delay, but deeper biases and systemic failure.[64]
4. Now compare this with countries like Canada, which has a conviction rate of about 62%, or China, which reports near-total conviction in criminal cases.[65] While China's numbers raise questions about transparency and fairness, they still show a more consistent system than India's when it comes to disposing of criminal cases.

Altogether, these tables show that justice in India is often too late, too slow, and sometimes does not come at all. If people cannot trust the courts to be quick and fair, it erodes faith in the entire system. The solution needs to be clear timelines for cases, more judges, and strict penalties for unnecessary delays. Only then can the system hope to deliver justice that is timely and meaningful.

---

62 National Crime Records Bureau (NCRB), Crime in India 2022, available at https://ncrb.gov.in/en/crime-india (last visited March 2, 2024).

63 Ibid.

64 Ministry of Home Affairs, *Answer to Parliamentary Question on SC/ST Convictions*, Rajya Sabha Debates, March 2023, available at https://mha.gov.in (last visited March 2, 2024).

65 Statistics Canada, *Adult Criminal Court Survey 2018–19*, available at https:/ /www.statcan.gc.ca (last visited March 2, 2024); Supreme People's Court (China), *Annual Work Report 2023 Summary*, reported in China Law Translate, available at https://www.chinalawtranslate.com (last visited March 2, 2024).

VII. CAUSES OF THE HIGH COST OF JUSTICE IN INDIA

a) ***High Legal Fees and Absence of Fee Regulation :*** One of the foremost reasons behind the inflated cost of justice in India is the absence of any statutory regulation on legal fees. Senior advocates, especially in metropolitan High Courts and the Supreme Court, often charge exorbitant appearance fees, ranging from ₹ 1 lakh to ₹ 5 lakhs per hearing.[66] For ordinary litigants, such costs are simply unaffordable.[67] Unlike in countries like the UK and Australia, where fee structures are partially regulated or standardized under legal aid schemes,[68] India has no framework ensuring affordability in civil or criminal representation. This results in wide disparities in access, favouring affluent parties who can afford seasoned counsel.

b) ***Delay and Adjournments :*** The chronic tendency for adjournments within Indian courts contributes significantly to legal cost inflation. Multiple hearings translate into repeated lawyer fees, travel expenses, lodging for out-of-town litigants, and lost wages. Adjournments are often used tactically whether for stalling or exhausting the other party and judges seldom penalize frivolous delays.[69] This laxity in case discipline adds layers of cost to every stage of litigation. Reports from the

---

66 Lawspot, How Much Do Lawyers Charge in India? Fee Guide 2024, available at https://www.lawspot.in/blog/how-much-do-lawyers-charge-in-india-fee-guide-2024/ (last visited March 2, 2024).

67 Bar & Bench, *Senior Advocates' Fees in High Courts and Supreme Court*, available at https://www.barandbench.com/fees-senior-advocates (last visited March 2, 2024).

68 The Times, *UK Legal Fees and Aid Schemes*, available at https://www.thetimes.co.uk (last visited March 2, 2024); McCrindle Research, *Australian Household Income Distribution 2024*, available at https://mccrindle.com.au (last visited March 2, 2024).

69 Commonwealth Human Rights Initiative, *Access to Justice in India: User Experiences Report* (2021), available at https://www.humanrightsinitiative.org (last visited March 2, 2024).

National Judicial Data Grid (NJDG) highlight that over 45% of all pending cases have had more than five hearings.[70]

c) ***Procedural Complexity and Outdated Laws :*** India's legal system is governed by statutes like the Civil Procedure Code (1908) and Criminal Procedure Code (1973), which are largely antiquated and laden with procedural formalities.[71] The filing of documents, issuance of summons, admission of evidence, and interim motions require multiple legal steps.[72] This complexity necessitates the involvement of lawyers even in relatively simple disputes, adding to the litigant's burden. While the e-Courts initiative is underway, implementation remains uneven, particularly in lower courts.[73]

d) ***Insufficient Legal Aid and Public Awareness :*** Though Article 39A of the Constitution mandates free legal aid for the economically weaker sections,[74] the implementation of the Legal Services Authorities Act, 1987 has been patchy. In rural areas and among marginalized communities, awareness of legal aid is minimal. Even when accessed, the quality of legal aid is frequently substandard, with underpaid panel lawyers treating such assignments with minimal interest.[75] Consequently, litigants

---

70 National Judicial Data Grid, *Case Statistics Dashboard*, available at https://njdg.ecourts.gov.in/njdgnew/ (last visited March 2, 2024).

71 Code of Civil Procedure, 1908, India Code, available at https://indiacode.nic.in (last visited March 2, 2024); Code of Criminal Procedure, 1973, India Code, available at https://indiacode.nic.in (last visited March 2, 2024).

72 PRS Legislative Research, *Judicial Performance in India: Issues and Statistics* (2016), available at https://prsindia.org/policy/vital-stats/judicial-performance-in-india (last visited March 2, 2024).

73 Department of Justice (India), eCourts Phase II Project Report (2022), available at https://doj.gov.in (last visited March 2, 2024).

74 Ibid.

75 Constitution of India, art. 39A.

either self-represent inadequately or are forced to hire private lawyers beyond their financial means.[76]

e) ***Judicial Vacancies and Infrastructure Deficit :*** India has just about 21 judges per million population, compared to 107 in the U.S. and 50 in many European nations.[77] Judicial vacancies remain alarmingly high: more than 20% of posts are unfilled in subordinate courts[78]. Additionally, lower courts frequently operate in outdated facilities, lacking sufficient courtrooms, digital resources, and administrative staff.[79] The delay and inefficiency this causes inevitably inflate legal costs, as cases drag on for years without resolution.

f) ***Forum Shopping and Excessive Appeals :*** The hierarchical nature of Indian courts, combined with the absence of strict limits on appeals, facilitates 'forum shopping', the practice of choosing courts perceived to be favourable.[80] While the right to appeal is fundamental, multiple levels of appeals and reviews, often on technicalities, prolong litigation unnecessarily and inflate costs. Reforms such as imposing costs on frivolous appeals or fast-tracking summary dismissals could help.

g) ***Corruption and Informal Payments :*** Though difficult to document quantitatively, numerous litigants report having to pay informal fees to clerks or other court staff to expedite

---

76 National Legal Services Authority (NALSA), *Annual Report 2022–23*, available at https://nalsa.gov.in (last visited March 2, 2024).

77 Law Commission of India, *Report No. 245: Arrears and Backlog* (2014), available at https://lawcommissionofindia.nic.in/reports/report245.pdf (last visited March 2, 2024).

78 Department of Justice (India), *Judicial Vacancies Report 2024*, available at https://doj.gov.in (last visited March 2, 2024).

79 Ibid.

80 Union of India v. Madras Bar Ass'n, (2010) 11 SCC 1.

procedures or receive timely updates.[81] This 'shadow cost' further burdens already stretched litigant finances, particularly among rural and first-time court users.

h) **Geographic Barriers and Centralized Higher Judiciary :** Most High Courts are situated in state capitals, and the Supreme Court sits only in New Delhi.[82] Litigants from distant rural districts often must travel hundreds of kilometres for hearings, incurring costs on transportation, accommodation, and lost income. The Law Commission's repeated recommendation to establish regional benches of the Supreme Court remains unimplemented.[83]

i) ***Over-Reliance on Lawyers and Limited Pro Se Mechanisms :*** India's justice system does little to encourage or facilitate litigants who wish to represent themselves (pro se representation).[84] Court procedures, language barriers, and documentation requirements make it nearly impossible for laypersons to navigate the system without legal counsel, thereby compounding the overall cost.

j) ***Lack of Performance-Based Judicial Accountability* :** There is currently no robust mechanism for tracking the performance of individual judges beyond their case disposal statistics.[85] As a result, inefficiencies and procedural laxities

---

81 Commonwealth Human Rights Initiative, *Court Process Delays & Informal Payments* (2021), available at https://www.humanrightsinitiative.org (last visited March 2, 2024).

82 Law Commission of India, *Report No. 229: Regional Benches* (2009), available at https://lawcommissionofindia.nic.in/reports/report229.pdf (last visited March 2, 2024).

83 Ibid.

84 Vidhi Centre for Legal Policy, *Evaluating the Performance of Lok Adalats in India* (2020), available at https://vidhilegalpolicy.in (last visited March 2, 2024).

85 World Justice Project, *Rule of Law Index 2023: India Profile*, available at https://worldjusticeproject.org/rule-of-law-index/ (last visited March 2, 2024).

go unchecked. Institutional reforms such as key performance indicators (KPIs), independent judicial audits, and digital dashboards could help hold the system accountable and reduce cost escalation through enhanced efficiency.[86]

VIII. MAKING JUSTICE AFFORDABLE AND ACCESSIBLE

"A justice system which is not inclusive fails its constitutional mandate. It must evolve to reach the last citizen."

- Justice D.Y. Chandrachud[87]

To make the cost of inflated judicial costs accessible, the following reform strategy is proposed to make justice more equitable, affordable, and time-bound:

a) ***Increase Judicial Strength and Fill Vacancies :*** India has one of the world's lowest judge-to-population ratios.[88] An immediate and sustained increase in judicial appointments is essential. Target: raise the number of judges from 21 to at least 50 per million citizens.[89]

Action: Expedite judicial recruitment and create a permanent commission for appointments.

---

86 Commonwealth Human Rights Initiative, *Judicial Performance & Accountability in India* (2022), available at https://www.humanrightsinitiative.org (last visited March 2, 2024).

87 Justice D.Y. Chandrachud, *Judicial Reforms and the Constitution*, Public Lecture, Supreme Court of India (2022), available at https://main.sci.gov.in (last visited March 2, 2024).

88 Law Commission of India, *Report No. 245: Arrears and Backlog: Creating Additional Judicial (wo)manpower* (2014), available at https://lawcommissionofindia.nic.in/reports/report245.pdf (last visited March 2, 2024).

89 Department of Justice (India), *Judicial Vacancies Report 2024*, available at https://doj.gov.in (last visited March 2, 2024).

Impact: Reduce caseload pressure, accelerate case disposal, and lower repeated hearing costs.[90]

b) ***Cap Adjournments and Penalize Delay :*** Frequent adjournments stall progress and inflate expenses.[91]

Action: Limit adjournments to a maximum of three per case (except in exceptional circumstances). Penalize frivolous delays under Section 35A CPC.[92]

Impact: Improved discipline in courtrooms and faster resolution.[93]

c) ***Modernize Procedure Codes :*** Procedural laws are outdated and obstructive.[94]

Action: Replace archaic provisions in CPC and CrPC with simplifzxc`ied alternatives. Introduce single-window e-filing, digital summons, and hybrid hearings.[95]

Impact: Reduce cost and time per case and facilitate wider pro se access.[96]

---

90 PRS Legislative Research, *Judicial Performance in India: Issues and Statistics* (2016), available at https://prsindia.org/policy/vital-stats/judicial-performance-in-india (last visited March 2, 2024).

91 National Judicial Data Grid, *Case Statistics Dashboard*, available at https://njdg.ecourts.gov.in/njdgnew/ (last visited March 2, 2024).

92 Code of Civil Procedure, No. 5 of 1908, § 35A, India Code, available at https://indiacode.nic.in (last visited March 2, 2024).

93 Commonwealth Human Rights Initiative, Court Process Delays & Informal Payments (2021), available at https://www.humanrightsinitiative.org (last visited March 2, 2024).

94 Vidhi Centre for Legal Policy, Procedural Reform Series – CrPC and CPC (2022), available at https://vidhilegalpolicy.in (last visited March 2, 2024).

95 Department of Justice (India), *eCourts Phase II Project Report* (2022), available at https://doj.gov.in (last visited March 2, 2024).

96 Ibid.

d) ***Expand Legal Aid and Public Defender Network :*** Despite constitutional guarantees, legal aid lacks reach and quality.[97]

Action: Allocate 1–2% of the judiciary's annual budget to NALSA. Mandate minimum training for legal aid lawyers.[98]

Impact: Improve access for the marginalized and ease financial burdens.[99]

e) ***Create Regional Benches of the Supreme Court :*** Geographical centralization of apex justice disadvantages remote litigants.[100]

Action: Implement Law Commission's Report No. 229; establish benches in Mumbai, Chennai, and Guwahati.[101]

Impact: Reduce travel costs and increase regional access to constitutional remedies.

f) ***Regulate Legal Fees and Promote Pro Bono :*** Legal costs vary unpredictably.[102]

Action: Bar Council of India to introduce indicative fee slabs. Make pro bono hours a criterion for senior designation.[103]

---

97 Constitution of India, art. 39A.

98 National Legal Services Authority (NALSA), *Annual Report 2022–23*, available at https://nalsa.gov.in (last visited March 2, 2024).

99 Commonwealth Human Rights Initiative, *Hope Behind Bars? Status of Legal Aid in India* (2018), available at https://www.humanrightsinitiative.org (last visited March 2, 2024).

100 Law Commission of India, *Report No. 229: Regional Benches of the Supreme Court* (2009), available at https://lawcommissionofindia.nic.in/reports/report229.pdf (last visited March 2, 2024).

101 Ibid.

102 Lawspot, *How Much Do Lawyers Charge in India? Fee Guide 2024*, available at https://www.lawspot.in/blog/how-much-do-lawyers-charge-in-india-fee-guide-2024/ (last visited March 2, 2024).

103 Bar Council of India, *Draft Rules for Senior Advocate Designation*, available at https://barcouncilofindia.org (last visited March 2, 2024).

Impact: Prevent overcharging and expand affordable legal assistance.

g) ***Institutionalize ADR Mechanisms :*** Alternative dispute resolution remains underutilized.[104]

Action: Make mediation mandatory before civil trials. Expand Lok Adalats and arbitration centres.[105]

Impact: Quicker resolutions at a fraction of the cost.[106]

h) ***Introduce Judicial Performance Audits :*** Judicial productivity lacks public metrics.[107]

Action: Introduce performance dashboards tracking case disposal, delay, and pendency per judge.[108]

Impact: Increase accountability and reduce inefficiencies.

i) ***Enact a "Justice Time Guarantee Act" :*** Delays undermine justice itself.[109]

Action: Create statutory deadlines for trial completion-e.g., 1 year for criminal, 2 years for civil cases- with review triggers.[110]

---

104 Vidhi Centre for Legal Policy, *Access to Dispute Resolution in India: Evaluation of ADR Mechanisms* (2021), available at https://vidhilegalpolicy.in (last visited March 2, 2024).

105 Legal Services Authorities Act, No. 39 of 1987, India Code, available at https://indiacode.nic.in (last visited March 2, 2024).

106 NALSA, *Lok Adalat Performance Review 2022*, available at https://nalsa.gov.in (last visited March 2, 2024).

107 World Justice Project, Rule of Law Index 2023: India Country Profile, available at https://worldjusticeproject.org/rule-of-law-index/ (last visited March 2, 2024).

108 Commonwealth Human Rights Initiative, Judicial Performance & Accountability in India (2022), available at https://www.humanrightsinitiative.org (last visited March 2, 2024).

109 UNDP, *Access to Justice: Practice Note* (2004), available at https://www.undp.org (last visited March 2, 2024).

110 Vidhi Centre for Legal Policy, Delay in Courts: Reform Ideas for Timely Justice (2023), available at https://vidhilegalpolicy.in (last visited March 2, 2024).

Impact: Ensure justice is not merely available but also timely.

j) ***Launch Grassroots Legal Literacy Campaigns :*** Awareness gaps remain high, especially in rural India.[111]

Action: Collaborate with panchayats, NGOs, and schools to educate citizens on legal rights and aid schemes.

Impact: Empower citizens to seek justice proactively and affordably.[112]

IX. CONCLUSION

India's legal system has grown over centuries from ancient traditions of *Dharma* to colonial courts, and now to a modern democracy. The Constitution promises justice to everyone, but for millions of Indians today, that promise feels out of reach. High legal costs, endless delays, and an overburdened system have made justice hard to access.

Recent data shows how serious the problem is. The Justice Affordability Index in India is just 3.64×, meaning most people cannot even afford one proper legal case. About 22% of the population is fully priced out of the system. In rural areas, a single lawyer's fee may cost more than a family's entire yearly income. Compare this to Japan or Australia, where the cost of justice is far lower relative to income, thanks to better support systems and legal aid.

The problem does not stop at money. Over 52 million cases are pending in Indian courts, with some dragging on for more than 30 years. Conviction rates are shockingly low in serious crimes, especially for people from marginalized communities. This shows not just a delay in justice, but a failure to deliver it at all.

---

111 Ministry of Law and Justice (India), Pan-India Legal Literacy Campaign 2022, available at https://lawmin.gov.in (last visited March 2, 2024).

112 National Legal Services Authority (NALSA), *Legal Awareness Programmes*, available at https://nalsa.gov.in (last visited March 2, 2024).

But there is hope. We know what needs to be done. India must hire more judges, set up regional benches of the Supreme Court, and regulate legal fees. Courts should use technology to cut delays, and legal aid must be improved so it helps those in need. Most importantly, the law must include clear deadlines so cases do not take forever.

Justice should not be something only the wealthy can afford. It should be a basic right for every citizen. The future of India's democracy depends on making this right real for everyone, everywhere.